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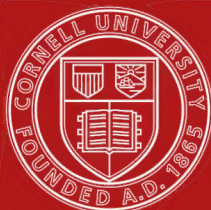
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A selection of leading cases in equity :



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A SELECTION
OF
LEADING CASES IN EQUITY,
With Notes.

BY
FREDERICK THOMAS WHITE
AND
OWEN DAVIES TUDOR,

OF THE MIDDLE TEMPLE, ESQs., BARRISTERS-AT-LAW.

With Annotations,
CONTAINING REFERENCES TO AMERICAN CASES,
BY J. I. CLARK HARE AND H. B. WALLACE.

WITH ADDITIONAL NOTES AND REFERENCES TO AMERICAN DECISIONS,
BY J. I. CLARK HARE.

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A SELECTION
OF
LEADING CASES IN EQUITY,
With Notes.

BY
F. T. WHITE AND O. D. TUDOR,

OF THE MIDDLE TEMPLE, ESQS., BARRISTERS-AT-LAW.

With Annotations,
CONTAINING REFERENCES TO AMERICAN CASES,

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Fourth American, from the Fourth London Edition.

WITH
ADDITIONAL NOTES AND REFERENCES TO AMERICAN DECISIONS,

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LEADING CASES IN EQUITY.

BASSET *v.* NOSWORTHY.

TERM HIL. 25 CAR. 2, ANNO 1673.

REPORTED REP. TEMP. FINCH, 102.

PURCHASE FOR VALUABLE CONSIDERATION WITHOUT NOTICE.—*A bill was filed by an heir-at-law against a person claiming as purchaser from the devisee under the will of his ancestor to discover a revocation of the will. The defendant pleaded, that he was a purchaser for valuable consideration, bonâ fide, without notice of any revocation, and the plea was allowed, and, upon proof of it, the bill was dismissed.*

Though lands by the falling in of several lives prove to be of much greater value than they were at the time of the purchase, if the consideration be such as will make the defendant a purchaser within the stat. 27 Eliz., he will be considered as a purchaser for valuable consideration ; for the question is, not whether the consideration be adequate, but whether it be valuable.

THE plaintiff, Sir William Basset, entitled himself, as son and heir of Elizabeth Seymour, who was the only daughter and heir of Sir Joseph Killegrew, who was brother and heir of Sir Henry Killegrew, whose estate the lands in the bill mentioned formerly were ; the defendant's title being under (as the plaintiff alleged) a pretended purchase of these lands at Drury House, and under the will of Sir Henry Killegrew, the purchase being from Jane Davis (afterwards the wife of Mr. Berkley) and from *Henry Hill, the pretended natural son of the said Sir Henry Kille- [*2] grew, of which will the plaintiff alleged there was a revocation by some subsequent deed or will ; and for a discovery thereof, and what Mr. Nosworthy really paid for the purchase, and what deeds and writings he had, and to set aside the incumbrances which he had bought to protect his purchase, and that Mrs. Seymour might try her title at law, upon the supposed revocation against the title of the defendant, as a purchaser under the said will, the now plaintiffs exhibited this bill.¹

¹ A bill of revivor.

To which the defendant pleaded a dismissal of a bill in the Court of Exchequer,¹ signed and enrolled, which bill was there brought for the same matter as in this bill, and fully examined and dismissed upon a full hearing, but without prejudice, and the dismissal duly signed and enrolled.

The defendant further pleaded, *that he was a purchaser for a valuable consideration, bonâ fide paid, without notice of any revocation.*

This cause being heard by the Lord Keeper Bridgman, he ordered precedents to be searched, where a plaintiff, after a dismissal of his bill on a judicial and formal hearing, and a full examination of witnesses in one Court of equity, and that without prejudice, had ever been admitted in another Court of equity, to examine new witnesses to the same matter formerly in issue and examined.²

Afterwards there being several orders made in this cause, and one by which the plea was overruled,³ the cause now came on to be heard.

LORD KEEPER FINCH,⁴ having read the articles for the defendant's purchase, and the conveyances, leases, fine, and recovery, which appeared to be made before any purchase, at Drury House, and having considered the whole matter, was of opinion that the Court had gone much out of the way, and that the cause had been perplexed with several extraordinary orders and not according to the usual course of proceedings; and therefore it ^[*3] was to be brought back to that state where it first went wrong.

Whereupon he discharged all former orders for examining witnesses at large, and confined⁵ all examinations to the matter of the defendant's plea, which, by the justice of a Court of equity, ought to conclude the plaintiff, unless he could disprove it. And a bill of the same nature having been brought in the Court of Exchequer, and there, after full examination, dismissed, it seemed very hard that the dismissal was without prejudice, because no cross bill can or ought to be received after publication, to examine the same witnesses again; for that might be a means to introduce subornation and perjury, even by the order of this Court, and no precedents can be found to warrant such practice.

Therefore the defendant having *pleaded* this dismissal in bar of any further examination, and *that he is a purchaser bonâ fide, without notice of any revocation*, and afterwards for the Court to

¹ See *Seymour v. Nosworthy*, Hard. 374, upon an issue directed by the Court of Exchequer, whether the will of Sir Henry Killebrew was revoked or not; Mich. 16 Car. 2.

² *Seymour v. Nosworthy*, before Lord Keeper Bridgman and Justice Moreton, 1 Ch. Ca. 155, where, however, the name of the case is omitted, and the cause is said to have been on demurrer; whereas it appears from other parts of the report to have been on a plea.

³ *Seymour v. Nosworthy*, Mich. Hil. 1669; 3 Ch. Rep. 40; Nels. 135; Freem. Ch. Rep. 128; 2 Eq. Ca. Ab. 69.

⁴ Afterwards Lord Chancellor and Earl of Nottingham.

⁵ "Confirmed," evidently by mistake in the report.

save the benefit of this plea, by way of answer, and yet to allow an examination to the whole matter which had been pleaded in bar to such examination (all which had formerly been done in this cause), was in effect to surprise the defendant, and, unawares, to draw him off from that which was his most material defence.

The cause being then set right before the Court upon the true merits thereof, there were only two points which were considerable :

1st, What the law of this Court is concerning purchasers ;

2nd, Whether the defendant was a purchaser within that law.

As to the first point, a purchaser *bonâ fide*, without notice of any defect in his title at the time of the purchase made, may lawfully buy in a statute or mortgage, or any other incumbrance ; and if he can defend himself at law by any such incumbrances bought in, his adversary shall never be aided in a Court of equity by setting aside such incumbrances ; for equity will not disarm a purchaser, *but assist him. And precedents of this nature [4] are very ancient and numerous, viz., where the Court hath refused to give any assistance against a purchaser, either to an heir, or to a widow, or to the fatherless, or to creditors, or even to one purchaser against another.

And this rule, in a Court of equity, is agreeable to the wisdom of the common law, where the maxims which refer to descents, discontinuances, nonclaims, and to collateral warranties, are only the wise arts and intentions of the law to protect the possession, and to strengthen the rights of purchasers.

As to the second point, the Court declared, that the defendant had sufficiently proved his plea, and himself to be a purchaser within the protection of this Court, because no fraud or circumvention appeared ; and it was evident that the defendant had paid several great sums to discharge statutes which incumbered those lands, over and above what was paid to Mrs. Jane Berkley for her estate for life and to Henry Hill for his reversion ; and though the lands were proved to be of much greater value at this time, by the falling in of several lives, than what they were at the time of the purchase, yet that will not alter the case in equity ; because *in purchases the question is not, whether the consideration be adequate, but whether it be valuable :¹ for if it be such a consideration as will make the defendant a purchaser within the statute 27th Eliz.,² and bring him within the protection of that law, he ought not to be impeached in equity.*

And since Henry Hill had nothing to subsist on during his minority but this reversion, and being a bastard, could have no kindred by the law, and probably but few friends, there was some hazard of the money which was advanced during his minority, if he died before the fine and recovery suffered.

Therefore, the Court allowed the plea and dismissed the bill,

¹ See *Copis v. Middleton*, 2 Madd. 410, 432.

² In the report by mistake cited as 21 Eliz.

and suppressed all the depositions taken in this cause before April last, and all since, but only such which relate to this plea of this defendant.¹

[*5] *In the principal case, Lord Nottingham acted upon the well-known rule, that equity will give no assistance against a bona fide purchaser without notice of an adverse title, and his statement of the law of the Court upon the subject is both succinct and accurate. Lord Rosslyn, C., thus comments on and adopts it: "In *Basset v. Nosworthy* (Ca. t. Finch, 102), which produced many points, the plaintiff took up the cause as heir of Lady Seymour, claiming under a legal title; the defendants set up a purchase for valuable consideration without notice; Lord Bridgman had overruled the plea, in consequence of which a great variety of proceedings took place in this Court. It came before Lord Nottingham. He reversed Lord Bridgman's order, and suppressed all the proceedings that took place in consequence of the production and discovery. The book does not state it amiss. 'A purchaser bona fide, without notice of any defect in his title at the time he made the purchase, may buy in a statute, or mortgage, or any other incumbrance: and if he can defend himself at law by any such incumbrance bought in, his adversary shall never be aided in a Court of equity for setting aside such incumbrance, for *equity will not disarm a purchaser, but assist him*; and precedents of this nature are very ancient and numerous; viz., where the Court hath refused to give any assistance against a purchaser, either to an heir or to a widow, or to the fatherless, or to creditors, or even to one purchaser against another,'" 2 Ves. jun. 457; and see the important judgment of Lord Chancellor Westbury in *Phillips v. Phillips*, 8 Jur. (N. S.) 145; 31 L. J. N. S. (Ch.) 321; 4 De G. F. & J. 208; *Clemow v. Geach*, 6 L. R. Ch. App. 147.

Nothing can be clearer than that a purchaser for valuable consideration, without notice of a prior equitable right, obtaining the legal estate at the time of his purchase is entitled to priority in equity, as well as at law, according to the well-known maxim, *where equities are equal, the law shall prevail*. *Pilcher v. Rawlins*, 7 L. R. Ch. App. 259.

Nor will a Court of equity prevent a bona fide purchaser without notice from protecting himself, against a person claiming under a prior equitable title, by getting in the outstanding legal estate, because, as the equities of both parties are equal, there is no reason why the pur-

¹ Proceedings were afterwards taken at law in this long contested case. See *Hitchins v. Basset*, 3 Mod. 203; 4 Jac. 2; B. R. 1688; Salk. 593; Trin. 5; W. & M. B. R. 1 Show. 537. And ultimately, upon a special verdict, the Court was of opinion that there was no revocation; and upon a writ of error, the judgment in B. R. was affirmed by the House of Lords. See *Sir Edward Hungerford v. Nosworthy*, Show. P. C. 146; and see 1 Vern. 351.

chaser should be deprived of the advantage he may obtain at law by his superior activity or diligence. See *Goleborn v. Alcock*, 2 Sim. 552; *Marsh v. Lee*, ante, vol. i., p. 611, and note.

And it is clear that a purchaser who pays, and procures the legal estate from an unsatisfied mortgagee, may hold it as against all mesne incumbrances of which he had no notice, before he completed *his purchase, even if that were done pendente lite, provided it was [6] done before a decree to settle priorities: *Bates v. Johnson*, Johns. 304; *Prosser v. Rite*, 27 Beav. 68; *Young v. Young*, 3 L. R. Eq. 801; *Pease v. Jackson*, 3 L. R. Ch. App. 576; *Marsh v. Lee*, ante, vol. i., p. 611, and note.

To so great an extent has equity favoured purchasers bona fide without notice, that it appears by *Culpepper's case*, cited by Lords Commissioners Trevor and Rawlinson, in *Sanders v. Deligne*, Freem. Ch. Rep. 123, that where a man had bought gavelkind land of the eldest son, and paid his purchase-money without knowledge that it was gavelkind, and afterwards for a song bought in the titles of the younger brothers, who were ignorant of their titles, it was yet held, that they could not be relieved afterwards in equity; for it was said that the purchaser, having honestly paid his money without notice, might use what means he could to fortify his title. In *Sir John Fagg's case*, cited 1 Vern. 52, "a purchaser came into a man's study, and there laid hands on a statute that would have fallen on his estate, and put it in his pocket; and in that case, he having thereby obtained an advantage in law, though so unfairly and by so ill a practice, the Court would not take that advantage from him;" *S. C.*, nom. *Sherly v. Fagg*, 1 Ch. Ca. 68; and in *Harcourt v. Knowel*, cited 2 Vern. 159, a purchaser was allowed to take advantage of a release obtained from the grantee of a rent-charge without consideration, and by fraud. And see *Siddon v. Charnells*, Bunb. 298. These, however, are extreme cases, showing, indeed, how partial equity is to purchasers, but extending the doctrine of protection to them farther than it would be carried at the present day: see *Carter v. Carter*, 3 K. & J. 617, 636, 637.

Where the equitable title of the purchaser, who had got in the legal estate, depended upon a forged will, he was held entitled to the protection of the Court. See *Jones v. Powles*, 3 My. & K. 581: in that case a person advanced money upon the mortgage of an estate, claimed by the mortgagor under a will, which ultimately turned out to be forged, and got a conveyance of the legal estate, then outstanding, in a mortgagee whose debt had been satisfied. Upon a bill being filed by the heiress-at-law, it was held, by Sir John Leach, M. R., that the mortgagee, being a purchaser without notice of the plaintiff's title, could protect herself by the legal estate. "My impression," said his Honor, "at the opening of this case was, that the protection of the legal estate extended only to cases where the title of the purchaser for valuable consideration without notice was impeached by reason of some secret

[*7] act or matter done by the vendor *or those under whom he claimed : but upon full consideration of all the authorities which have been referred to, and the dicta of judges and text writers, and the principles upon which the rule is grounded, I am of opinion that the protection of the legal estate is to be extended, not merely to cases in which the title of the purchaser for valuable consideration without notice is impeachable by reason of a secret act done, but also to cases in which it is impeached by reason of the falsehood of a fact of title asserted by the vendor, or those under whom he claims, where such asserted title is clothed with possession, and the falsehood of the fact asserted could not have been detected by reasonable diligence." See 1 J. & L. 264.

So in the recent case of *Young v. Young*, 3 L. R. Eq. 801, a testator, in 1832, devised his estate (which was then subject to a mortgage to one Talford), to his wife for life, and then to his children. The will was never proved, and no notice of it was entered on the Court rolls. The widow emigrated in 1845, leaving her eldest son in possession of the estate as her agent. In 1851, the son falsely representing himself to be in possession of the estate as heir of his father, procured a further advance upon mortgage of the estate, from W. Longrigg, who paid off the first mortgage to Talford, in whom the legal estate was vested by customary grant and admittance, and having taken a grant of the estate from Talford and the son, was, thereupon, admitted tenant of the property. Longrigg, when he advanced the money was in perfect ignorance of the existence of the will, and believed that the son was the owner of the estate as heir of his father. The widow having died, it was held by Sir R. Malins, V. C., that Longrigg having legal estate, without notice of any adverse title, was entitled to be protected against the rights of the children, and to tack his further advance. "Here," said his Honor, "the heir-at-law was in possession, and seems to have represented that he was in possession as heir, which is equivalent to a representation that there was no will, and, being in such possession, he applies for a further advance. The will was not proved, and there was no entry of it on the Court rolls; consequently, there can be no negligence attributable to Mr. Longrigg, and I must consider that he has all the rights that a purchaser for valuable consideration would have. The case of *Jones v. Powles* (3 My. & K. 581), is a very strong one. . . . It was approved of by Sir W. Page Wood, in the case of *Carter v. Carter* (3 K. & J. 617, 638). Those cases go beyond what is here wanted."

The principle upon which these cases proceed, seems to have been [*8] *departed from in the case of *Carter v. Carter*, 3 K. & J. 617. There the testator died in 1847, leaving a will dated January, 1846, by which he gave a beneficial share in an eighth of real estates to John Carter. Thereupon, John Carter, believing himself to be the beneficial owner, conveyed his share to the defendant as mortgagee. Afterwards, a later will of the testator, dated in April, 1846, was dis-

covered, by which the estates were devised to John Carter and two others upon certain trusts. The two other trustees disclaimed, and John Carter, thereupon, became the sole trustee, and the legal estate was vested in him, which he had already conveyed to his mortgagee. It was held by Sir W. Page Wood, V. C., that although the defendant had acquired the legal estate in one-eighth of the estate for valuable consideration, as it were by accident and without notice that the former will had been revoked, so that his conscience was not affected by any of the trusts to which, by the subsequent will the estate was subjected, he must hold subject to those trusts, since the will by which they were created was the very instrument upon which his title to the legal estate depended. "The only legal estate," said his Honor, "he (the defendant) can avail himself of, is a legal estate under a conveyance, which on the very face of it, betrays the trust; and the question is, whether you are obliged to say, 'I have no other conveyance than this: this is my legal title,' such a legal title can be held a protection from the claims of the cestuis que trustent. In other words, on a bill filed by the cestuis que trustent for the execution of the trusts of the will, can any purchaser plead a purchase of the trustees' legal estates without notice of trusts; because the trustee affected to convey a different estate from that which he in fact conveyed. Now, no case has ever been brought up to that; and looking to the distinction drawn between the case of a trust expressed on the face of the instrument, and cases where there is merely the general direction to hold in trust for the persons ultimately to be entitled—two cases of an extremely different character—it does not appear to me, that if you are desirous to rely for your title on that which on the very face of it, when produced, discloses the equitable interests, you can be heard to say, 'I claim the estate under this instrument, and I disclaim every charge that appears upon the face of it; or aver ignorance of the deed which constitutes your title.'"

In a recent case, however, it has been held, that a bona fide purchaser for value, having the legal estate, will not be held to have notice of the contents of a deed, concealed from him at *the time of his purchase, on the ground that he would be compelled to rely upon [*9] it in support of his legal title in an action of ejectment: *Pilcher v. Rawlins*, 7 L. R. Ch. App. 259, where the Lord Chancellor and Lords Justices reversed the decision of Sir John Romilly, M. R. (reported 11 L. R. Eq. 53), who followed the decision of Sir W. Page Wood, V. C., in *Carter v. Carter*, 3 K. & J. 617. And Lord Justice James in his judgment thus comments upon *Carter v. Carter*. "In the case of *Carter v. Carter*," says his Lordship, "which was decided by the present Lord Chancellor, and which was followed by the Master of the Rolls in this case, and with which I am bound to say I am unable to agree, an exception from the rule was under the circumstances supposed to exist. It is very clearly expressed in a few lines of the judgment in that case;

‘But here the purchaser taking the conveyance under one will, supposed by all parties to be really the last will of the testator, finds himself driven to rely upon another, and a second will containing on the face of it all the trusts which the testator has created;’ and that circumstance is supposed to create the exception. To my mind, there are to that supposition two short and conclusive answers—the one, a matter of principle, and the other, a matter of fact. My view of the principle is, that when once you have arrived at the conclusion that the purchaser is a purchaser for valuable consideration without notice, the Court has no right to ask him, and has no right to put him to contest the question, how he is going to defend himself, or what he is going to rely on. He may say, honestly and justly, “I am not going to tell you. I have got the deeds; I defend them, and you will never be able to produce secondary evidence of them. I am not obliged to produce them at all; probably, before you get half way through your action of ejectment, you will find a *jus tertii* which you will not dispose of; the estate is in the hands of a legal tenant to whom I have let it, and no one can determine that tenancy without notice, and no one can give that notice but myself; I will not give that notice, and no Court has any power to compel me to give it. I have a right to rely, as every person defending his position has, on the weakness of the title of the person who is seeking to displace me.’ That seems to be exactly the position of such a purchaser as this.”

“The purchaser in *Carter v. Carter*, did not rely on the will which created the trust; he relied on another title; for the will formed the title of the adverse party, and the answer to that adverse party is, by the good luck which sometimes attends honest men, ‘though you produce an instrument which *points out your title, and gives the [*10] property to some one else, yet I am prepared with a legal defence in a conveyance which was executed before.’ It appears to me, that there is no right in this Court to prevent the purchaser from setting up that defence to the claim so made against him. If there ever was a case in which, according to my judgment, any Court ought to be in favour of a purchaser and against such a title, it is a case in which a testator has through the grossest negligence, allowed two wills to exist after his death, so that some members of his family produce one will, apparently making out a perfectly good title to a mortgagee or purchaser, and then, when a mortgagee or purchaser has been induced, unwittingly, to pay or advance his money, some other members of the family produce the other will, which has been suppressed or concealed during the whole of that time, and thus seek to take the estate away from the mortgagee or purchaser. It seems to me to be a very ingenious device by which a testator would be able to give his property twice over to his family; but in my opinion, it is a device which ought not to be encouraged in any way in equity. I

am, therefore, of opinion, that whatever may be the accident by which a purchaser has obtained a good legal title, and in respect of which he has paid his money and is in possession of the property, he is entitled to the benefit of that accident; just as a purchaser would be entitled to avail himself of the possession so acquired, without any reference to the rights of the persons who may be otherwise interested:" *Monckton v. Braddell*, 6 I. R. Eq. 352.

It seems, however, that a person cannot plead that he is a purchaser for valuable consideration without notice, where he purchases and pays the purchase-money to a pretended agent of an apparent owner, without his authority, the apparent owner being merely a grantee under a fraudulent deed, who had never been in possession: *Ogilvie v. Jeaffreson*, 2 Giff. 353, 380.

And not only where the purchaser has actually obtained, but where he has the best right to call for the legal estate, will he be entitled to the protection of equity; *Willoughby v. Willoughby*, 1 T. R. 763; *Blake v. Sir Edward Hungerford*, Prec. Ch. 158; *Charlton v. Low*, 3 P. Wms. 328; *Ex parte Knott*, 11 Ves. 609; *Shine v. Gough*, 1 Ball. & B. 436; *Bowen v. Evans*, 1 J. & L. 264; *Tildesley v. Lodge*, 3 Sm. & G. 543. And see *ante*, vol. i., p. 624.

And the rule in favour of purchasers applies to personal as well as to real estate: *Dawson v. Prince*, 2 De G. & Jo. 41.

Where a trustee has made good a breach of trust with regard to one trust fund, by the application for that purpose of funds belonging *to another trust, the cestuis que trustent of the first fund will be considered as purchasers for value without notice, and the ces- [*11] tuis que trustent of the second fund will not be able to reclaim any part of it so applied in making good the breach of trust. Thus, in *Thorn-dike v. Hunt*, 3 De G. & Jo. 563, a trustee of two different settlements having applied to his own use funds subject to one of the settlements, replaced it by funds which, under a power of attorney from his co-trustee under the other, he transferred into the names of himself and his co-trustee in the former. In a suit in respect of breaches of trust of the former settlement, the trustees of it transferred the fund thus replaced into Court on a motion. It was held by the Lords Justices, reversing the decision of Sir John Romilly, M. R., that the transfer was equivalent to an alienation for value without notice, and that the cestuis que trustent under the other settlement could not follow the trust fund. See also *Case v. James*, 29 Beav. 512, 3 De G. F. & J. 256.

But though a purchaser bona fide without notice may, after notice, obtain the legal estate, buy in an incumbrance, or lay hold on any plank to protect himself, "yet he shall not protect himself by taking a conveyance from a trustee after he had notice of the trust; for by taking a conveyance, with notice of the trust, he himself becomes the trustee, and must not, to get a plank to save himself, be guilty of a breach

of trust." See *Saunders v. Dehew*, 2 Vern. 271; *S. C.*, nom. *Sanders v. Deligne & Barnes*, Freem. C. C. 123; *Allen v. Knight*, 5 Hare, 272; affirmed by Lord Cottenham on appeal, 11 Jur. 527; *Baillie v. M'Kewan*, 35 Beav. 177; and a trustee for successive encumbrancers cannot by conveying the legal estates to one of them give him priority over the other: *Sharples v. Adams*, 32 Beav. 213; *Collyer v. Finch*, 19 Beav. 500; 5 Ho. Lo. Ca. 905.

But as the first mortgagee is not a trustee for the second, although he have notice of his mortgage, a third mortgagee advancing his money without notice of the second may gain priority over it by taking a conveyance of the first: *Peacock v. Burt*, 4 L. J. N. S. Ch. 33 (Coote, Mortg. Append.).

There does not, however, appear to be any case in which a purchaser obtaining a conveyance of a mere dry trust estate from a trustee of a satisfied term, or from a mortgagee whose mortgage has been satisfied, such trustee or mortgagee having at the time when he made the conveyance, notice of an intervening charge or trust, has been held entitled to protect himself from such charge or trust, by means of the legal estate which he has so obtained. Per Sir W. P. Wood, V. C., in *Carter v. Carter*, 3 K. & J. 640; and see **Maundrell v. Maundrell*, 10 [*12] Ves. 246; *Ex parte Knott*, 11 Ves. 609; *Cory v. Eyre*, 1 De G. Jo. & Sm. 149. See, however, Dart, V. & P. 759, 4th ed.

A purchaser, moreover, without notice cannot avail himself of the legal estate, which, by the fraud of another, has been obtained from the holder for the protection of the purchaser, but has not actually been conveyed to him. See *Eyre v. Burmester*, 10 Ho. Lo. Ca. 90. In that case Eyre was the holder of a mortgage on lands given to him by John Sadleir who was largely his debtor. John Sadleir afterwards mortgaged these lands to the directors of a banking company as security for some fresh advances. Before these advances were actually made, the solicitor for the directors discovered that the lands had been previously mortgaged to Eyre. The directors refused to complete the transaction with John Sadleir unless Eyre's interest in the lands was released. John Sadleir represented to them that it would be easy to procure the release as Eyre's mortgage was only collateral security, and he applied to Eyre, who consented to give the release on getting proper securities in substitution for the mortgage. By deeds duly executed between Eyre and John Sadleir, the latter pretended to give substituted securities, among others, railway shares and a promissory note. The release was executed by Eyre. The substituted securities, the shares and the note, proved to be forgeries. It was held by the House of Lords, reversing the decree of the Lord Chancellor of Ireland, that Eyre had not, by executing the release, lost his right against the mortgaged lands, the release having been obtained from him by fraud, that even if John Sadleir had conveyed the released lands to the directors they could only have

claimed under him against Eyre, and that the release, valid against John Sadleir and those who claimed under him, was invalid as against Eyre, who claimed not only not under John Sadleir, but against him by a title paramount.

An important question arises, when the person, seeking the aid of equity against a bona fide purchaser comes himself fortified with the legal estate; and one might have supposed that the Court acting up to the maxim, "*where equities are equal, the law shall prevail*," would, whether the bill were for discovery or relief, give aid against the purchaser. The authorities, however, have determined otherwise. In the principal case, it will be observed, the plaintiff, claiming under a legal title as heir, sought the assistance of the Court; but Lord Nottingham left him to get whatever remedy he could at law, observing, "that equity will not disarm a purchaser, but assist him; and that precedents of this nature *were very numerous where the Court had refused to give *any* assistance against a purchaser, either to an heir, or [*13] to a widow, or to the fatherless, or to creditors, or even to one purchaser against another."

In *Burlace v. Cooke*, Freem. Ch. Ca. 24, an heir exhibited a bill for discovery of evidence concerning lands of his ancestor's; the defendant swore that he was a purchaser of the lands, and the heir demanded a sight of his writings; but Lord Nottingham said that he should not see them. For although the heir prima facie had a legal title, he might go into a Court of law if he pleased; but this Court would not compel the showing of writings to any person unless he had an equitable title, as a mortgagee; and that was the difference between a legal and equitable title. In *Rogers v. Seale*, Freem. Ch. Ca. 84, Lord Nottingham, on the contrary, made this distinction, "that where the plaintiff hath a title in law, there, though the defendant doth purchase without notice, yet he shall discover writings; but otherwise, it is if the plaintiff hath only a title in equity; for there, if the defendant purchased without notice, he shall never discover, nor make good the plaintiff's title." These two first decisions of Lord Nottingham, both of which are badly reported, are clearly contradictory.

In *Parker v. Blythmore*, Prec. Ch. 58, the plaintiff had a legal title, but the deed under which he claimed was lost, upon his filing a bill setting up the deed, Sir John Trevor, M. R., was of opinion that the plea of the defendant, that he was a purchaser for valuable consideration without notice, was good; but it was not necessary actually to decide the question, as the plaintiff, by replying to the plea, had admitted its validity.

In *Williams v. Lambe*, 3 Bro. C. C. 264, a widow filed a bill against a purchaser from her husband, claiming her dower. The defendant pleaded, that he was a purchaser of the estate (subject to a mortgage), for valuable consideration, without notice of the vendor being married.

Lord Thurlow, however, overruled the plea, observing, that the only question was, whether a plea of purchase without notice would lie against a bill to set out dower; he thought, where a party is pursuing a *legal title*, as dower is, that plea does not apply, it *being only a bar to an equitable, not to a legal claim*. He therefore overruled the plea, though he said he could not see how the plaintiff could proceed without making the mortgagee a party, as, if it turned out that the mortgage (being in fee) was before the marriage, there would be an end to her title.

In *Jerrard v. Saunders*, 2 Ves. jun. 454 (where, however, neither *Parker v. Blythmore* nor *Williams v. Lambe*, are cited), Lord Rosslyn *said he had looked into *Rogers v. Seale*, Freem. Ch. Ca. 84; [*14] that it was impossible it could be the determination of Lord Nottingham, that, if the plaintiff has a *legal title*, the defendant could not protect himself as a purchaser for valuable consideration, but he might if the plaintiff had an equitable title; that it was directly contrary to what he laid down in *Burlace v. Cooke*, soon after he got the Great Seal; that the very reverse was often stated by him; that it was laid down by him, that, against a purchaser for valuable consideration, this Court had no jurisdiction; that *Fagg's case* (cited 1 Vern. 52) was determined by him; the defendant had picked up from the conveyancer's table the deed that affected his title, and though he got it in that manner, Lord Nottingham would not oblige him to set it forth. However, in *Strode v. Blackburne*, 3 Ves. 222, Lord Rosslyn said, that the plea of purchase for valuable consideration without notice, was a *shield to the possession*, and that he found it very difficult to imagine a case in which it could be used for any other purpose than to defend the *actual possession*; and accordingly in that case, where a bill being filed by the tenant for life in possession, under a settlement for discovery or delivery of the title-deeds, the defendant pleaded a mortgage in fee by a former tenant for life alleging himself to be seised in fee, without notice of the settlement; his Lordship ordered the plea to stand for an answer, with liberty to accept.

In the important case of *Walwyn v. Lee*, 9 Ves. 24, Lord Eldon considered not only that the plea was good as against the plaintiff with a legal title but also (clearly overruling *Strode v. Blackburne*), that the fact of the plaintiff being in possession, gave him no claim to the assistance of the Court against a bona fide purchaser without notice. In that case a tenant in tail in *possession* under a marriage settlement, filed a bill for discovery and delivery of title-deeds of an estate which had been mortgaged by his father, who was tenant for life under a settlement, and a private Act of Parliament. The defendant pleaded that the plaintiff's father, alleging himself to be seised in fee, and being in actual possession of the premises as apparent owner, and being also in actual possession of the title-deeds relating thereto, as apparent owner thereof,

and having the disposal thereof, executed the several mortgages (stating them) under which the defendant claimed, and averred that the defendant, and the other mortgagees, through whom he derived, had no notice. It was argued for the plaintiff, that, as the defendant neither was in possession, nor had the means of procuring it, the Court ought not to permit him to keep the deeds for the sole purpose of extortion. Lord Eldon, however, *allowed the plea. "This bill," said his Lordship, "is filed by a person having got pos- [*15] session. If the principle is, that this Court will not stir against a purchaser for valuable consideration without notice, what are the legal rights of the son, tenant in tail, when his father's life estate determines? His legal rights are, that he shall have possession of the estate: I do not know that I am entitled to say, of the title-deeds, but that he shall recover in trover the value of the deeds, or in detinue, in which the judgment is for the deeds, or the value. But, without attending to the imperfection of the law in such actions, which is probably the ground of the jurisdiction here for the specific delivery of the thing, *I will suppose his right at law to be the specific delivery.* It is true, he is not seeking in equity to recover possession of the estate. But he is seeking to recover something, which he cannot recover at law, the value of which non constat he can recover at law without the discovery of the deeds. Is it of necessity, then, that this Court must hold as against a purchaser for valuable consideration without notice, that, if the possession of the estate has been got from him, the possession of the deeds shall be taken out of his hands by this Court, and thrown in to the person who has got from him the possession of the estate? I do not go further to consider, whether the possession can be forever withheld from him, reserving that, and doubting whether, upon the argument of this plea, the Court has any right to discuss that question, or to take upon itself to say, as the ground upon which it is in this state of things to proceed, that the possession may be for ever withheld from him. Is it not worth consideration, whether the very principle of this plea is not this: 'I have honestly and bona fide paid for this, in order to make myself the owner of it, and you shall have no information from me as to the perfection or imperfection of my title, until you deliver me from the peril in which you state I have placed myself in the article of purchasing bona fide?'

"Is it not worth consideration, whether every plea of purchase for valuable consideration without notice does not admit that the defendant has no title? If he has a good title, why not discover? I apprehend there is sufficient ground for saying, *a man who has honestly dealt for valuable consideration without notice shall not be called upon, by confessions wrung from his conscience, to say he has missed his object in the extent in which he meant to acquire it.* I doubt, therefore, the argument calling upon the Court to presume that this man can bring

no ejectment; that if he did, he could not recover; that he has not now the legal fee; that he *has not some term vested in him; [*16] that he may not be able to procure either; and presuming that, at the hazard of preventing him from doing that very thing, if he is at this moment engaged in the endeavour to do it. It is asked whether the Court is to permit extortion, by enabling the defendant to withhold the deeds from the owner? Is not the very doubt, whether this Court will call upon the defendant to admit that the plaintiff is the owner? Next, the possession of the deeds at least is a thing purchased with the estate; and if it happens that the purchase misses its object to this extent, that the purchaser has had the possession taken from him without the assistance of this Court, is there a clear principle, that, therefore, the possession of the deeds shall, with the assistance of the Court, be recovered by that person who so obtained possession of the estate? I am not sure that follows as a principle of sound equity, if the principle of the Court is, that, *against a purchaser for valuable consideration without notice this Court gives no assistance*. Feeling this case to be of great importance, with reference to the transactions of the world, especially if I shall be compelled to infringe upon an authority to which I look with great respect, but which at this moment I cannot think consistent with the doctrine of this Court as to a purchaser for valuable consideration without notice, I am obliged to take some further time." The plea having stood a considerable time for judgment, was allowed.

Notwithstanding the decision of *Walwyn v. Lee*, the question was again raised in *Collins v. Archer*, 1 Russ. and My. 284. There, a rector, in 1811, demised his rectory to A. for a term of years, to secure the due payment of an annuity. In 1814, he for valuable consideration demised the tithes of certain lands within the rectory to the occupier, B., who, at the time, had no notice of the prior charge. The annuity fell into arrear in 1816, and in 1817 the rector took the benefit of the Insolvent Act. B. remained in the occupation of the lands, and retained the tithes, claiming to be entitled to them under the deed of 1814; and no step was taken to enforce payment until 1827, when A. filed against him a bill for an account; in answer to which B. insisted that he was a purchaser for valuable consideration without notice. But it was held by Sir John Leach, M. R., that the defendant ought to account for the tithes for the six years before the filing of the bill. "Following," said His Honor, "the case of *Williams v. Lambe*, and the general principle of a Court of equity, I am of opinion that that defence is of no avail against the legal title." In this case *Burlace v.*

Cooke, *Parker v. Blythmore*, *Jerrard v. Saunders*, and *Walwyn v. *Lee*, were not cited, either in the argument or judgment. [*17]

The subject, however, afterwards met with full consideration by Lord Chancellor Sugden, in the case of *Joyce v. De Moleyns*, 2 J. & L.

374, where the doctrine laid down in *Walwyn v. Lee* was approved of and acted upon. There the heir-at-law obtained possession of title-deeds relating to impropriate tithes, of which his second brother, under the will of their father, was tenant for life, and deposited them with bankers by way of equitable mortgage, to secure a sum which they advanced to him. Upon a bill being filed by the administrator of a bond creditor of the father, for the administration of his estate, and praying that the bankers might be decreed to deliver up the deeds, the bankers insisted that they were purchasers for valuable consideration, without notice of the will, or of the title of any persons claiming thereunder, or of the demands of the plaintiff; and submitted that the bill should either be dismissed, or that the plaintiff should redeem them. And Lord Chancellor Sugden dismissed the bill as against the bankers, with costs. "It is clear," observed his Lordship, "that the persons entitled to the tithes may maintain trover for the deeds. There is no question as to their title to recover at law; but I apprehend that *the defence of a purchase for value without notice, is a shield, as well against a legal as an equitable title*. There has been a considerable difference of opinion upon the subject amongst judges. I must decide the question for myself: and I have always considered the true rule to be that which I have stated. Therefore, I think that *the mere circumstance that this is a legal right*, is not a bar to the defence set up, if in other respects it is a good defence. That it is a good defence, cannot be denied. Suppose a tenant for life under a will, with remainder over; and that the tenant for life, being the heir-at-law of the testator, conveys the inheritance to a purchaser without notice, the remainderman cannot have any relief in equity against the purchaser. He must establish his title outside of this Court, as well as he can. It is the same with respect to title deeds. Deeds are chattels; and, where no adverse claimant interferes, the person entitled to the estate is entitled to the deeds. But the person who has possession of the deeds may deal with them as with any other chattels, subject to the rights of those who are interested in them. Here a person obtains the possession of title deeds having no title to the estate; another person advances money to him upon the security of a deposit of the deeds. The rule, therefore, comes into operation (for it applies equally to real estate and to chattels), that if a man advance money bona fide, and without *notice of the infirmity the title of the seller, he will be protected in this Court, [*18] and the parties having title must seek relief elsewhere. . . . In answer to the objection made by the defendants, it is urged that they are equitable mortgagees, and brought before the Court in that character, and that the Master will, under the decree, report on their title; and so they may, under the decree, have what is their right. That, however, is merely begging the question; for, if their title as purchasers for value enables them to say that the bill must

be dismissed as against them, then the plaintiff offers them nothing, for he says that the person who pledged the deeds had no interest of any kind in the estate: therefore, though the plaintiff treats them as equitable mortgagees of the estate, yet at the hearing he denies them that character; and they cannot fill the character of equitable mortgagees of the deeds, for the person depositing them had no title. The defendants, therefore, use the possession of the deeds, as they have a right to do, as a shield to protect them against the plaintiffs. They can make no use of the deeds themselves; they cannot maintain possession of them against the true owner: but in this Court they have a right to say that they ought not to be compelled to deliver them up, as they obtained them bona fide and without notice." On the following day his Lordship said, that Lord Eldon had decided the very point in *Walwyn v. Lee*, 9 Ves. 24, and added, that in *Bernard v. Drought*, 1 Moll. 38, Sir A. Hart extended the doctrine to the case of a solicitor's lien, but in *Smith v. Chichester*, 2 D. & War. 393, he considered that it had been carried to far.

So in *Bowen v. Evans*, 1 J. & L. 264, Lord Chancellor Sugden said that in his opinion, whether the purchaser has the legal estate, or only an equitable interest, he may by way of defence, avail himself of the character of a purchaser without notice, and is entitled to have the bill dismissed against him, though the next hour he may be turned out of possession by the legal title. See also *Payne v. Compton*, 2 Y. & C. Exch. Ca. 457; *Attorney-General v. Wilkins*, 17 Beav. 285; *Lane v. Jackson*, 20 Beav. 535; *Hope v. Liddell*, 21 Beav. 183; *Penny v. Watts*, 1 Mac. & G. 150; *Gomm v. Parrott*, 5 W. R. (C. P.) 882, 3 Jur. N. S. 1150, where this doctrine has been approved of and followed.

The principle however of the cases that decide, that the defence of being a purchaser for valuable consideration without notice, can be made by persons not having the legal estate, is not applicable to cases where a legal mortgagee files a bill of foreclosure against a subsequent mortgagee or purchaser who has advanced his money without notice of the prior incumbrance. *See *Finch v. Shaw*, and *Colyer v. Finch*, 19 Beav. 500; there Finch, the plaintiff in the first suit in 1842, became first legal mortgagee of an estate of the defendant Shaw, and Colyer, the plaintiff in the second suit, became purchaser of the estate in 1849. It was held by Sir John Romilly, M. R., that Colyer could not set up as a defence to a bill of foreclosure by the first mortgagee, that he was a purchaser for valuable consideration without notice of the mortgage. His Honor, after stating that he had no doubt as to the propriety of the decisions with respect to purchasers for valuable consideration without notice, observed, "It would be a new and a very dangerous doctrine, to say, that where a person has mortgaged property to one, and given him a legal mortgage, and has afterwards mortgaged the same property to a second, concealing the existence of

the first mortgage, the first mortgagee is to be deprived of his ordinary rights in this Court, incidental to his mortgage. I have found no case that leads to that conclusion, and on the contrary, it appears to me inconsistent with the whole doctrine of this Court relating to tacking."

. . . And after observing that there were several cases upon the subject, which might require some nicety of distinction to reconcile precisely, and noticing the cases of *Williams v. Lambe* (3 Bro. C. C. 264) and *Collins v. Archer* (1 Russ. & My. 284), his Honor added, "The distinction I apprehend to be this:—if the suit be for the enforcement of a legal claim for the establishment of a legal right, then, although this Court may have jurisdiction in the matter, it will not interfere against a purchaser for valuable consideration without notice. but leave the parties to law; if on the other hand, the legal title is perfectly clear, and attached to that legal title there is an equitable remedy, or an equitable right, which can only be enforced in this Court, I have not found any case, nor am I aware of any, where this Court will refuse to enforce the equitable remedy which is incidental to the legal right." The case of *Colyer v. Finch*, was on appeal affirmed by the House of Lords (5 H. L. Cas. 905); and Lord Cranworth, C., observed that the reasons of the Master of the Rolls were no doubt perfectly satisfactory, but that he should proceed on a shorter ground, "For the purpose," said his Lordship, "of the question whether the Court would interfere against a purchaser for valuable consideration without notice, a foreclosure is not relief at all. The mortgagee who seeks foreclosure stands in such a position to the mortgagor, or the purchaser from the mortgagor for valuable consideration without notice, that that purchaser can at any time file a bill to redeem the mortgage; and that being so, it would be most unjust if there was not a correlative [*20] right on the part of the mortgagee to say, 'You shall redeem now, or you shall never redeem.' Therefore I think that is a ground which entirely puts an end to all questions as to Mr. Finch's suit, and that he would be entitled, unless so far as it is interfering with the other suit, to the decree which the Master of the Rolls has given him; namely, the ordinary foreclosure decree." See also *Burlace v. Cooke*, Freem. Ch. Ca. 24, *ante*, p. 13.

Nor can the defence of a person being a purchaser for valuable consideration without notice, be used by a person having equal equities against an incumbrancer not having the legal estate, who is prior to him in point of date. See *Phillips v. Phillips*, 4 De F. & Jo. 208; 31 L. J. Ch. (N. S.) 325; 18 Jur. (N. S.) 145. There, A. being entitled to the equity by redemption in certain lands, by a deed of family arrangement dated in February, 1820, granted to his brother B. an annuity of 20*l.* charged on those lands, and payable on the death of his mother C. By a settlement made on his marriage in May, 1821, A. settled the above lands, subject to the mortgage existing thereon, and he at the

same time covenanted that they were not otherwise incumbered. A. died in 1825, and C. died in 1839. The first payment of the annuity became due in March, 1840. In 1859 B. filed a bill against those claiming under the settlement for payment of the annuity. The defendants set up orally at the bar the defence, that they were purchasers for valuable consideration without notice of B.'s annuity. It was held by Lord Westbury, C., that even assuming such defence could be set up orally at the hearing (but which he held could not), it was not available, inasmuch as the defendant was only the purchaser of an equitable interest. "I take it," said his Lordship, "to be a clear proposition, that every conveyance of an equitable interest is an innocent conveyance, that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to, and no more. If, therefore, a person seised of an equitable estate (the legal estate being outstanding), makes an assurance by way of mortgage, or grants an annuity and afterwards conveys the whole estate to a purchaser, he can only grant to the purchaser that which he has, namely, the estate subject to the annuity or mortgage, and no more. The subsequent grantee takes only that which is left in the grantor. Hence grantees and incumbrancers claiming in equity, take and are ranked according to the dates of their [*21] securities, and the maxim *applies *qui prior est in tempore, potior est in jure*. The first grantee is *potior*, that is *potentior*. He has a better and superior, because a prior, equity. The first grantee has a right to be paid first, and it is quite immaterial whether the subsequent incumbrancers at the time they took their securities and paid their money had notice of the first incumbrance or not. These elementary rules are recognized in the case of *Brace v. The Duchess of Marlborough* (2 P. Wms. 491); and they are further illustrated by the familiar doctrine of this Court as to the tacking securities. It is well known that if there are three incumbrancers, and the third incumbrancer at the time of his incumbrance and payment of his money had no notice of the second incumbrance, then, if the first mortgagee or incumbrancer has the legal estate, and the third pays him off and takes an assignment of his securities and a conveyance of the legal estate, he is entitled to tack his third mortgage to the first mortgage he has acquired, and to exclude the intermediate incumbrancer. But this doctrine is limited to the case where the first mortgagee has the legal title; for if the first mortgagee has not the legal title, the third mortgagee, by payment off of the first, acquires no priority over the second. Now the defence of a purchaser for valuable consideration is the creature of the Court of equity, and it can never be used in a manner at variance with the elementary rules which have been already stated. . . . It was indeed said at the bar that the defendants being in possession had a legal advantage in respect of that possession of which they ought not to be deprived. But that is to confound the subject of adjudication

with the means of determining it. The possession is the thing which is the subject of controversy, and it is to be awarded by the Court to one or to the other. But the subject of controversy, and the means of determining the right to that subject, are perfectly different. The argument, in fact, amounts to this: 'I ought not to be deprived of possession, because I have possession.' The purchaser will not be deprived of anything that gives him the legal right to the possession, but the possession itself must not be confounded with the right to it. The case, therefore, that I have to decide is the ordinary case of a person claiming under an innocent equitable conveyance that interest which existed in the grantor at the time when that conveyance was made. But, as I have already said, that interest was diminished by the estate that had been previously granted to the annuitant, and as there was no ground whatever for pretending that the deed creating the annuity was a voluntary deed, so there is no ground whatever for *contend- [*22] ing that the estate of the person taking under the subsequent marriage settlement is not to be treated by this Court, being an equitable estate, as subject to the antecedent annuity, just as effectually as if the annuity itself had been noticed and excepted out of the operation of the subsequent instrument. I have no difficulty in holding that the plea of purchase for valuable consideration is, upon principle, not at all applicable to the case before me, even if I could take notice of it as having been rightly and regularly raised." See, also, *Vorley v. Cooke*, 1 Giff. 230; *Parker v. Clarke*, 30 Beav. 54.

In consequence of the decisions of *Walwyn v. Lee*, and *Joice v. De Moleyns*, questions have arisen in what instance the Court will order the delivery up of title deeds in favour of a person entitled to them, though the person holding the title deeds may have taken them without notice of any prior estate or interests. In those cases it will be observed, that the sole object of the suits, which were by the legal owners, was the recovery of the title deeds; and the learned judges, by whom those cases were decided, refused to give any assistance against a purchaser for valuable consideration without notice, inasmuch as in each case the legal owner might, in an action of trover, recover the deeds at law.

Where, however, in consequence of a fund being in Court (*Stackhouse v. Countess of Jersey*, 1 J. & H. 721), or in consequence of the legal estate being outstanding in a trustee, and the beneficial interest being claimed by several adverse but equally innocent purchasers for value without notice, the Court is called upon to declare, and does declare, the right to the fund or estate in question, in such cases as the Court is called upon to make, and does make, a decree against some one or more of such purchasers for value, such a decree would be obviously incomplete in a material particular if, while declaring the plaintiff to be absolutely entitled to the whole beneficial interest in the

estate, it left the title deeds in the possession of one of the defendants, claiming to hold them under an adverse title which the same decree declared to have no foundation; the Court therefore will, in such cases, order the delivery up of the title deeds. Per Lord Hatherley, L. C., in *Newton v. Newton*, 4 L. R. Ch. App. 144. Suppose the owner of an equitable estate for value conveys the whole estate to A., and then does the same to B., and again conveys the whole estate to C., for valuable consideration, having, in fact, nothing whatever to convey to B. or to C.; then neither B. nor C. can hold the title deeds of the property against A. But the Court will, on declaring who is the real owner, [*23] declare that B. or C. shall deliver *up to A. the title deeds belonging to that estate, of which A. is the sole and exclusive owner. Per Lord Romilly, M. R., in *Newton v. Newton*, 6 L. R. Eq. 141; see also *Frazer v. Jones*, 17 L. J. Ch. (N. S.) 353.

Where the person creating a charge in favour of a subsequent claimant, had any interest whatever in the subject-matter which he proposed to charge, then the person in whose favour he has created this latter incumbrance, and who has got possession of the title deeds belonging to the estate, may hold them till he is redeemed or foreclosed; and in such cases the court will not go into the question of the greater or lesser amount of the prior charge, but if he had a beneficial interest in the property, or a right to redeem it, that is sufficient to give the last incumbrancer a right to hold the deeds. For instance, if the equitable owner of an estate creates a first charge on it in favour of A., and a second in favour of B., and a third in favour of C., to whom he delivers up the custody of the title deeds, whether this order of priorities is originally undisputed, or whether it is settled by the decree of the Court, C. cannot be compelled to deliver up the title deeds until he is foreclosed or redeemed, because there is a possibility of interest in the estate remaining to him after payment of A. and B. Per Lord Romilly, M. R., in *Newton v. Newton*, 6 L. R. Eq. 141; see also *Thorpe v. Holdsworth*, 7 L. R. Eq. 139.

It may appear difficult to reconcile all the cases upon this subject with each other, especially the cases of *Williams v. Lambe* and *Collins v. Archer*. Lord Westbury, however, in the important case of *Phillips v. Phillips*, 4 De G. F. & Jo. 208; 8 Jur. N. S. 145; 31 L. J. Ch. N. S. 321, approves of the decisions of *Williams v. Lambe* and *Collins v. Archer*, upon the ground that in those cases the application being made where the Court had *concurrent* jurisdiction with Courts of law, the rule that a defendant could plead that he was a purchaser for valuable consideration without notice, did not apply, as it did in the other cases before noticed, where the application was made to the *auxiliary* jurisdiction of the Court. His Lordship gives the following summary of the law on this subject:—"The defence of a purchase for valuable consideration is the creature of the Court of equity. . . . It seems at

first to have been used as a shield against the claim in equity of persons having a legal title. *Basset v. Nosworthy*, Rep. temp. Finch, 102, S. C., 2 White and Tudor's Leading Cases in Equity, 1, is, if not the earliest, the best early reported case on the subject. There the plaintiff claimed under a legal title, and this circumstance together with the maxim I have *referred to (*qui prior est tempore potior est jure*) probably gave [*24] rise to the notion that this defence was good only against the legal title. But there appear to be three clauses of cases, in which the use of this defence is most familiar—first, where an application is made to the auxiliary jurisdiction of the Court by the possessor of a legal title, as by an heir-at-law (which was the case of *Basset v. Nosworthy*), or by a tenant for life for the delivery of title deeds (which was the case of *Walwyn v. Lee*), and the defendant pleads that he is a bonâ fide purchaser for valuable consideration without notice. In such case the defence is good, and the reason given is, that as against a purchaser for valuable consideration without notice, the Court gives no assistance—that is, no assistance to the legal title. But this rule does not apply where the Court exercises a legal jurisdiction concurrently with Courts of law. Thus it was decided by Lord Thurlow in *Williams v. Lambe* (3 Bro. C. C. 264), that the defence could not be pleaded to a bill for dower; and by Sir J. Leach in *Collins v. Archer* (1 Russ. & My. 284), that it was no answer to a bill for tithes. In those cases a Court of equity was not asked to give to the plaintiff any equitable, as distinguished from legal relief. The second class of cases is the ordinary one of several purchasers or incumbrancers, each claiming in equity, and one who is later or last in time succeeds in obtaining an outstanding legal estate, not held upon existing trusts, or a judgment or any other legal advantage, the possession of which may be a protection to himself or an embarrassment to other claimants. He will not be deprived of this advantage by a Court of equity. To a bill filed against him for this purpose by a prior purchaser or incumbrancer, the defendant may maintain the plea of purchase for valuable consideration without notice, for the principle is, that a Court of equity will not disarm a purchaser—that is, will not take from him the shield of any legal advantage. This is the common doctrine of the *tabula in naufragio*. Thirdly, where there are circumstances that give rise to an equity as distinguished from an equitable estate—as, for example. an equity to set aside a deed for fraud, or to correct it for mistake, and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice—the Court will not interfere. Now these are the three cases in which the defence in question is most commonly found.”

Lord St. Leonards, in his last edition of *Vendors and Purchasers* (14th ed.), pp. 795—798, disapproves of the doctrine as laid down by Lord Westbury in *Phillips v. Phillips*, and says, that “Till *the [*25] case of *Phillips v. Phillips* the validity of the defence against an

equitable title appears not to have been questioned." Lord Westbury's doctrine, however, appears not only to reconcile the apparently conflicting decisions upon this subject, but also puts the doctrine upon an intelligible ground.

It is no doubt true that the plea of purchase for valuable consideration without notice, may, as a general rule, be used as a defence both as against a plaintiff having a legal or an equitable estate, where the right of the plaintiff must necessarily be determined at law.

If the plaintiff has a legal title, he is left to recover at law without any assistance from equity; if, on the other hand, the defendant, a bona fide purchaser, has got the legal estate, a Court of equity will do nothing to deprive him of the advantage he may obtain thereby in a Court of law.

Where, however, a Court of equity has concurrent jurisdiction with the Courts of law, as in matters of dower or tithes, it will, as in *Williams v. Lambe* (3 Bro. C. C. 264), and *Collins v. Archer* (1 Russ. & My. 284), refuse to allow the plea of purchase for value without notice a fortiori will it refuse to do so where the right of the plaintiff is purely equitable, and must, if at all, be determined in a Court of equity.

All that a Court of equity does when it allows the plea, is to send the plaintiff without assistance to the forum proper to determine the question at issue between the parties, when the Court itself has no jurisdiction to do so. If the Court of equity has either concurrent or exclusive jurisdiction, it refuses to allow the plea, for if it did not do so its conduct in the first case would cause unnecessary delay and expense, in the second case it would amount to an absolute denial of justice. It follows that if courts of equity were invested with complete legal jurisdiction, the plea could no longer be used.

The cases of *Williams v. Lambe* and *Collins v. Archer* appear to have been rightly decided, because, to use the words of the learned counsel for the plaintiffs (Mr. Tinney and Mr. Rolfe) in the latter case, and which are equally applicable in the former—"the plaintiffs apply to a Court of equity (the subject being one in which a Court of equity has concurrent jurisdiction), because the account, which is necessary to complete relief, can be obtained more conveniently here than by proceeding at law:" 1 Russ. & My. 290. The reason, however, given for the decision, viz., that the plea is no defence against a legal title, is erroneous, and at variance with the numerous authorities already cited, and does not appear to be supported either by the decision of *Phillips v. Phillips*, *or the propositions laid down by Lord Westbury in [*26] that case.

A defendant, who may have a right, by setting up the defence in his answer that he is a purchaser for value without notice, to protect himself from the production of title deeds, will not be able to do so as to

those the contents of which he has set forth in his answer, because when a defendant professes to set out a deed the plaintiff has a right to see whether it is stated correctly or not: *Hunt v. Elmes*, 27 Beav. 62, 64; and see *Lutimer v. Neate*, 11 Bligh. 154; 4 C. & F. 570; but see Wigram on Discovery, 352, 2nd ed.

The defence that a person is purchaser for valuable consideration will not prevent the Court from protecting the property pending litigation. Thus in *Greenslade v. Dare*, 17 Beav. 502, where a bill was filed to impeach a conveyance of an advowson, Sir John Romilly, M. R., restrained the institution of a clerk presented by a person who set up the defence that he was a purchaser for valuable consideration without notice. "Although," said his Honor, "this Court regards with favour the case of a purchaser for valuable consideration without notice, yet there being a real question in the cause between the plaintiff and the defendant, it does not allow the defendant to take the fruit on an allegation on his part, even though supported by evidence, until the hearing of the cause, for then, and not until then, is the question in the cause to be determined." Upon the hearing the bill was dismissed with costs, 20 Beav. 284.

And it is clear that although a Court of equity will assist a widow by putting a term out of her way, where third parties are not interested, it will not give that assistance against a purchaser: *D'Arcy v. Blake*, 2 S. & L. 388; *Lady Radnor v. Vandebendy*, Prec. Ch. 65; Show. P. C. 69.

In *Baker v. Morgans*, 2 Dow. 526, Baker, in 1781, by an ejectment for non-payment of rent, entered upon the possession of a widow, tenant for life of a lease for lives renewable forever, remainder to her children, who were infants. Baker demised part of the premises to J. C. Beresford, and part to J. Coghlan. The children, in 1806, long after they came of age, filed their bill for relief against Baker, Beresford, and Coghlan; but it was held by the House of Lords, reversing a decree of the Irish Court of Exchequer, that there was no ground for interference in equity, Lord Redesdale observing, that the chief question as to the interference of equity in such cases, had come before him in the case of *O'Connors v. Lord Bandon* (2 S. & L. 679); that it was only a question at law, and that the length of time during which one of them had been of age before proceeding *commenced, [*27] would be a strong objection, even at law. "He could not," he added, "dismiss the subject without adverting to the situation in which Beresford and Coghlan were placed by the decree. It was important to keep in view, that they were both purchasers for valuable consideration. Both had taken possession, and expended money on the premises; and this was the first time when equity had turned a purchaser for valuable consideration out of possession when the legal title was in him. The effect of turning them out of possession was to vest a right of ac-

tion in them against Baker, who would thus be involved in difficulties beyond description. Was a purchaser for valuable consideration bound to see that the whole of a proceeding at law under which the vendor or lessor was in possession, was perfectly regular? There never was a time when equity so dealt with purchasers for valuable consideration. Even if this ground, then, was tenable as against Baker, it was not tenable as against them. But there was nothing here to warrant the plaintiffs to proceed in equity in any way; the proceeding, if any were competent, must be at law. They did not state that they wanted any necessary instrument; there was no affidavit to the bill of any such being lost; and it even appeared by their own showing, that they had evidence to proceed by ejectment, if they had so chosen. Equity, therefore, could not interfere."

In many other respects favour was shown to bona fide purchasers. Thus, a commission of bankruptcy would not formerly have been superseded for fraud, if there were purchasers under it; for, under the old law a commission being superseded, all fell with it. (*Ex parte Edwards*, 10 Ves. 104; *Ex parte Leman*, 13 Ves. 271; *Ex parte Rawson*, 1 V. & B. 160; *Ex parte Latour*, 1 M. & B. 89.)

Nor will a Court of equity relieve against a mere accident, (*Harvy v. Woodhouse*, Sel. Ch. Ca. 80); or rectify a mistake (*Bell v. Cundall*, Amb. 101), so as to affect a purchaser without notice. The mistake or ignorance of parties to a conveyance of their claims, will not turn to the prejudice of a bona fide purchaser: *Malden v. Menill*, 2 Atk. 8; *Marshall v. Collett*, 1 Y. & C., Exch. Ca. 238. So, in *Sturge v. Starr*, 2 My. & K. 195, a man already married, performed the ceremony of marriage with a woman, and joined with her in assigning her life interest in a trust fund to a purchaser; it was held, that though she might not have executed such an instrument, had she been aware of the fraud practised upon her, that fraud could not affect the rights of a bona fide purchaser.

How purchaser may defend himself.—1st. *By demurrer*, if it appear clearly on the face of the *bill, that the defendant was a purchaser for valuable consideration without notice: see Mitf. Tr. Pl. 199, 4th ed.

2nd. *By plea*, which must be sworn to by the defendant: *Marshall v. Frank*, Prec. Ch. 480. The plea must aver that the person who conveyed was seised, or pretended to be seised, when he executed the conveyance: *Story v. Lord Winsdor*, 2 Atk. 630; *Jackson v. Rowe*, 4 Russ. 514; and that he was in possession, if the conveyance purported an immediate transfer of the possession at the time when he executed the purchase or mortgage deed: *Trevanian v. Mosse*, 1 Vern. 246; *Lady Lanesborough v. Lord Kilmaine*, 2 Moll. 403; *Ogilvie v. Jeaffreson*, 2 Giff. 353, 379.

If it be of a particular estate, and not in possession, it must set out

how the vendor became entitled to the reversion: *Hughes v. Garth*, Amb. 421. But if the purchaser set up a fine and non-claim as a bar to the plaintiff's right, it is not sufficient to aver, that at the time the fine was levied, the seller of the estate being seised, or pretending to be seised, conveyed, &c., but it must be averred that he was *actually seised*: *Story v. Lord Windsor*, 2 Atk. 630; *Page v. Lever*, 2 Ves. jun. 450; *Dobson v. Leadbeater*, 13 Ves. 230. The plea must aver the actual consideration (*Millard's case*, Freem. Ch. Ca. 43; *Wagstaff v. Read*, 2 Ch. Ca. 156); although, in some cases, it has been held sufficient to aver generally that it was valuable (*More v. Mayhow*, 1 Ch. Ca. 34; *Day v. Arundel*, Hard. 510); but it must aver that the consideration was bona fide paid, not merely secured to be paid: *Hardingham v. Nicholls*, 3 Atk. 304; *Molony v. Kernan*, 2 D. & War. 31. A mere statement of the payment in the recital of the purchase deed in the plea will not be sufficient (*Maitland v. Wilson*, 3 Atk. 814); and if the consideration be valuable, equity will not inquire whether it be adequate; because, as is laid down in the principal case, "the question is not whether the consideration be adequate, but whether it be valuable; for if it be such a consideration as will make the defendant a purchaser within the statute 27 Eliz., and bring him within the protection of that law, he ought not to be impeached in equity:" *More v. Mayhow*, 1 Ch. Ca. 34; *Wagstaff v. Read*, 2 Ch. Ca. 156; *Bullock v. Sadlier*, Amb. 764; *Mildmay v. Mildmay*, cited Amb. 767.

The plea must also deny notice of the plaintiff's title or claim *previous* to the execution of the purchase deeds and the payment of the consideration; for if he had notice before either the execution of the deeds, or the payment of the consideration, he would be bound by it: *Lady Bodmin v. Vandebendy*, 1 Vern. 179; *Jones v. Thomas*, 3 P. Wms. *243; *Attorney-General v. Gower*, 2 Eq. Ca. Ab. 685, pl. 11; *More v. Mayhow*, 1 Ch. Ca. 34; *Story v. Lord Windsor*, 2 [*29] Atk. 630. And the notice so denied must be notice of the existence of the plaintiff's title, and not merely notice of the existence of a person who could claim under that title: *Kelsal v. Bennet*, 1 Atk. 522, overruling *Brampton v. Barker*, cited 2 Vern. 159.

Notice must be denied whether it be charged in the bill or not: *Aston v. Curzon*, and *Weston v. Berkeley*, 3 P. Wms. 244, n. (f); *Brace v. Duchess of Marlborough*, 3 P. Wms. 491, 6th Resolution; *Hughes v. Garner*, 2 Y. & C., Exch. Ca. 328. Notice of fraud must be denied by way of averment in the plea, otherwise the fact of notice of fraud will not be in issue (*Harris v. Ingledew*, 3 P. Wms. 94; *Meadows v. Duchess of Kingston*, Amb. 756; *Hoare v. Parker*, 1 Bro. C. C. 578; *S. C.*, 1 Cox. 224; *Jackson v. Rowe*, 4 Russ. 514). But it will be sufficient if they are denied generally; for it is not the office of a plea to deny particular facts of notice, even if such particular facts are charged: *Pennington v. Beechey*, 2 S. & S. 282; *Thring v. Edgar*, 2 S. & S.

274; *Cork v. Wilcock*, 5 Madd. 328. If, however, particular instances of notice of fraud are charged, the plea must be accompanied by an answer denying the notice of fraud as specially and particularly as charged by the bill, so that the plaintiff may be at liberty to except to its sufficiency (*Pennington v. Beechey*, 2 S. & S. 282; and see *Anon.*, 2 Ch. Ca. 161; *Price v. Price*, 1 Vern. 186; *Hardman v. Ellames*, 5 Sim. 650; 2 My. & K. 732). But a general denial will be sufficient since the orders of August, 1841, where the interrogatory is framed in general terms: *Gordon v. Shaw*, 14 Sim. 293. And see Consolidated Order XV., rule 3.

A settlement in consideration of marriage may of course be pleaded as a purchase for valuable consideration (*Harding v. Hardrett*, Rep. t. Finch, 9); but if it be made after, in pursuance of an agreement before marriage, the agreement must be stated in the plea as well as the settlement: *Lord Keeper v. Wyld*, 1 Vern. 139.

A plea of a purchase for valuable consideration protects a defendant from giving any answer to a title set up by the plaintiff; but a plea of a bare title only will not be sufficient: *Brereton v. Gamul*, 2 Atk. 241. And where a defendant has a right to plead to a discovery of deeds and writings, he must except his own purchase deeds, for he pleads them: *Salkeld v. Science*, 2 Ves. 107.

3rd. *By answer*.—If a purchaser without notice neglects to protect himself by plea, he may defend himself by answer (*Attorney-General v. Wilkins*, 17 Beav. 285, 291); but if he submits to answer, he [30] must, according to the general rule, answer fully, although he might by demurrer or plea have protected himself. “It was,” observes Lord Lyndhurst, “for some time considered an exception to the rule when the defence was a purchase for valuable consideration without notice (*Jerrard v. Saunders*, 2 Ves. jun. 454; *Rowe v. Teed*, 15 Ves. 372; *Leonard v. Leonard*, 1 Ball & B. 323); but in the case of *Ovey v. Leighton* (2 S. & S. 234), where that point came distinctly before Sir John Leach, he said that it fell within the same principle, and he decided accordingly; and afterwards the present Vice-Chancellor of England, in the case of *The Earl of Portarlington v. Soulby* (7 Sim. 28), acted upon that decision. I consider, therefore, that this is no longer to be considered an excepted case; and that a party whose defence is, that he is a purchaser for valuable consideration without notice, cannot, if he chooses to make that defence by his answer, refuse to answer consequential matters; and that, if he wishes to protect himself from that necessity, he ought to avail himself of the defence by plea or demurrer.” *Lancaster v. Evors*, 1 Ph. 352.

In a case in the House of Lords, Lord Eldon made the following remarks as to the different defences which might be set up by a purchaser: “Certainly there is a great difference,” said his Lordship, “in point of prudence, between pleading that he was a purchaser for valu-

able consideration without notice, and running the risk of what may appear at the hearing. If a man buys an estate, and a bill is filed, and a title shown to relief, he may plead that he is a purchaser for valuable consideration without notice; and he must support this plea by denying all the circumstances from which notice may be implied; and if, after all that can be said to charge him with notice, he is hardy enough to swear that he had no notice, and to deny all the circumstances, and he does plead, and refuses to try the question in any other way, then it must rest very much with his own conscience. But if he forbears to plead, and if it turns out in the progress of the suit that he was a purchaser for valuable consideration without notice, it is too much to deprive him of the effect of that, merely because he does not stop the suit at first, if it be so in fact:” *Lord Rancliffe v. Parkins*, 6 Dow, 230. It has however been recently decided, that where a defendant puts in an answer, but does not set up the defence that he is a purchaser for value without notice, he cannot afterwards insist on that defence: *Phillips v. Phillips*, 4 De G. F. & Jo. 208; 31 L. J. N. S. (Ch.) 321; 8 Jur. (N. S.) 145; and *see *Lyne v. Lyne*, 21 Beav. 318; 8 De G. Mac. & [*31] G. 553.

Assistance given by Courts of Equity to bona fidé purchasers.—Hitherto it has been taken into consideration how far a purchaser without notice can defend himself, and by what means; but equity will not only stand neutral, and render no aid against a purchaser, it will also, as laid down by Lord Nottingham in the principal case, assist him. Thus, upon the application of a bona fide purchaser without notice, ancient statutes (*Pembroke v. Eyre*, Toth. 158; *Burge v. Wolfe*, Toth. 160), sleeping mortgages, or incumbrances under which no claim has for a long time been made (*Rutter v. Bartley*, Toth. 160; *Abdy v. Loveday*, Rep. t. Finch, 250; *Sibson v. Fletcher*, 1 Ch. Rep. 59; *Lord Dillon v. Costelloe*, 2 Moll. 512; *Wallace v. Lord Donegal*, 1 D. & Walsh, 461), have been decreed by the Court to be delivered up, cancelled, or vacated.

Where a person, knowing his own title to property, even although covert or under age, encourages, or even lies by, and permits a purchaser to buy it, equity will compel such a person to convey to the purchaser: [*Wendell v. Rennsellaer*, 1 Johnson’s Ch. 354; *Vanhorn v. Frick*, 3 S. & R. 278; *Carr v. Wallace*, 7 Watts, 100; *Wells v. Pierce*, 7 Foster, 503; *Higgins v. Ferguson*, 14 Illinois, 269; 2 Smith’s Leading Cases, 759, 7th Am. ed.; *Belknap v. Nevins*, 2 Johnson, 573; *Cheaney v. Arnold*, 18 Barbour, 435; *Saunderson v. Ballance*, 2 Jones, Eq. 322; *Godefrey v. Caldwell*, 2 California, 489.] See *Savage v. Foster*, 9 Mod. 35; in which case a mother being entitled under a settlement to a life interest in an estate, with remainder to a daughter by a first marriage in tail, on the marriage of her daughter by a second marriage, conveyed the land to her own use for life, with

remainder to the intended husband and his heirs. The daughter by the first marriage, and her husband who knew the lands were settled upon her in tail, solicited her mother to make the conveyance, and assisted in carrying on the marriage. The lands were afterwards sold, and, upon a bill being filed by the purchaser, it was decreed that the eldest daughter should levy a fine to the plaintiff, to extinguish her right to the lands in the settlement, and that the plaintiff should have a perpetual injunction to quiet his possession. "This bill," it was observed by the Court, "is brought to be relieved against a fraud in the defendant, who would avoid the plaintiff's title by an elder settlement, though she was privy to and assisting in carrying on the marriage of him under whom the plaintiff claims, and never gave any notice of the title to the purchaser. Now, when anything in order to a purchase is publicly transacted, and a third person, knowing thereof, and of his own right to the lands intended to be purchased, doth not give the purchaser notice of such right, he shall never afterwards be admitted to set up such right to avoid the purchase: for it was apparent fraud in him not to give notice of his title to the intended purchaser; and in such case

[*32] *infancy *or coverture shall be no excuse*; for though the law prescribes formal conveyances and assurances for the sales and contracts of infants and feme coverts, which every person who contracts with them is presumed to know; and if they do not take such conveyances as are necessary, they are to be blamed for their own carelessness, when they act with their eyes open; yet, when their right is secret, and not known to the purchaser, but to themselves, or to such others who will not give the purchaser notice of such right, so that there is no laches in him, this Court will relieve against that right, if the person interested will not give the purchaser notice of it knowing he is about to make the purchase; neither is it necessary that such infant or feme covert should be active in promoting the purchase, if it appears that they were so privy to it that it could not be done without their knowledge." See also *Hobbs v. Norton*, 1 Vern. 136; 2 Ch. Ca. 128; *Hanning v. Ferrers*, 2 Eq. Ca. Ab. 356, pl. 20; *Clare v. Earl of Bedford*, 13 Vin. 536; *Watts v. Cresswell*, 9 Vin. 415; *S. C.*, nom. *Watts v. Hailswell*, 4 Bro. C. C. 507, n.; *Berrisford v. Milward*, 2 Atk. 49; *Cory v. Gertcken*, 2 Madd. 40; *Mangles v. Dixon*, 1 Mac. & G. 437; *Thompson v. Simpson*, 2 J. & L. 110; *Govett v. Richmond*, 7 Sim. 1; *Nicholson v. Hooper*, 4 My. & Cr. 179, 185, 186; *Overton v. Banister*, 3 Hare, 503. And see, and consider, *Stikeman v. Dawson*, 1 De G. & Sm. 90; *Wright v. Snowe*, 2 De G. & Sm. 321; *Vaughan v. Vanderstegen*, 2 Drew. 363; *In re King*, 3 De G. & Jo. 63; *Sharpe v. Foy*, 4 L. R. Ch. App. 35; *In re Lush's Trusts*, Ib. 591.

But although an infant may falsely represent himself of age, a person aware that he was not of age, and who was therefore not deceived

by such representation, cannot obtain relief in equity: *Nelson v. Stocker*, 4 De G. & Jo. 458.

Upon the principle laid down in *Savage v. Foster*, if a person having an incumbrance on an estate, deny the fact upon an inquiry being made by a person about to purchase it, equity will relieve against the incumbrance: *Ibbotson v. Rhodes*, 2 Vern. 554; *Amy's case*, cited 2 Ch. Ca. 128; *Hickson v. Aylward*, 3 Moll. 1: so likewise, where upon a treaty for a mortgage of an estate, a person who was entitled to be recouped out of the estate, in case a certain incumbrance was levied out of his own estate, was in communication with the mortgagee, to whom he was referred as a person to give information upon the subject of the transaction, but he gave the mortgagee no information of his equitable claim, it was held by Lord Chancellor Sugden that he could not afterwards set up his claim against the mortgagee: *Boyd v. Belton*, 1 J. & L. 730.

*If a trustee, in whom property is vested, represent it as un- [*33] incumbered, he will be answerable to the purchaser in case it turns out that he has had notice of an incumbrance, and he will not be allowed to allege forgetfulness as an excuse. See *Burrows v. Lock*, 10 Ves. 470, 475; *Slim v. Croucher*, 2 Giff. 37, 1 De G. F. & Jo. 518; *Re Ward*, 31 Beav. 7. But in order to render a trustee so liable, his representations must be clear and unambiguous, so that there can be no doubt as to the sense in which they were used, unless indeed he used ambiguous language for the purpose of deception: *Stephens v. Venables*, 31 Beav. 124.

Mere silence, however, on the part of an incumbrancer, where he is not brought into contact with parties engaged in any transaction relative to the property upon which he claims a charge, or where he is not called upon by them to speak concerning it, will not, it seems, amount to a waiver of it on his part. Thus, in *Osborn v. Lea*, 9 Mod. 96, the Court was of opinion, "that it would be very hard for a mortgagee to be at the peril of losing his mortgage money, if he did not give notice of his mortgage to any person whom he knew to treat about the sale, or any settlement of the lands in his mortgage; and that it very much differed from the case where the mortgagee himself helps to carry on such treaty."

Even where a person has been induced to become a purchaser, by the misrepresentation of another, ignorant of his own right, but where he might have had notice of it, equity will relieve the purchaser; *Shirley v. Wright*, 2 Ohio, N. S. 651, 2 Smith's Lead. Cases, 769, 7th Am. ed.; thus, in *Teasdale v. Teasdale*, Sel. Ch. Ca. 59, a father, supposing his son to be tenant in fee, stood by and let his son make a settlement on his intended wife, for her jointure. The father, after the decease of his son, discovered that he was only tenant for life, and that the fee was in himself, on which title he had a verdict, and judgment at law. Upon a bill being filed by the son's widow, it was insisted on behalf of the father, that the

case was different from the cases where persons cognizant of their title had concealed them; that the father did not know of his title, and therefore could not be said to conceal it. But Lord King said he should make no difference whether he knew of this title or not, considering the near relation of father and son. It was plain, it was thought the son had the fee; and, had it been known it was in the father, it would have been insisted on that he should have joined, else the marriage would not have been had; as he knew of the settlement, he should not take advantage against it. See also *Pearson v. Morgan*, 2 Bro. C. C. 388; *West v. Jones*, 1 Sim. N. S. 205.

[The distinction seems to be between participation or procurement, and silence or acquiescence; the one imposing no liability, unless there is wilful concealment or fraud: *Glabaugh v. Byerly*, 7 Gill, 384; *Strong v. Ellsworth*, 26 Vermont, 369; *Knouff v. Thompson*, 4 Harris, 357; while the other may create a bar, by rendering it more just to throw the loss on him who has occasioned it, than on a purchaser who has been induced to buy by an assurance, which, though made in good faith, proves to be unfounded; *Wells v. Pierce*, 7 Foster, 503; *Willis v. Swartz*, 4 Casey, 413; *Beaupland v. M'Keen*, Ib. 124; *M'Kelvey v. Truby*, 4 W. & S. 323. No one should be made answerable for stating his opinion truly, or for answering a question according to his knowledge or belief; *Parker v. Barker*, 2 Metcalf, 421; *Laurence v. Brown*, 1 Selden, 394; *Morris v. Moore*, 1 Humphreys, 343; *Tilghman v. West*, 8 Iredell, 83; *Royston v. Howie*, 15 Alabama, 309; but the case is widely different where one officiously induces another to buy or expend money by a statement which is untrue in fact, although made under the influence of mistake and without an intention to deceive; *Stiles v. Cowper*, 3 Atkyns, 692; *Buchanan v. Moore*, 13 S. & R. 394; *Richardson v. Pickering*, 41 New Hampshire, 380; *Robinson v. Erwin*, 2 Penna. 19; *M'Kelvey v. Truby*; *Wells v. Pierce*, 2 Smith's Leading Cases, 662, 5th Am. ed.; and see post, vol. 2, note to *Ryall v. Rowles*, for cases on the analogous question which arises on the assignment of choses in action.

In *M'Kelway v. Amour*, 2 Stockton's Ch. 115, the owners of two adjacent lots of land were under the influence of a mistaken impression as to the identity of their lots, each supposing that the land which belonged to his neighbor was his own. In consequence of this mistake, one of them built a house on the lot of the other, and the latter stood by without objecting, while the walls were going up. A bill having been filed, under these circumstances, for relief, the Court held that both parties were bound to redress a common error for which neither could reproach the other, and that the defendant might elect to retain the land and pay for the building, or to convey the land and receive a pecuniary compensation for its value, but that if he would do neither, he should then be compelled to exchange the lot which belonged to him

for the adjacent lot, which both parties supposed to be his when the house was erected, although it really belonged to the complainant.

The principle that acquiescence may estop applies with peculiar force to chattels and to choses in action, because the right to personal property is usually transferred *in pais*, and the buyer cannot rectify or avoid the error by examining the written or recorded title; *The Morris Canal Co. v. Lewis*, 1 Beasley, 323.]

In the principal case, the Lord Keeper justly remarked, that the *rule by which a Court of equity affords protection to purchasers, [*34] is agreeable to the wisdom of the common law, where the maxims which refer to descents, discontinuances, non-claims, and collateral warranties, were only the wise arts and intentions of the law to protect the possession and strengthen the rights of purchasers. The same object has been constantly kept in view by the Legislature, by which many statutes have been enacted for the protection and relief of purchasers.

As to tacking incumbrances, see *Marsh v. Lee*, ante, vol. i., p. 611. As to what amounts to notice, see note to *Le Neve v. Le Neve*, post, p. 40.

The general rule, that priority in point of time gives priority in point of right, is recognized by courts of equity, as well as by those of common law; 2 Johnson's Ch. 608; 18 Wend. 253; 9 Paige, 76; *Watson v. Le Roy*, 6 Barbour, S. C. 485; *Boone v. Chiles*, 10 Peters, 177; *Willoughby v. Willoughby*, 1 Term. 763, 774; *Frere v. Moore*, 8 Price, 475, 488.

If land which has been mortgaged to different persons successively, be sold and the proceeds brought into chancery for distribution, the first mortgagee is entitled to a preference. Under these circumstances, the case falls within the general rule, *prior in tempore, potior in jure*, and it will make no difference that the second mortgagee gave value without notice, and that neither claimant has the legal title. See *Colyer v. Finch*,

19 Bevan, 510; 5 House of Lords Cases, 906, 921; *Brace v. The Duchess of Marlborough*, 2 P. Wms. 490, 495; *Willoughby v. Willoughby*, 1 Term R. 730. But where a chancellor, instead of dealing with the thing itself, has to reach it through the conscience of the parties, he must necessarily inquire whether the complainant has a right *in foro conscientiæ*, which cannot be effectually prosecuted at law. In other words, it must appear that the defendant is morally bound to do what the prayer of the bill requires, and that the aid of equity is requisite to perfect the complainant's title. It follows, that a chancellor can have no jurisdiction as against one who having bought in good faith, may conscientiously retain what he has acquired if he can do so consistently with the law of the land.

If the complainant has the legal title, it may be enforced before a tribunal constituted for that end. If he has not, there is no moral obligation on the defendant to make way for the complainant. Hence, a court of equity stands neutral, and will not lend its aid to either side; *Beekman v. Frost*, 14 Johnson, 544, 562. In *Jerrard v. Saunders*, 2 Vesey, jr., 454, 457; Lord Loughborough declared, "against a purchaser for valuable consideration, this court has no jurisdiction. You cannot attach upon the conscience of the party any demand whatever, where he stands as a purchaser having paid his money, and denies all notice of the circumstances set up by the bill. * * * Against such a one, this court will not take the least step imaginable." Or as the principle is stated by Sugden in terms that have been adopted by the Supreme Court of the United States: "A court of equity acts only on the conscience of the party; and if he has done nothing that taints it, no demand can attach upon it so as to give jurisdiction." Sugden on Vendors; *Boone v. Chilles*, 10 Peters, 177, 210. The dicta of Lord Eldon in *Walwyn v. Lee*, 9 Vesey, 24, *ante*, 13, are but an amplification of this principle.

It is accordingly established, that a bona fide purchase for value, and without notice, is a good defence, not only against all prior equities, but against all adverse proceedings in equity, whether instituted to compel the purchaser to surrender what he has bought, or to

make a discovery which might be used to his prejudice in a court of law; *Zollman v. Moore*, 21 Grattan, 313; *Carter v. Allen*, *Ib.* 241; *Howell v. Ashmore*, 7 Stockton, 82; *Jones v. Zollicoffer*, 2 Taylor, 214; *Demarest v. Wyncoop*, 3 Johnson's Chancery, 147; *High v. Batte*, 10 Yerger, 335; *Woodruff v. Cook*, 1 Gill & J. 270; *Whittick v. Kane*, 1 Id. 202; *Owings v. Mason*, 2 A. K. Marshall, 380; *Goodtitle v. Cummings*, Blackford, 179; *Varick v. Briggs*, 6 Paige, 323; *Tompkins v. Powell*, 6 Leigh, 576; *Hughson v. Mandeville*, 4 Dessausure, 87; *Maywood v. Lubcock*, 1 Bailey's Equity, 382; *Brown v. Budd*, 2 Carter, 442; *Dan v. M'Knight*, 6 Halsted, 385; *Mundine v. Pitts*, 14 Alabama, 84; *Heilner v. Imbrie*, 6 S. & R. 401. The source or nature of the prior equity is immaterial; and a vendor who conveys Blackacre by mistake for Whiteacre, cannot reclaim it from a subsequent bona fide purchaser; *Harrison v. Cochelin*, 23 Missouri, 117.

Every one is a purchaser within this rule who gives value or changes his position for the worse, under a belief that the vendor is entitled, which is justified by what appears at the time, although the event shows it to be ill founded. The sale need not be absolute; it is enough that money is advanced, or credit given in any other form and the land taken as a security. A mortgagee is consequently entitled to protection as a purchaser, and the law has been so held from an early period; *Willoughby v. Willoughby*, 1 Term. 763; *Dicker-*

son v. Tillinghast, 1 Paige, 214; *Boyd v. Beck*, 29 Alabama, 713; *Wells v. Morrow*, 38 Id. 125; *Porter v. Green*, 4 Clarke, 571. But the mortgage must be given for an advance made at the time, and not as a mere collateral or additional security for the fulfilment of a previous obligation; *Dickerson v. Tillinghast*, 4 Paige, 214. One who takes a deed or mortgage solely in consideration of an existing debt, is not a purchaser, because he receives without giving anything in return. But if time be given for the payment of the debt, or a valid security relinquished, and *a fortiori* if the grant or mortgage is accepted in satisfaction, a new consideration will arise, and the transaction may be valid as against an antecedent equity; *Padget v. Laurance*, 10 Paige, 170, 180; *Petrie v. Clark*, 11 S. & R. 371; 2 American Lead Cases, 223, 5th ed.

A grantee from a *bona fide* purchaser stands in the same position as the grantor, and will be equally favored by a chancellor, although affected with notice at the time of the grant; *Bracken v. Miller*, 4 W. & S. 102; *Church v. Church*, 1 Casey, 228. The grantor's conscience is clear, and he may transfer that which he might honestly retain. The rule is not less politic than just, because the *jus disponendi* would otherwise be clogged by a restraint of indefinite duration; *Bumpus v. Platner*, 1 Johnson's Ch. 213; *Fletcher v. Beck*, 6 Cranch, 36; *Alexander v. Pendleton*, 8 Id. 462; *Vattier v. Hinde*, 7 Peters, 252;

Boone v. Chilles, 10 Id. 177; *Dana v. Newhill*, 13 Mass. 498; *Connecticut v. Bradish*, 14 Id. 296; *Trull v. Bigelow*, 16 Id. 406; *Boynton v. Rees*, 8 Pick. 29; *Filby v. Miller*, 1 Casey, 264; *Rutgers v. Kingsland*, 3 Halsted's Chancery, 178, 658; *Blight's Heirs v. Banks*, 6 Monroe, 198; *Halstead v. The Bank of Kentucky*, 4 J. J. Marshall, 554; *Gallatian v. Erwin*, Hopkins, 48; 8 Cowen, 36; *Bumpus v. Platner*, 1 Johnson's Chancery, 213; *Demarest v. Wyncoop*, 3 Id. 147; *Varick v. Briggs*, 6 Paige, 323; *Griffith v. Griffith*, 9 Id. 315; *Lacy v. Wilson*, 4 Munford, 413; *Curtis v. Lanier*, 6 Id. 42; *Brackett v. Miller*, 4 W. & S. 102; *Mott v. Clark*, 9 Barr, 399; *The City Council v. Paige*, Spear's Ch. 159; *Holmes v. Stout*, 3 Green's Ch. 492.

In like manner, notice at a sale under an execution, will not affect the purchaser unless the equity is anterior to the judgment, because he is entitled to fall back on the right of the judgment creditor; or, to speak more accurately, because the judgment creditor is entitled to obtain payment of the debt, and cannot be precluded from doing so by information which comes too late after the lien has attached; *Henderson v. Downing*, 24 Mississippi, 208; *Schutt v. Large*, 6 Barb. 375. But one who acquires or parts with an estate fraudulently, cannot clear the title by conveying the property to a *bona fide* purchaser, and then taking a reconveyance; and a trust will on the contrary be fastened on the estate as soon as it returns to

his hands; *Church v. Church*, 1 Casey, 278; *Oliver v. Piatt*, 3 Howard, 401; *Schutt v. Large*. And it is well settled in general, that to make a defence, grounded on a purchase for value, available, there must be positive good faith, as well as absence of notice, and that when there is anything inequitable in the conduct of the purchaser, or in the circumstances under which he buys, he will not be entitled to the protection of a court of equity; *Cram v. Mitchell*, 1 Barbour's Ch. 251.

A purchase without notice from a purchaser with notice will confer a valid title, because the vendee is not answerable for a fraud of which he is ignorant; *Tompkins v. Powell*, 6 Leigh. 176; *Glidden v. Hunt*, 24 Pick. 221; *Varick v. Boggs*, 6 Paige, 323.

It results from the same principle that a *bona fide* purchase is valid, not only against an antecedent equity, but although the premises were fraudulently acquired by the vendor; *Somes v. Brewer*, 2 Pick. 184; *Wood v. Mann*, 1 Sumner, 506; *Galatian v. Erwin*, Hopkins, 48.

It seems that formerly a chancellor would not deprive a *bona fide* purchaser of an advantage gained by fraud or even feloniously, *ante*, 5; See *Zollman v. Moore*, 21 Grat-tan, 313, 321; but it was held with more reason in *Sanders v. Dehew*, 1 Vernon, 271, that a purchaser cannot protect himself by taking a conveyance from a trustee with knowledge that it is a violation of the trust; *Willoughby v. Willoughby*, 1 Term. 763, 771. And

the recent cases of *Pielcher v. Rawlins*, 9 L. R. Eq. 53, and *Carter v. Carter*, 3 Kay & Johnson Ch. 617, are to the same effect. So to cite an analogous case, an incumbrancer who takes an assignment of an outstanding term, knowing that it is held for the protection of a mortgage, cannot set it up against another mortgage to the same party, of which he was ignorant. For as the second mortgagee has the best right to an assignment of the term, so it cannot be used against him by one who buys with notice; *Willoughby v. Willoughby* 1 Term. 763, 771.

It was said in the principal case that equity will not disarm a purchaser, but assist him. The weight of authority, nevertheless, is that a *bona fide* purchase is not a ground for relief, although it may be a defence; *Patterson v. Slaughter*, Ambler, 293; *Beekman v. Frost*, 1 Johnson Ch. 288; 14 Johnson, 544, 561. In the case last cited, Spencer, C. J., observed: "No book of precedents, no treatise on equity, furnishes an instance of a bill filed on the ground that there has been a purchase without notice and for a valuable consideration." In *Beekman v. Frost*, the bill alleged that the defendant held a mortgage for \$3000, which had been erroneously recorded as being for a debt of \$300; that the complainant purchased the mortgaged premises in good faith, without notice of the mistake; and that he tendered the sum of \$300, with interest, which was refused. The prayer was for an injunction to prevent the defendant from dis-

posing of the premises, under a provision in the deed authorizing a sale in case of default. It was held by the court of errors, reversing the decree of the chancellor, that the complainant was not entitled to such relief on the facts averred. His liability did not extend beyond the debt as recorded, unless he had notice; but the proper way of raising the question was through a bill to redeem, averring his readiness and willingness to pay the \$300, which was confessedly a charge on the land.

It is no doubt true, that a court of equity will not assist a purchaser against one who has a prior right which he can maintain with a good conscience; but it would be too much to assert that a purchase cannot be a ground for equitable relief and discovery. A vendee, under articles of agreement, may sustain a bill for specific performance against the vendor and those claiming under him with notice. And it is well settled that equity will supply the defective execution of a power in aid of a purchaser. The true rule therefore appears to be that to entitle a purchaser to come into a court of equity as a plaintiff, it must appear that the circumstances are such as not only to discharge his conscience, but charge the defendant's. If the latter is under an obligation which cannot be adequately enforced at law, a chancellor will not withhold his aid, because the complainant's right grows out of a purchase. The *ratio decidendi* in *Buckman v. Frost*, seems to have been that the mortgagee was as much a purchaser as

the complainant, and the equities being equal, there was no reason why the former should be enjoined. But the conduct of the mortgagee in proceeding to sell under the power, for a greater amount than was legally due as between him and the complainant, and after a tender had been made by the latter, was clearly inequitable, and therefore a fit subject for an injunction.

Lord Chancellor Cowper is reported to have said that a court of equity will not compel a trustee to act, or to afford the *cestui que trust* the means of acting for himself, to the prejudice of a *bona fide* purchaser, and this doctrine is seemingly approved by Sugden. It would, nevertheless, appear that as the favor shown to a purchaser, is because there is nothing to charge his conscience, it should not extend to discharging the conscience of another. Moreover, while a purchaser may claim protection where the bill is filed directly against him, a chancellor will not refrain from enforcing a just right because it may incidentally prejudice a purchaser. A decree will not be made against a *bona fide* mortgagee, at the instance of a prior incumbrancer, but a sale or foreclosure will be unhesitatingly decreed on behalf of a first mortgagee, although a subsequent *bona fide* mortgagee will thereby be excluded from the fund; *ante*, 16.

It seems to have been thought in some instances, that a plea that the defendant is a *bona fide* purchaser, is not valid, unless he has acquired the legal title, and does

not apply where the vendor had no right, or had parted with his right by a prior deed. See *Polk v. Galant*, 2 Dev. & Bat. 395; *Winborn v. Gorrell*, 3 Iredell Eq. 117; *Boone v. Chilles*, 10 Peters, 177. *Wood v. Mann*, 1 Sumner, 506. But this is at variance with the principle that a chancellor has no jurisdiction where there is nothing to affect the defendant's conscience. An innocent purchaser is not less entitled to favor in a court of equity because the vendor had nothing to convey; *ante*, 6. It is accordingly clear under the English decisions, that it is not essential to the immunity of the purchaser that he should have acquired the legal estate. It is enough that he has a better right to such estate than his adversary; *Coleman v. Cooke*, 6 Rand. 618; *Walker v. Bodington*, 2 Vernon, 599; *Willoughby v. Willoughby*, 1 Term, 763, 768. A puisne mortgagee may, by having an outstanding term which is held in trust to protect the inheritance, assigned to a trustee for his use, obtain a preference over a prior mortgage of which he was ignorant, though not if he knew of its existence when he made the loan; *Willoughby v. Willoughby*. So, in *Williamson v. Gordon's Ex'rs*, 5 Munford, 257, where property which had been conveyed in trust for the payment of debts, leaving a resulting equity in the grantor, was subsequently sold by him to the plaintiff, who applied the purchase-money in discharge of the trust, subject to an agreement with the trustee for a conveyance, this agreement, though not fulfilled,

was held to give the purchaser a better right to the legal title than that of the holder of an intermediate equity, for which nothing had been actually paid, and which had grown up between the date of the original deed of trust, and that of the sale to the plaintiff. A similar opinion was expressed in *The Mutual Assurance Society v. Stone*, 3 Leigh, 218, although the circumstances did not require its application. It would, nevertheless, appear that a covenant by a trustee or other holder of the legal title to convey it to a purchaser, will not give him "a better right" as against one to whom the trustee actually conveys without notice, because the covenantee has a mere equity to a specific performance, and not the law. See *Maundrell v. Maundrell*, 16 Vesey, 247; *Frere v. Moore*, 8 Price, 475.

It is well settled, on the one hand, that notice before the sale is perfected by the payment of the price and the execution of the deed, will invalidate any subsequent step that may be taken by the purchaser; *Murray v. Finster*, 2 Johnson's Ch. R. 155; *Frost v. Beekman*, 1 Id. 288; *Wormley v. Wormley*, 8 Wheaton, 421; *Beck v. Uhrich*, 1 Harris, 636; *Jewett v. Palmer*, 7 Id. 65; *Losey v. Simpson*, 3 Stockton, 246; and on the other, that where the character of a *bona fide* purchaser has been acquired by paying value and obtaining a conveyance, notice of an antecedent equity will not preclude the vendee from strengthening his position by any means that do not savor of wrong. One who takes

an equitable title or incumbrance in ignorance of its nature, and under the belief that he is acquiring a legal right, may, therefore, protect himself by getting in the legal title to the exclusion of equities prior to his own; *Bagarly v. Gaither*, 2 Jones' Eq. 80; *Carroll v. Johnston*, Ib. 120; *Boone v. Childes*, 10 Peters, 177. Accordingly, an assignment of the legal estate in the form of a first mortgage or outstanding term, to a subsequent mortgagee, will entitle him to a preference over an intervening mortgage, of which he was ignorant when he made the loan; *Marsh v. Lee*, 2 Ventris, 337; *Willoughby v. Willoughby*, 1 Term, 763; Sugden on Vendors, 695; Adams Eq. 163. This doctrine, which is commonly known as that of tacking, can have no application in this country, unless both incumbrances are unrecorded, for where a prior mortgage is of record, junior encumbrancers are held to have notice of its existence, and where it is not, it will be postponed under the operation of the recording acts, to any other which is; vol. 1, 855, notes to *Marsh v. Lee*. As between two equitable liens, which do not appear of record, that which is fortified by the legal title should prevail. But the union of the legal and equitable estate will not produce this result, unless they not only meet in the same hand, but are held in the same right, and a third mortgagee will not obtain priority over the second, by appointing the holder of the first mortgage as his executor, although

the latter accepts the office; *Barnet v. Wilston*, 12 Vesey, 130.

The statutes of the several States declare unregistered deeds and mortgages void against subsequent purchasers. It is well settled, that to entitle a purchaser under these acts, he must have given value in good faith; *Dickerson v. Tillinghast*, 4 Paige, 214; *Harris v. Norton*, 16 Barb. 464; *Maupin v. Emmons*, 4 Missouri, 304; *Spackman v. Ott*, 15 P. F. Smith, 131; *Cary v. White*, 52 New York, 38; *Nice's Appeal*, 4 P. F. Smith, 206. Knowledge, or the notice which is equivalent to knowledge, may consequently take the place of registration; *Henry v. Morgan*, 2 Binney, 497; *Jacques v. Weeks*, 7 Watts, 90; *The Union Canal Co. v. Young*, 1 Wharton, 432; *Farmers' Bank v. Bronson*, 14 Michigan, 361; *Mathews v. Everitt*, 23 New Jersey Eq. 473; *Owens v. Miller*, 29 Maryland, 144; *Fort v. Burch*, 5 Denio, 487; *Harrington v. Allen*, 48 Mississippi, 493; *The Matter of Lineman*, 32 Maryland, 225; *Myers v. Ross*, 3 Head. 60; *George v. Kent*, 7 Allen, 16; *Lineman's Est.*, 22 Maryland, 325; *Mass. Manuf. Co. v. Emmons*, 47 Missouri, 304; *White v. Foster*, 102 Mass. 305; *Bayliss v. Young*, 51 Illinois, 127; *Gilbert v. Jess*, 31 Wisconsin, 110; *Conover v. Van Mater*, 3 C. E. Green, 481; *Baker v. Mather*, 25 Michigan, 31; *Myers v. Ross*, 3 Head. 59; *Nices' Appeal*. So, where judgments have priority by statute over unregistered deeds and mortgages, a failure to record the instrument may be supplied by

notice to the creditor before judgment, though not afterwards; *Ayres v. Depsey*, 27 Texas, 593; *Mellon's Appeal*, 8 Casey, 121; *Brittain's Appeal*, 9 Wright, 172; *Hoy v. Allen*, 27 Iowa, 201.

These cases proceed on the ground that one who buys, knowing that the vendor has sold or mortgaged the property to a third person, is *particeps criminis*; *Gibbes v. Cobb*, 7 Richardson's Eq. 54; *Jackson v. Burgott*, 10 Johnson, 457, 459; *Hamilton v. Nutt*, 34 Conn. 501; *Beal v. Gordon*, 55 Maine, 482. Moreover, the object of registration, which is to afford notice, is attained if the purchaser receives the requisite information by other means. The doctrine applies, although the statute provides unqualifiedly that an unregistered conveyance shall be void against subsequent purchasers, because the Legislature will not be presumed to have designed that any one shall retain a title which has been fraudulently acquired; *Gibbes v. Cobb*; *Grimstone v. Carter*, 6 Paige; *Van Renssalaer v. Clark*, 17 Wend. 25; and as legal and equitable jurisdiction are concurrent as it regards fraud, so relief may be had in a legal tribunal; *Jackson v. Tuttle*, 9 Cowen, 233; 6 Wend. 213; *Jackson v. Burgott*; *Van Renssalaer v. Clark*; although this conclusion is questionable where the notice is merely constructive.

It was held at one period, in New York, in accordance with the earlier English decisions, that one who buys in ignorance of an unrecorded deed, will not be affected by the

constructive notice which does not amount to knowledge, or indicate the existence of conscious fraud; *Day v. Dunham*; *Jackson v. Van Valkenburg*, 8 Cowen, 262; *Hine v. Dodd*, 2 Atkins, 275, *ante*; *Doyle v. Teas*, 4 Scammon, 202, 245; and the authorities in Maryland and Ohio, incline in the same direction; *Alderson v. Ames*, 6 Maryland, 52; *The Girard Ins. Co. v. The U. S. Ins. Co.*, 3 Maryland Ch. 380; 11 Maryland, 517; *Woodworth v. Paige*, 5 Ohio N. S. 76. In *Dey v. Dunham*, Chancellor Kent said, that the notice which puts a party upon inquiry, is not sufficient to break in upon the policy and express provisions of the recording acts, and the same rule was laid down in *Jackson v. Van Valkenburg*. Agreeably to this view, the subsequent purchaser will not be postponed, unless the notice is so clearly proved as to show that his conduct was fraudulent in accepting a conveyance "in prejudice to the known title of another," *ante*. But it is now established in New York, as it would appear to be in England, that any notice which would be effectual in the case of an antecedent equity, will supply the want of registration in that of a deed; *ante*, *Whithead v. Boulnois*, 1 Young & Collier, 303; *Tuttle v. Jackson*, 6 Wend. 213; *Jackson v. Post*, 15 Wend. 438, 588; *Grimstone v. Carter*, 3 Paige, 421; *Williamson v. Brown*, 15 New York, 354, 358; *Doyle v. Teas*, 4 Scammon, 202, 250. The same doctrine prevails in Pennsylvania; *Jacques v. Weeks*, 7 Watts, 261;

and generally in the United States, where the law has not been changed by statute; *Perkins v. Swank*, 43 Mississippi, 349; *Harbert v. Hanrick*, 16 Alabama, 599; *Center v. The Bank*, 22 Id. 744; *Hewes v. Wiswell*, 8 Maine, 94; *Clark v. Bosworth*, 51 Maine, 520; *Warren v. Richmond*, 53 Illinois, 32. A *lis pendens* and a recital in a mortgage, through which the defendant in a judgment derived title, were accordingly, in *Center v. The Bank*, held to give the judgment creditor constructive notice of an unrecorded deed.

The revised statutes of Massachusetts provide "that no unrecorded conveyance of real estate shall be valid except against the grantor and persons having actual notice thereof," and the statutes of California, Maine and Vermont and Maryland are to the same effect.

The constructive notice arising from possession, is not sufficient under these statutes, although it may, when coupled with other circumstances, present a case of actual notice; *Pomeroy v. Stevens*, 11 Metcalf, 244; *Mara v. Pierce*, 9 Gray, 306; *Messick v. Sunderland*, 6 California, 315; *Stafford v. Lick*, 7 Id. 489; *Bird v. Dennison*, Ib. 305. But actual notice in this sense does not mean notification, and may be inferred from the purchaser's admissions, from a recital in the deed, or from any evidence tending to show knowledge *Maupin v. Emmons*, 47 Missouri, 304; *Lyman's Est.* 22 Maryland, 325; *White v. Foster*, 102 Mass. 375; *George v. Kent*, 7 Allen, 16.

In *George v. Kent*, part of a tract of land, covered by a mortgage, was conveyed to one Patrick Murphy, by an unregistered deed, and the grantor subsequently conveyed another portion of the same tract to the plaintiff, by a deed describing his lot as "bounded on the west by land of Patrick Murphy," and it was held that this description was notice of the unregistered deed, and that Murphy had acquired a prior right entitling him to throw the burden on the mortgagor, and consequently on the plaintiff. Chapman, J., said: "It is not requisite that notice should be by actual exhibition of the unregistered deed. Intelligible information of a fact, either verbally, or in writing, and coming from a source which a party ought to give heed to, is generally considered as notice of it. . . . The description of the land in the plaintiff's deed was equivalent to an affirmation by the grantor, that the land lying west of it was owned by Patrick Murphy, by virtue of some proper instrument of conveyance. He knew from this information, that Murphy's title was prior to his own. Having such a title, Murphy is not bound to contribute to the redemption of the mortgage."

It results from what has been said, that the position of a grantee in an unregistered deed is similar to that of the owner of an equitable estate or interest. In some of the States there is this difference, that as between two successive grantees of the same premises, he will have precedence whose deed

s first registered; *Reed v. Kemp*, 16 Illinois, 445; *Potts v. Anstatt*, 4 W. & S. 307; *Ebner v. Gonndie*, 5 Id. 49; *Youngblood v. Vastrue*, 46 Missouri, 239; *Goundie v. The Northampton Water Co.*, 7 Barr, 233; *Souder v. Morrow*, 9 Casey, 85; *Lightner v. Mooney*, 10 Watts, 407. Although the second grantee may have given value in good faith, his title is incomplete until he registers his deed, and may be defeated by the registration of the prior conveyance; *The Penna. Salt Co. v. Niel*, 4 P. F. Smith, 9. But this course of decision rests on the wording of the statutes of these States rather than on general principles, and when the terms of the act are general, that unregistered deeds shall be void against subsequent purchasers, such a purchaser will acquire a title whether he does or does not record his deed; *Steele v. Spence*, 1 Peters, 552, *post*. It is the equity arising from the payment of value, under the false impression occasioned by the neglect of the prior purchaser, which the policy that dictated the registry acts should protect; see *Wheaton v. Dyer*, 15 Conn. 307.

It is well settled, that a purchase with notice of an unrecorded deed or mortgage from a purchaser without notice, will confer a valid title; *Trull v. Bigelow*, 16 Mass. 406; *Boynton v. Rees*, 8 Pick. 329; *Mott v. Clark*, 9 Barr, 399; *Lacey v. Wilson*, 4 Munford, 313; *Webster v. Van Steinbergh*, 46 Barb. 211; and so of a purchase without notice from a purchaser with notice; *Jackson v. Given*, 8 John-

son, 137; *Jackson v. Valkenburgh*, 8 Cowan, 260; *Varick v. Briggs*, 6 Paige, 323; *Fallass v. Pierce*, 30 Wisconsin, 443; *Knox v. Sillo-way*, 10 Maine, 221; *Connecticut v. Bradish*, 14 Mass. 296; *Mallory v. Stodder*, 6 Alabama, 801; *Truluck v. Peeples*, 3 Kelly, 446. This is not less true under the recording acts than where the prior right is an equity arising from an act *in pais* or a parol contract. But as this rule is designed in furtherance of good faith and fair dealing, it does not apply where land which has been fraudulently acquired is sold to a *bona fide* purchaser, and reconveyed by him to the vendor, and the latter will then be as much bound to make restitution to the rightful owner as he was before the sale; *Shutt v. Large*, 6 Barb. 373. So a purchaser with actual or constructive notice cannot stand on the validity of the title as deduced of record, if the vendor bought with notice, although this was unknown to the purchaser, and he had every reason to rely on the good faith of his immediate vendor. It has been held to follow that if the same premises are conveyed successively to different persons, and the first conveyance is registered, although not until after the registration of the second, a subsequent purchaser from the second grantee will run the risk of his good faith, and may be postponed by proof that he knew, or ought to have known of the prior grant; *Mahoney v. Middleton*, 41 California, 48; *Jackson v. Post*, 9 Cowen, 120; 15 Wend. 588; *Van Rensselaer v. Clark*, 17

Wend. 25. In *Van Rensselaer v. Clark*, land which had been conveyed to Van Rensselaer was again conveyed to Schuyler. The latter had actual notice, but was the first to record his deed, and Clark relying on this, bought from him after the registration of the deed to Van Rensselaer. The Court was of opinion that the registry of this deed was notice, although Schuyler's deed preceded it on the record, and that Clark was therefore to be regarded as standing in Schuyler's shoes, and could not hold the land against Van Rensselaer. Cowen, J., said, "It has been contended that Clark having bought of Schuyler on the faith of finding that his deed was first recorded, should not be compelled to look further, or run the risk of actual notice to Schuyler. In *Jackson v. Post*, 15 Wend. 588, it was held that the registry of a deed is notice to every one from the time of its being recorded, and even to a purchaser standing a second or farther remove from the common source of title. The same decision established that a purchaser, with such notice, takes, at the peril of his immediate grantor's title being impeached by actual notice, though his deed was recorded previous to the adverse one." In like manner the registration of a deed after judgment has been obtained against the grantor, is constructive notice to one who buys subsequently at a sheriff's sale under a writ issued on the judgment; *Potter v. M'Dowell*, 43 Missouri, 93; *Stilwell v. M'Donald*, 39 Id. 288. It would, nevertheless, appear that

nothing should operate as notice, which does not indicate the existence of a better right than that which the vendor apparently has, and professes to be able to convey. This cannot be said of a deed which, though prior in date, is subsequent as regards the time of registry. One who buys under these circumstances should not be affected by a latent fact, which is not brought to his knowledge. A party whose laches have contributed to mislead a purchaser, is not entitled to the favor shown to diligence. See *Ely v. Wilcox*, 20 Wisconsin, 523; *Williams v. Beard*, 1 South Carolina, 309. The better opinion, consequently, seems to be that it is not requisite to bring the search against an antecedent grantor further down than the registry of the deed, by which he conveyed to the vendor, and that the purchaser, will not, therefore, be charged constructively with notice of a deed, which though executed before, was not registered till after the sale; *Ely v. Wilcox*; *Trull v. Bigelow*, 16 Mass. 418; *Somes v. Brewer*, 2 Pick. 184; *Day v. Clark*, 25 Vermont, 402; *The State of Connecticut v. Bradish*, 14 Mass. 291. "When," said Jackson, J., in the case last cited, "a purchaser is examining his title in the registry of deeds, and finds a good conveyance to his grantor, he is not expected to look further. This case, it is true, presents the question in a very strong point of view for the demandants, as Bradish had only to look to the next page to discover the prior conveyance

to them. But if he is required to look one day, or one page beyond that which exhibits the title of his grantor, it will be impossible to say where the inquiry shall stop."

In *Day v. Clark*, 25 Vt. 402, the Court held that if registering a deed, after the registration of a second deed from the same grantor, was notice to a purchaser from the grantee in the second deed, that the premises had been conveyed to a third person before the execution of the conveyance to his immediate vendor, it did not inform him that the latter had such notice. Whether he had or not, was consequently immaterial to the purchaser, who was entitled to rely on the priority of registration, as conclusive of the question of right. This reasoning was cited and approved in *Ely v. Wilcox*, 20 Wisconsin, 530. It would, nevertheless, appear, that if the purchaser is put on inquiry, as he necessarily is, if he has notice of the prior deed, he should apply to the grantee in the first deed, and ascertain from him whether he gave notice to the second grantee. The true ground seems to be, that when the registration of a deed is not from any cause notice to a grantor, it will not be more effectual as it regards those claiming under him as creditors or purchasers.

A fraudulent grant is voidable, and not void, and cannot be set aside after the property has passed into the hands of an innocent purchaser. This is equally true whether the fraud is practiced on the grantor, or collusively with him, to the injury of third persons: *Ledyard v.*

Butler, 9 Paige, 152; *Somes v. Brewer*, 2 Pick. 184; *Fletcher v. Peck*, 6 Cranch. 133; 1 Smith's Leading Cases, 355. *post*, 7 Am. ed.; *Collins v. Heath*, 34 Georgia, 443; *Price v. Junkin*, 4 Watts, 85; *Fetterman v. Murphy*, Ib. 424; *Poor v. Woodbury*, 25 Vermont, 236; *Hart v. The Bank*, 33 Id. 252; *Mateer v. Hissim*, 3 Penna. 160. Such is the well settled rule at common law, and such the uniform construction of the statutes of 13 & 21 Elizabeth, invalidating conveyances made to defraud creditors and purchasers; *Thompson v. Lee*, 3 W. & S. 479. It was held at one period that as the 13 Elizabeth declares that conveyances to defraud creditors shall be utterly void, no title vests in the fraudulent grantee, and he cannot give what he has not received; *Hope v. Henderson*, 3 Devereux, 12, 16; *Preston v. Crowfoot*, 1 Conn. 521. The law was so held by Chancellor Kent in *Roberts v. Anderson*, 3 Johnson, Ch. 371; 18 Johnson, 516. But the decree was reversed on error, Spencer, C. J., saying that an act which was merely void, might be treated as a nullity by the doer, or by third persons who had no interest in the controversy. Applying this test to the case in hand, it was plain that a conveyance in fraud of creditors, conferred a title which was valid as between the parties and against every one who was not aggrieved. It followed that a bill filed after the property had been conveyed for value without notice, came too late. The law is now established on this basis throughout the Union. *Boyce v.*

Waller, 2 B. Monroe, 91; *Ledyard v. Butler*, 9 Paige, 132, and *Frazer v. Western*, 1 Barb. Ch. 220; *Wood v. Marvin*, 1 Sumner, 507; *Rowley v. Bigelow*, 12 Pick. 307; *Hood v. Fahnestock*, 8 Watts, 489; *Erskine v. Decker*, 39 Maine, 467; *Sydney v. Roberts*, 13 Texas, 598; *Reed v. Smith*, 14 Alabama, 38; *Coleman v. Coche*, 6 Randolph, 618; 1 Amer. Lead. Cases 58, 5th ed.

In like manner, a vendor who is induced to sell by fraud, cannot reclaim the property from one who has purchased it in good faith from the fraudulent vendee. *White v. Garden*, 10 C. B. 919; *Rowley v. Bigelow*, 12 Pick. 387; *Root v. French*, 13 Wend. 570; *Mears v. Waples*, 3 Houston, 581; *The Chicago Dock Co. v. Foster*, 48 Illinois, 507; *Williams v. Russell*, 39 Conn. 406; see 1 Smith's Leading Cases, 1203, 7 Am. ed.; although the principle does not apply while the vendor remains in possession, nor until the goods are actually delivered by him, nor where possession is obtained surreptitiously without his knowledge or consent; *Dean v. Gates*, 22 Ohio, N. S. 388; *Barnard v. Campbell*, 68 Barb. 287. It has also been held that where the fraud consists in a false allegation that the buyer is acting on behalf of a third person, who has given no such authority, the contract is merely void, and a subsequent *bona fide* purchaser will not acquire a title; *Kingsford v. May*, 1 Hurlstone & Norman, 503; *Decan v. Shipper*, 11 Casey, 239.

The principle is the same whether

real or personal estate is in question, and was applied in *Taylor v. Gilt*, 10 Barr, 428, in favor of one who had given value for a bond on a faith of a written assignment by the obligee, which the latter sought to invalidate on the ground of fraud. The price must, nevertheless, be adequate if not full; it must have been actually paid before notice; and there must be nothing in the transaction to indicate that the purchaser was cognizant of the fraud; *Buffington v. Gerrish*, 15 Mass. 156; *Hodgden v. Hubbard*, 18 Vermont, 504; *Field v. Stearns*, 42 Id. 506; *Poor v. Woodburn*, 25 Id. 235; *Jackson v. Somerville*, 1 Harris, 259; *Roberts v. Dillon*, 3 Daly, 50; *Robinson v. Dauchy*, 3 Barb. 20; *Joslin v. Cower*, 60 Id. 48; *Risen v. Knapp*, 1 Dillon, 201.

In general, when the legal and equitable title meet in the same hand, the former ceases to exist, and will not be revived in favor of a volunteer. If the legal interest in land descend *ex parte materna*, and the equitable interest *ex parte paterna*, the equitable estate will merge in the legal, and both go in the line through which the legal estate descended; *Goodright v. Wells*, Douglas, 741; 3 Vesey, 339; *Wade v. Paget*, 1 Brown, Ch. 363; *James v. Morey*, 2 Cowen, 246, 259, 313, 318; *Doty v. Russell*, 5 Wend. 129. The equitable estate will not be kept alive in favor of the heirs on the maternal side, for the sake of preventing those on the paternal side from taking by virtue of their legal and therefore superior title. "The moment," said

Lord Mansfield, "both meet in the same person, there is an end of the trust. He has the legal interest and all the profits by his title. One cannot be a trustee for himself." It follows that when the holder of an equity executes a conveyance, or suffers the lien of a judgment, and afterwards acquires the legal title, a subsequent purchaser from him for value and without notice should be preferred to the grantee or judgment creditor; and the case is still stronger if the purchaser has the record on his side as against an unrecorded equity. Such a controversy may arise where a judgment is entered against a vendee under articles of agreement, who subsequently obtains a deed, records it, and mortgages the premises to a third person who is ignorant of the antecedent equity. Under these circumstances, the mortgagee obviously has the better right; first, as a *bona fide* purchaser, and next, as holder of the legal title, which being deduced of record, should prevail against any right which the record does not disclose.

A different view prevails in Pennsylvania where the acquisition of the legal title by him who has the equitable right, affects it with the liens which bound the equity, contrary to the general doctrine of that State, that judgments shall not bind after acquired land; *Lynch v. Dearth*, 2 Penna. 101; *Foster's Appeal*, 3 Barr, 79; *Lyon v. M'Gaffney*, 4 Id. 126; *Campbell's Appeal*, 12 Casey, 247. In *Lynch v. Dearth*, a judgment was entered against a purchaser under

a written contract. The vendor then gave him a deed which was placed of record, and the premises were mortgaged the same day to a third person who had advanced the purchase-money. The court held that the judgment had priority over the mortgage.

The claims of a judgment creditor do not rise as high as those of a purchaser, and it is a logical inference from these decisions, that the grantee of an equity will be preferred to one who gives value in good faith after the grantor has acquired the legal title. Such a conclusion is obviously indefensible; and would hardly be adopted by any tribunal that was not bound by the authority of *Lynch v. Dearth*. One who carries the search for incumbrances back to the period at which the estate vested of record in the vendor, need look no further as it regards him, and should be safe in buying, if the record shows that the title came to the vendor's hands without break or flaw, and that nothing was done, or suffered by him subsequently, that could impair the title. To affect such a purchaser with a prior unrecorded equity, it should at least appear that it was brought home to him by notice, *ante*.

It has been held in some instances that a purchase for value and without notice cannot be pleaded as against the legal title; *Snelgrove v. Snelgrove*, 4 Des-saussure, 274; *Jones v. Zollicoffer*, 2 Taylor, 214; *Blake v. Heyward*, 1 Bailey's Equity, 208; *Larrow v. Beam*, 10 Ohio, 148.

Such an allegation is irrelevant in a court of law, and we have seen that it is not a ground for equitable relief. But the better opinion seems to be that it is always pleadable in equity as a defence, *ante*, 15. To justify the intervention of a chancellor, it must appear not only that the complainant has a legal right, but that the defendant is under a moral obligation to concede what the bill requires; *Beekman v. Frost*, 18 Johnson, 544. And as this is equally true, whether the complainant's title is legal or equitable, so a plea that the defendant is a *bona fide* purchaser is good in either instance. See *The Union Canal Co. v. Young*, 1 Wharton, 431. It was indeed said in *Peabody v. Fenton*, 3 Barb. Ch. 451, 464, that to protect a purchaser, he must have acquired the legal title as well as the equitable right. Taken literally, this would imply that he is not entitled to protection where the legal title is in the complainant. But it will appear on examination that what the chancellor meant was that an agreement to buy is not sufficient, and that the sale must have been consummated by the transfer of such title as the vendor had to give. "The principle," said Lord Cranworth, in *Colyer v. Finch*, 5 House of Lords Cases, 906, 921, "on which the court protects a purchaser for valuable consideration without notice, is wholly regardless of what estate he has. It may be that he has not the legal estate, but that will be quite unimportant as to a court of equity interfering or re-

fusing to interfere. His equity depends on this, that he stands equitably in at least as favorable a position as his opponent, and therefore, the court will not interfere against him. In *The Union Canal Co. v. Young*, Rogers, J., said that whatever the rule might be "elsewhere, a purchase for value without notice was a good defence in Pennsylvania under the recording acts, as well against a legal as an equitable title."

The rule that a purchase for value is a good equitable defence, is, nevertheless, subject to certain qualifications. Where the titles of both parties are merely equitable, and there has been no laches or neglect on either side, the first in point of time will prevail, and a plea that the subsequent purchaser gave value in good faith is invalid, because chancery is the only tribunal that can take cognizance, and if it remained neutral there would be a denial of justice; *Adams' Equity*; *Jones v. Jones*, 8 Simons, 633. See *Ballards v. M'Carty*, 10 Watts, 63; *Newton v. Newton*, 6 Law R. Eq. 141; 4 Law R. Ch. Appeals, 144, *ante*, 20.

In like manner, a court of equity may direct a sale or foreclosure at the instance of a mortgagee, although the premises have been sold without notice of the mortgage. Such an order does not deprive the purchaser of any legal or equitable right, and is merely that he shall redeem at once, or be forever barred; *Colyer v. Finch*, 19 Beavan, 510; 5 House of Lords Cases, 906, 921. The legal title

to the premises is in the mortgage, and if the decree incidentally precludes the terre tenant, this is because there are no other means of rendering the land available for satisfaction of the debt.

A plea that the defendant is a purchaser for value and without notice, has no application as between legal titles, or in a court of law. A defective title does not become valid by being transferred; *Ruckman v. Decker*, 8 C. E. Green, 283. What it was in the hands of the grantor, it will be in those of the grantee. *Nemo plus juris ad alium transferre potest quam ipse habet*; *Coke Lit.* 309, b. It is immaterial that the grantee gives value in the belief that he is acquiring a good title. This is true even when the flaw is latent, and could not be discovered by an attentive examination. The fraudulent alteration of a deed by the grantee may consequently preclude a subsequent *bona fide* purchaser, although the change is made by filling up a blank, and does not appear on inspection; *Arrison v. Harmistead*, 2 Barr, 191, 197. Rogers, J., said that "where the vendor has nothing to convey, nothing can be acquired by the vendee. One who bought from the grantee, in a voidable deed, might be in a better position than a vendor. But the principle did not apply to a sale by a vendor who had no title, or, what came to the same thing, who had avoided the title by his own wrong. A deed acquired surreptitiously without, or altered after, delivery, was invalid even in the hands of a *bona*

fide purchaser; *Van Amrage v. Miller*, 4 Wheaton, 382. This was true of negotiable instruments, and applied *a fortiori* where land was concerned; *Van Amrage v. Miller*; *Master v. Miller*, 4 Term. 320; 2 H. Bl. 140; *Waring v. Smith*, 2 Barb. Ch. 133; *Wade v. Withington*, 1 Allen, 561; 1 Smith's Lead. Cas. 1280, 7 Amer. edition."

In like manner, the purchaser of an equitable estate must stand or fall by the right of the vendor, and cannot rely on his having given value in good faith, as a reason why he should be preferred to a prior grantee; *Boons v. Chilles*, 10 Peters, 177; *Kramer v. Arthurs*, 7 Barr, 65; 24 Mississippi, 208; *Penonneau v. Blakely*, 14 Illinois, 15; *Daniel v. Hollingshead*, 16 Georgia, 196. His conscience may be clear, but he is necessarily subject to the rule that one who buys from a vendor who has parted with his title, can take nothing by the deed; *Newton v. Newton*, 6 Law R. Eq. 141; *ante*, 20. In the words of Vice Chancellor Shadwell, equity follows the law, and when the legal estate is outstanding, conveyances of the equitable interest, are considered and treated, in a court of equity, in the same manner as conveyances of the legal estate are considered and treated at law; *Jones v. Jones*, 8 Simons, 633; *Sumner v. Waugh*, 56 Illinois, 531. A plea that the defendant is a *bona fide* purchaser must consequently aver that he had good reason to believe that the legal estate would pass by the deed; *Boone v. Chilles*, 177, 210. As between merely equitable claimants, each

having equal equity with the other, "he who hath precedency in point of time, hath the advantage in point of right;" *Shiras v. Craig*, 7 Cranch, 48. This has sometimes been laid down too broadly, and in a way to convey the idea that the purchaser of an equity is affected with notice of every act tending to impair the title, done or suffered by the vendor; *Chew v. Barnet*, 11 S. & R. 389; *Serjeant v. Ingersoll*, 7 Barr, 340; 3 Harris, 343; *Goldsborough v. Turner*, 67 North Carolina, 403. See *Rhines v. Baird*, 5 Wright, 256, 265. Properly understood, the rule is simply this, that the assignment of an equity transfers the vendor's interest, and can transfer no more; but the assignee is not, on that account, less a *bona fide* purchaser, or precluded from taking any legitimate step to perfect his title; *Sumner v. Waugh*, 56 Illinois, 539; *Fitzimmons v. Ogden*, 7 Cranch, 218; *Peacock v. Burt*, Appendix to Coote on Mortgages.

The purchaser of an equitable estate or interest may consequently procure a conveyance of the legal title for the purpose, and with the effect of defeating a prior equity, of which he was ignorant at the time of buying, although it has been brought to his knowledge since the sale; *Adams' Equity*, 159, 160; *Butler's note*, Coke Lit. 290; *Fitzimmons v. Ogden*, 7 Cranch, 1, 18; *Zollman v. Moore*, 21 Grattan, 313; *Campbell v. Brackenridge*, 8 Blackford, 471; *Gibler v. Tremble*, 14 Ohio, 423; *Osborn v. Carr*, 12 Conn. 195, 208; *Siter v. M'Clenachan*, 2 Grattan,

280, 283; *Baggarly v. Gaither*, 2 Jones' Eq. 80; *Carroll v. Johnston*, Ib. 129. Such at least is the rule, where the purchaser buys on the faith of a pretended legal title, and the vendor's interest proves to be merely equitable. Hence it is that a mortgagee of an equity of redemption may by taking an assignment of the legal title from the first mortgagee, exclude an intervening incumbrancer; *Brace v. Marlborough*, 2 Peere Williams, 491, vol. 1, 841; *Belchier v. Butler*, 1 Eden, 523; and although this doctrine does not apply in the United States under the recording acts, it is, nevertheless, sound in principle. Accordingly, if the purchaser of an equitable estate or interest can acquire an outstanding legal title, he will be secure not only against any secret act or matter, whereby the vendor's right was impaired, but although the vendor had no right, or a determinable right which has expired; *Willoughby v. Willoughby*, 1 Term, 763; *Jones v. Powles*, 3 Mylne & Keen, 581; *Cottrel v. Hughes*, 15 C. B. 532, 560; *Willoughby v. Willoughby*, 7 Term, 763, 770. A purchase from a *cestui que trust*, fortified by a conveyance from the trustee, is consequently valid, notwithstanding a prior grant by the *cestui que trust* in which the trustee did not join; See *Flagg v. Mann*, 2 Sumner, 486, 560; and it is immaterial that the purchaser knew that the *cestui que trust* had not the legal estate, if he did not know that he had already parted with his interest. In like manner, one who buys an equity and records the deed, will

be preferred to a prior purchaser, whose deed is not duly acknowledged and recorded; *Alexander v. Ames*, 6 Maryland, 52; *The General Ins. Co. v. The U. S. Ins. Co.*, 10 Id. 517; *Bellas v. M'Carty*, 10 Watts, 29; see *Russell's Appeal*, 3 Harris, 319. So the assignee of a chose in action or other equitable right may get in the legal title to protect his equity against a prior assignment; *Fitzimmons v. Ogden*.

In *Carroll v. Johnston*, 2 Jones' Eq. 120, the bill alleged that one Isaac Roberts had entered into a written agreement for the sale of land to Strong, who subsequently conveyed all his right, title and interest to the plaintiff, Carroll. It was further charged, that the defendants with full notice of the agreement, had obtained a deed from Roberts. The defendants answered that they had agreed in good faith to purchase the land from Strong for a valuable consideration, consisting in part of a debt due from him, and as to the residue of future advances, which were for the greater part made. They were subsequently informed of the deed from Roberts to Carroll, and obtained a conveyance of the legal estate from Roberts to protect themselves. It was held that they had the better right. "The plaintiffs by their deed acquired nothing but an equitable right, the legal title being in Roberts. By their agreement with Strong, made while in ignorance of the equity of plaintiffs, the defendants acquired an equitable interest in the property in dispute, quite equal to that of the plaintiffs. In *Baggarry v.*

Gaither, 2 Jones' Eq. Rep. 80, it is declared, that a party so situated may protect himself by procuring the legal title; that the latter purchaser or incumbrancer on payment of his money becomes an honest claimant in equity, and is entitled, if he can, to protect his claim; Adams' Eq. 330. That case decides the present; the defendants had a right to clothe themselves with the legal title. The equities being equal, the court will not interfere." It was held in like manner in *Leach v. Ansbacher*, 5 P. F. Smith, 85, that one who bought an equitable estate in good faith, and paid for it before notice, might acquire the legal title after notice.

It is indeed said in *Grimstone v. Carter*, 3 Paige, 421, 437, and repeated in *Fash v. Ravesies*, 32 Alabama, 451, that a chancellor will not suffer one having a subsequent equity to protect himself by obtaining a conveyance of the legal title after he has either actual or constructive notice of the prior equity; *Tourville v. Nash*, 3 Peere Williams, 307; *Moore v. Mayhew*, Freeman Ch. 175. This doctrine is contrary to the rule laid down in *Belchier v. Butler*, 1 Eden, 523, and the point actually decided was, "that to enable a party to defend himself as a *bona fide* purchaser, he must aver in his plea, or state in his answer, not only that there was an equal equity in himself by reason of his having paid the purchase money, but that he had also clothed his equity with the legal title before he had notice of the prior equity." It is no doubt true, that notice while the transaction is still in-

complete, will preclude the right to obtain a conveyance, although the purchaser will still be protected to the extent of his actual payments, but it does not follow, that one who has paid in full and received a conveyance, cannot protect himself against an equity of which he has no notice until after the execution of the deed.

In *Ingersoll v. Sargeant*, 7 Barr, 340; 3 Harris, 343, a fee farm or ground rent was conveyed in trust for Reed, who was the owner of the land. The trust did not appear in the deed, and was created to prevent the rent from merging. Reed subsequently conveyed the land to Ingersoll, and covenanted to extinguish the rent. He then sold the rent to the plaintiff, who paid him the price and took a deed from Sargeant. It was held that the plaintiff "acquired an equitable ownership only, because the legal title was outstanding in a trustee, and it is a rudamental principle, that one who purchases an imperfect or inchoate title must stand or fall by the case of his vendor. The fact that he was dealing with one who had not the legal title, was a circumstance to arouse suspicion and prompt inquiry. If he had demanded the reason why the rent was conveyed in trust, and not directly to Reed, he would have been told that Reed had sold the ground, clear of incumbrance, to Ingersoll, and covenanted to extinguish the rent. However ignorant in fact, he must consequently be regarded as legally cognizant, and could not set up the legal

title against Ingersoll's prior and superior equity."

This argument seems to be erroneous, first, in assuming that the buyer of an equity is *ipso facto* bound to inquire of the vendor for defects which do not appear in the line of his title; and next, that such an inquiry will lead to a discovery of the truth. In selling a ground rent which he had agreed to extinguish, Reed committed a breach of faith. If the plaintiff had asked him why the rent was placed in trust, he would have told as much as was consistent with the accomplishment of his purpose, but he would have disclosed no more. As between the plaintiff and Ingersoll, who were both innocent purchasers, the preference was due to the plaintiff, who had perfected his title by obtaining a conveyance from the trustee, while Ingersoll was content to take a promise which the vendor might or might not fulfil.

The doctrine that a purchaser from a *cestui que trust* is affected with notice of every defect in the vendor's title, is not sustained by the authorities. The utmost that can be said where the legal estate is outstanding in the hands of a trustee, is that the purchaser should inquire of him before buying; *Vattier v. Hinds*, 7 Peters, 252, 271. If such an obligation exists, the presumption is that it was fulfilled, unless some evidence is adduced to the contrary. The burden is always on him who alleges notice to substantiate the averment by proof. But it cannot be requisite to inquire of

the vendor, or of any one who joins with him in making title, whether he is committing a fraud or breach of trust by disposing of that which belongs to a third person, or has been already sold. One who is engaged in a fraudulent design, seldom hesitates at falsehood. The law exacts nothing vain or useless. To make inquiry a duty, the circumstances must be such that it will lead to knowledge; *Wilson v. M' Cullough*, 11 Harris, 440, 445. Hence, no one need ask for information where there are no means of testing the accuracy of the reply, and no security that it will be free from error. Possession is notice, because the tenant must abide by his answers to the interrogatories of one who is about to buy. The same remark applies to a declaration by a debtor that there is no offset, and generally to every statement by a party in interest of a nature to influence the conduct of a purchaser. But no such guarantee exists where a vendor is asked to disclose a fact which will defeat the sale by showing that he has no title to convey. See *Wilson v. M' Cullough*, 11 Harris, 440, 445.

We have seen that where the right on either side is equitable, and the case falls within the exclusive jurisdiction of a chancellor, he will afford relief against a *bona fide* purchaser in order to prevent a failure of justice, *ante*, 18. Under these circumstances, a court of equity adopts the rule that, other things being equal, he who is first in point of time, has the better right. The assignment of a *chose*

in action is within this principle, as conferring no title that can be recognized or enforced in a merely legal tribunal. Hence, the assignee is not entitled to the protection which equity affords to purchasers, and must not only stand or fall by the vendor's title, but cannot rely on the purchase as a defence to a bill for relief and discovery by a prior assignee; *Downer v. The Bank*, 39 Vermont, 25, 32; *Peacock v. Rhodes*, 1 Douglas, 636. This is, however, only true where the interest on either side is merely equitable, for if the subsequent assignee has obtained the legal title, or a legal right or superiority of any kind, although subsequent to the assignment, a chancellor will not interfere for the purpose of taking it away; *Ogden v. Fitzsimmons*, 7 Crauch, 1, 18; and in the case last cited, the rule was applied in favor of the assignee of a judgment, who had purchased the land bound by the lien. It is every day's experience that the transfer for value of a bill or note payable to bearer or duly endorsed, to a *bona fide* purchaser, may confer a right, although the vendor had none, or had parted with his right by an assignment, which did not pass the legal title; *Peacock v. Rhodes*, Douglas, 636; *Phelan v. Moss*, 17 P. F. Smith, 159; and the rule applies at the present day to bonds payable to bearer, and designed to pass current from hand to hand; *Lardner v. Murray*, 2 Wallace, 110; 1 Smith's Lead. Cas., 818, 7 Am.ed. In like manner, a purchaser of stock who omits to have it trans-

ferred to him on the books, will be postponed to a subsequent purchaser, who perfects his title; *Kortright v. The Bank*, 22 Wend. 354; *Delafeld v. The State of Illinois*, 26 Id. 192; *Craig v. The City of Vicksburgh*, 31 Mississippi, 216; *The Morris Canal and Banking Co. v. Fisher*, 1 Stockton, 666. So the assignment of a bond according to the mode provided or prescribed by the legislature, may entitle the assignee as against a prior but less formal transfer. See *Moore v. Halcombe*, 3 Leigh, 597; *Downer v. The Bank*, 39 Vermont 25, 29.

It is equally well-settled that a chancellor will not deprive an assignee of a *chose in action*, of a legal advantage, arising from his diligence, or the laches of one to whom the demand was previously assigned. In *Judson v. Corcoran*, 17 Howard, 612, the defendant, who had prosecuted a claim against the Mexican government which had been transferred to him by assignment, before the Commissioners appointed to distribute the fund, and obtained an award, was held to have thereby acquired a preference over the plaintiff, who had taken a previous assignment of the same claim, but who had slept on his rights, and failed to appear before the commissioners. "The contest," said Catron, J., "here depends on the merits. Judson had the earliest assignment of part of the amount declared to be due to Williams by the two United States commissioners, in 1842, to the extent of \$6,000, and the claim assigned be-

ing a right depending on an equity against the government of Mexico, and assuming that both sets of assignments are alike fair, and originally stood on the same *bona fide* footing, the rule of necessity is, that the assignor having parted with his interest by the first assignment, the second assignee could take nothing; and, as he represents his assignor, is bound by the equities imposed on the latter; 2 White & Tudor's Eq. Ca., notes to *Ryall v. Rowles*; and hence has arisen the maxim in such cases, that he who is first in time is best in right. But this general rule has exceptions, and the case before us was obviously decided in the court below on an exception to the general rule.

"Judson took his assignment in January, 1845, which he first produced in May, 1851, when this bill was filed. In the meantime Corcoran had got his assignment, and immediately gave written notice of it to the Department of State, and August 17th, 1847, received an answer from the secretary, recognizing the fact of notice having been received, and that it was filed with the documents of the postponed claim of Williams and Lord, appertaining to the unfinished award.

"Corcoran's assignment was fair, and accepted on his part without knowledge of Judson's; nor is the contrary alleged in the bill. And assuming Judson's to be fair also, and that no negligence could be imputed to him, then the case is one where an equity was successively assigned in a *chose in action*

to two innocent persons, whose equities are equal, according to the moral rule governing a court of chancery. Here, Corcoran has drawn to his equity a legal title to the fund, which legal title Judson seeks to set aside, and asks an affirmative decree in his favor to that effect.

"Now, nothing is better settled than that this cannot be done. The equities being equal, the law must prevail.

"There are other objections to the case made by the appellant, growing out of negligence on his part in not presenting his assignment and claim of property to the State Department, so as to notify others of the fact. The assignment was held up and operated as a latent and lurking transaction, calculated to circumvent subsequent assignees, and such would be its effect on Corcoran, were priority accorded to it by our decree. It is certainly true, as a general rule, as above stated, that a purchaser of a *chose in action*, or of an equitable title, must abide by the case of the person from whom he buys, and will only be entitled to the remedies of the seller; and yet, there may be cases in which a purchaser, by sustaining the character of a *bona fide* assignee, will be in a better situation than the person was of whom he bought; as, for instance, where the purchaser, who alone had made inquiry and given notice to the debtor, or to a trustee holding the fund (as in this instance), would be preferred over the prior purchaser, who neglected to give no-

tice of his assignment, and warn others not to buy.

"The cases of *Dearle v. Hall*, and *Loveridge v. Cooper*, 3 Russell's R. 1, 60, established the doctrine to the foregoing effect in England; they were followed in the case of *Mangles v. Dixon*, M'Naughton and Gordon's R. 437. And the same principle of protecting subsequent *bona fide* purchasers of *choses in action*, &c., against latent outstanding equities, of which they had no notice, was maintained in this court in the case of *Bayley v. Greenleaf*, 7 Wheaton, 46. That was an outstanding vendor's lien, set up to defeat a deed made to trustees for the benefit of the vendee's creditors. The court held it to be a secret trust; and although to be preferred to any other subsequent equity unconnected with a legal advantage, or equitable advantage, which gives a superior claim to the legal title, still, it must be postponed to a subsequent equal equity connected with such advantage.

"The rule was distinctly asserted by Chancellor Kent, in 1817, in *Murray v. Lyburn*, 2 Johns. C. C. 442, before the question was settled in England, and before this court discussed it, which was in 1822. And the same principle was applied by the Court of Appeals of Virginia, in the case of *Moore v. Holcombe*, 3 Leigh's R. 597, in 1832."

Similar language was held in *Maybin v. Kirby*, 4 Richardson, Eq. 105; and it results from the same principle that an assignee of

a demand, who brings a suit in the name of the assignor, and obtains a judgment for the debt which is paid, may rely on his diligence as a defence to an action for money had and received, by a prior assignee whose title was originally superior to his own, but who has lost his right by not asserting it in due season. *The Mercantile Ins. Co. v. Corcoran*, 1 Gray, 75.

It has been held in some instances that the assignment of a chose in action, is within the general rule that a transfer procured by fraud, cannot be avoided after the property has passed into the hands of a bona fide purchaser; *Taylor v. Get*, 10 Barr, 428. But in *Cockel v. Taylor*, 15 Beavan, 103; 15 English Law and Equity, 101, the court came to an opposite conclusion, on the broad ground that the title of such an assignee cannot rise higher than that of the assignor, and must consequently fail when that is vitiated by fraud.

The subject matter in this case was a mortgage of a fund in court, and the question would have been different, had the mortgage been of land. The doctrine that when the equities are equal, he who has the law shall prevail, applies to the assignment of a bond and mortgage. A mortgage is a grant of the premises, subject to a condition of defeasance. It consequently vests the legal estate in the mortgagee, who may enter or maintain a writ of entry or ejectment; 1 Smith's Leading Cases, 891, 7 Am. ed. This is the view alike of law and equity, and it prevails in Pennsylvania, and generally in the New England

States, although it has been abrogated by statute in New York. A mortgagee is, therefore, a purchaser who has the law; *Willoughby v. Willoughby*, 1 Term, 763, 767; and this is equally true of one to whom he assigns the mortgage, in a way to pass the legal title; *Prior v. Wood*, 7 Casey, 142; *Pierce v. Faunce*, 47 Maine, 513; *Carpenter v. Longan*, 16 Wallace, 276; *Gidden v. Hunt*, 24 Pick. 221. Such an assignee is entitled to a preference over an equitable assignee of the bond. So the assignment of a first mortgage to the holder of a third, confers a legal right which may be enforced to the exclusion of the second mortgage. See notes to *Marsh v. Lee*, vol. 1. This result depends on the acquisition of the legal title, and will not ensue from tacking a mortgage of an equity of redemption. Hence, where four mortgages are executed successively to different persons, the last mortgagee cannot obtain priority over the third, by taking an assignment of the second mortgage; *Brace v. The Duchess of Marlborough*, 2 Pere Williams, 495; *Willoughby v. Willoughby*, 1 Term, 753, 773; *Siter v. M'Clanahan*, 2 Grattan, 280, 305.

"Where there is equal equity, possession must prevail;" *Archer v. The Bank of England*, Douglas, 637, 639; and hence as between two bona fide assignees of a policy, he will have the preference to whom it is actually handed over as a security, or by way of sale; *Wells v. Archer*, 10 S. & R. 412; *Ellis v. Kreutzinger*, 27 Missouri, 311. One who relies on an equitable

right ought to perfect it as far as the nature of the case will permit, and may be postponed to a subsequent purchaser, who is misled through his neglect in leaving the documentary evidence of the title in the assignor's possession; *Mears v. Ball*, 1 Hare, 73; *Wells v. Archer*. "If," said Tilghman, C. J., in the case last cited, "the plaintiff had known of the policy, and suffered it to remain in Field's possession, and in consequence of this, it was pledged to the defendant for a valuable consideration without notice, the defendant would have had a superior equity." See *Colyer v. Finch*, 5 House of Lords Cases, 906.

Another exception to the rule that he who is first in point of time, has the better right, arises where the holder of the antecedent equity has been guilty of laches which have facilitated a fraud or deceit on a subsequent purchaser, and the case will then fall within the principle that a loss should be borne by him whose default occasioned it; *Garland v. Harrison*, 17 Missouri, 282. "The maxim *prior in tempore potior in jure*," said Gibson, C. J., in *Fisher v. Knox*, 1 Harris, 622, "must not be allowed to protect one who has neglected a precaution requisite to protect those who come after him from imposition." The principle has been applied under a great variety of circumstances. An assignee of a judgment who neglects to have it marked to his use, will be postponed to a subsequent assignee, to whom the judgment is duly transferred of record; *Campbell's Appeal*, 5 Casey, 401; *Fisher*

v. Knox. So a covenant to postpone a judgment to a prior or contemporaneous mortgage, is not binding on a subsequent purchaser of the judgment, unless it is entered on the docket, or brought to his knowledge in some other way; *Hendrickson's Appeal*, 12 Harris, 363. In like manner, the failure of a grantee to record his deed, may postpone him to a *bona fide* assignee of a mortgage created subsequently by the grantor, and it is immaterial that the mortgagee knew of the deed, unless he communicated his knowledge to the assignee; *Mott v. Clark*, 9 Barr, 399. See *Reader v. Johnson*, 8 Harris, 190, 193.

The doctrine is carried in England, and in some American tribunals, to the extent of requiring the assignee of a *chose in action*, or of personal property held in trust, to give notice of the assignment to the debtor or trustee, and thus enable him to put third persons on their guard; and one who does not take this precaution, may be postponed to a subsequent purchaser; *post*, notes to *Ryall v. Rowles*.

It should, nevertheless, be remembered, that a rule by which one is precluded from asserting a right which is indisputably his own, operates as a forfeiture, and should not be enforced, unless he has been guilty of the gross negligence, which if not collusive, prepares the way for fraud; *Evans v. Bicknell*, 6 Vesey, 190; *Plumb v. Fluitt*, 2 Anstruther, 432; *Colyer v. Finch*, 19 Beavan, 500; 5 House of Lords Cases, 905. A man may fall short of the care which a large

experience of life and business would suggest, without being responsible to third persons for a loss which they might have avoided, if he had been more cautious; *Colyer v. French*; *French v. Colyer*; *Biddle v. Bayard*, 1 Harris, 150.

In *Biddle v. Bayard*, the plaintiff lost a pocket book, containing a certificate of stock endorsed in blank. The certificate was purchased by the defendant from a third person, and without notice that the vendor had no title. The plaintiff brought trover, and it was contended for the defence that the plaintiff should have endorsed the instrument to his own order. By carrying it about with him, endorsed in blank, he had enabled the finder to mislead the defendant, and should consequently bear the resulting loss. This argument was overruled and judgment entered for the plaintiff.

It has been intimated in some instances, that the assignee of a *chose in action* is not liable to the latent equities of third persons, where he has no means of ascertaining their existence, and buys in the full belief that the assignor has the right which he assumes to convey; *Livingston v. Dean*, 2 Johnson's Ch. 479; *Murray v. Lylburn*, Ib. 443; *Murray v. Ballou*, 1 Id. 366; *Davis v. Barr*, 9 S. & R. 137; *Taylor v. Gitt*, 10 Barr, 431; *Mott v. Clark*, 9 Id. 403; *M'Connell v. Wenrich*, 4 Harris, 365; *Moore v. Holcombe*, 3 Leigh, 597; *M'Blair v. Gibbs*, 17 Howard, 232; *The Ohio Life Ins. Co. v. Ross*, 2 Maryland

Ch. 25, 39. This is no doubt true, if by a latent equity we are to understand one left in the back ground through carelessness or design. It is the duty of a buyer to perfect his title as far as the circumstances will permit; see *Fisher v. Knox*, 1 Harris, 622; and if he does not, and third persons are misled, he must bear the loss. One who wilfully leaves the documentary evidence of a demand which he has purchased in the hands of the vendor, cannot complain if he is postponed to a subsequent purchaser. But this is entirely consistent with the doctrine that as between two innocent purchasers of a *chose in action*, who stand on an equal footing in other respects, he should be preferred who was first in point of time. No well considered decision conflicts with this principle, although dicta may be found looking the other way. Subject to the exceptions above noted, an equity which binds the assignor, is equally obligatory on the assignee, although the latter may have given value without notice, the general rule being that a purchaser stands in the shoes of the vendor, and can assert no right that could not have been maintained by him. It is immaterial in this regard that the equity is latent, unless the failure to make it appear results from bad faith or negligence; *Poillon v. Martin*, 1 Sandford Ch. 569; *Burk v. Lathrop*, 22 New York, 585; *Maybin v. Kirby*, 4 Richardson's Eq. 105; *Judson v. Corcoran*, 17 Howard, 612; *Bradley v. Root*, 5 Paige, 632; *Cockell v. Taylor*, 15 English Law and Equity, 101;

Taylor v. Bates, 5 Cowen, 376; *Muir v. Schenck*, 3 Hill, 226; see *Donly v. Hays*, 17 S. & R. 400, 408.

So an equitable assignment or appropriation of a debt as a security, or for value received, may be postponed to a subsequent statutory transfer which passes the legal title. See *M'Connell v. Wenrich*; *Moore v. Holcombe*. The principle is the same where the contest lies between an equitable assignee of a mortgage, and one to whom it has been transferred by an instrument duly executed to pass the estate in the land, *ante*. *Donley v. Hays*, 17 S. & R. 400, 406.

Whatever the rule may be with regard to the latent equities of third persons, it is well settled, that the assignee of a *chose in action* takes it subject to every defence that would have been available between the original parties; *Wheeler v. Hughes*, 1 Dallas, 23; *Reder v. Johnson*, 8 Harris, 190. The defence need not exist at the time of the assignment, but may grow out of a transaction occurring subsequently before notice to the debtor, who is entitled to suppose that the right remains in the creditor, until he learns the contrary from some authentic source. Notice is therefore an indispensable precaution, and if it is not given, a demand against the assignor purchased, or arising subsequently to the assignment, may be set off in a suit brought in his name for the benefit of the assignee. The rule applies equally whether the defence consists in an allegation that the

debt has been paid, or grows out of a collateral agreement varying the original demand; *Finney v. Brown*, 1 Penna. Rep. 257. So an equity that would have been valid against the mortgagee, will be as good against an assignee, because the debt is the principal, and the mortgage a mere security, and whatever invalidates the one necessarily extinguishes the other; *Clute v. Robinson*, 2 Johnson, 595; *Westfall v. Jones*, 23 Barb. 9. There is nothing harsh or inequitable in this rule, because the assignee may protect himself by interrogating the mortgagor, when the latter must answer truly at the risk of being estopped. 2 Smith's Leading Cases, 720, 7 American edition, *ante*, vol. 1, notes to *Marsh v. Lee*.

A mortgage given to secure a promissory note, is an exception to this rule; and an indorsee for value in good faith, and before the maturity of the note, may enforce the mortgage, notwithstanding any equity or defence that may exist between the original parties, and, as it would seem, although the mortgagee has been paid in full; *Carpenter v. Longan*, 16 Wallace, 276; *Pierce v. Faunce*, 47 Maine, 513.

It has been held in New York, that as the mortgage debt is the principal, and the mortgage itself a mere collateral, so the assignee of a mortgage, although by a writing under seal, and duly recorded, is not entitled to the favor which equity shows to a *bona fide* purchaser of an estate in land; *Van Rensselaer v. Stafford*, Hopkins,

569; 9 Cowen, 316; *Poillon v. Martin*, 1 Sandford Ch. 569; *Peabody v. Fenton*, 3 Barb. Ch. 451; *Sweet v. Sweet*, Ib. 647; *Burt v. Lathrop*, 22 New York, 585.

In *Poillon v. Martin*, one who had been fraudulently induced to part with a mortgage for uncurrent bank notes, was held entitled to recover, not only against the person who did the wrong, but against an assignee to whom the mortgage had been transferred subsequently for value, without notice of the fraud. The same rule prevails in some of the other States; *Kamena v. Huelby*, 8 C. E. Green, 78; *English v. Waples*, 13 Iowa, 57; *Sims v. Hammond*, 33 Id. 368; and it was held in the case last cited, that notice to a mortgagee of a prior unrecorded mortgage, is binding on a subsequent assignee in good faith and for value. In this instance, however, the first mortgage was recorded before the assignment, while in *Kamena v. Huelby*, the assignment was not such as to transfer the legal title. See *Mulford v. Peterson*, 6 Vroom, 127.

This doctrine is sustained by the case of *Whalley v. Whalley*, 1 Vernon, 404, and by the opinion of Mr. Powel, 2 Powell on Mortgages, 601, but would seem to be inconsistent with the well established doctrine, that the transfer of the title to land as a security, is as much a purchase as if the conveyance were absolute, and may consequently be pleaded in bar of equitable relief and discovery. If this is true of the mortgage as originally made, it

should be equally so of every subsequent act by which it is transferred in good faith and for value. *Peacock v. Burt*; Coote on Mortgages, 375; *Donley v. Hays*, 17 S. & R. 400, 408; Sugden on Vendors, 738, vol. 1, 739. A mortgage is something more than a debt attended by a lien for its payment; it operate as a conveyance, both at law, and in equity which here as elsewhere follows the law; *Conard v. The Atlantic Ins. Co.* 1 Peters, 344, 441; *Ewan v. Hobbs*, 5 Metcalf, 1; and hence the assignee of a mortgage in good faith and for value should have all the rights of a purchaser; *Donley v. Hays*, 17 S. & R. 400, 408; *Wilson v. Hill*, 2 Beasley, 143, 150. The rule was laid down in *M'Farland v. Griffiths*, 4 W. C. C. R. 385, although the court would seem to have erred in regarding it as applicable to the mortgagor. His right to redeem on paying the amount really due is inseparable from the mortgage, and follows it into the hands of the assignee, who must know that it exists, and should ascertain the truth by inquiry.

But this does not apply to the latent equities of third persons, which are not brought home to the assignee by notice. The weight of authority accordingly is, that a bona fide assignee of a mortgage by a deed duly executed, and, when requisite, recorded, should have priority over prior claimants, whose equity arises out of a mere appropriation or transfer of the debt, which is not so drawn as to pass title to the land; *Wilson v. Hill*, 2 Beasley, 143, 150. "A mort-

gage," said C. J. Gibson in *Donley v. Hays*, "is the subject of a legal assignment, because the mortgagee has the legal estate in the land, but the interest in a mortgage which passes by the assignment of a bond secured by it, is a mere equity, and the assignee, as in *Whitfield v. Fausset*, 1 Vesey, 391, must therefore abide by the case of the assignor." See *Den v. Dimon*, 5 Halsted, 156; *Pierce v. Faunce*, 47 Maine, 513; *Carpenter v. Lougan*, 16 Wallace, 276; *Livingston v. Dean*, 2 Johnson, Ch. 479; *Mott v. Clark* 9 Barr, 399; *Pryor v. Wood*, 7, Casey, 142; *Olds v. Cummings*, 31 Illinois, 188. The rule should obviously be the same where a second assignment is taken without notice of an equity, which, though growing out of the first, does not appear on the face of the transaction; *Cicotte v. Gagnier*, 2 Michigan, 381. This rule has the great advantage of facilitating the sale and transfer of mortgages, while that laid down in *Poillon v. Martin*, tends to render them unmarketable. A creditor who can dispose of the security, need not call in the debt; and this in times of financial difficulty is a gain to the community as well as the parties. See *Donley v. Hays*, 17 S. & R. 400, 408.

To render the assignment of a mortgage valid against prior equities growing out of the act or agreement of the assignor, it must be so executed as to pass the legal title; and where it does not, the case is within the principle which as between equal rights gives superiority to that which is first in

point of time. See *Mulford v. Peterson*, 6 Vroom, 127. A different rule seems to have been applied in *The Ohio Life Ins. Co. v. Ross*, 2 Maryland Chancery, 25; but the decision would seem to have been founded on the erroneous idea, that the purchaser of a *chose in action* takes it free from antecedent equities.

In *Mott v. Clark*, the mortgagee had notice that the mortgagor was a trustee, and the question was, whether the subsequent assignment of the mortgage for valuable consideration and without notice, clothed the assignee with the rights of a purchaser, and entitled him to disregard the trust. The court held, that although a mortgage might be so far a mere *chose in action*, or security, as to be subject to the equities between the mortgagor and mortgagee, against which the assignee may protect himself by asking the former how much is due, and whether he has any defence, yet that with regard to the equities of third persons the case is different, and an assignment for value is to be regarded as a purchase; and it was consequently decided, that the mortgage was good in the hands of the assignee, not only against the equity of the defendant, which had bound it in those of the assignor, but against a deed from the mortgagor to the defendant, which the latter had failed to put on record. In delivering the opinion of the court on this occasion, Rogers, J., held the following language: "The fact of notice was properly left by the

court to the jury, who found that the mortgagee had notice. But, in answer, the plaintiff contends that admitting this to be so, he is an assignee without notice, and however it may be as between the mortgagee and third persons, he takes the property discharged of all equities of which he had no knowledge. The question, therefore, is (granting he had no notice, which is undoubted), does the assignee stand in the same or a better position than the mortgagee? On this point the court instructed the jury, that the assignment of a mortgage is not so within the recording acts, as to give the assignee protection against an unrecorded deed, of which the mortgagee had full notice. That a mortgagee is a purchaser within the statute of frauds is ruled in *Lancaster v. Dolan*, 1 Rawle, 245, on the authority of *Chapman v. Emery*, Cowp. 278. Now it has been repeatedly ruled, that although a purchaser has notice of an equitable claim, by which his conscience is affected, yet a person purchasing from him *bona fide*, and without notice of the right, will not be bound by it. So a person having notice of an equitable claim may safely purchase of a person who bought *bona fide* and without notice. These positions are elementary, and are fully sustained by the authorities cited. If, therefore, a mortgagee is to be considered on the footing of a purchaser, it would seem to follow that an assignee without notice takes the property discharged of a latent equity, if any existed. These

cases, although analogous, are not expressly in point, but the case of an assignee of a bond and mortgage is expressly ruled in *Livingston v. Dean*, 2 J. C. R. 479. He takes it subject to all the equity of the mortgagor, but not to the latent equity of a third person. To subject him to such an equity, he must have express or constructive notice at the time of the assignment. It is a general and well settled principle, says the chancellor, in *Murray v. Lylburn*, 2 J. C. R. 443, that the assignee of a *chose in action* takes it subject to the same equity it was subject to in the hands of the assignee: 2 Vern. 691-765; 1 P. Wms. 497; 1 Ves. 122; 4 Ves. 118. But this rule is generally understood to mean the equity residing in the original obligor or debtor, and not an equity residing in some third person against the assignor. He takes it subject to all the equity of the obligor, say the judges in the very elaborately argued case of *Morton v. Rose*, 2 Wash. 233, on this very point, touching the rights of the assignee of a bond. The assignee can always go to the debtor and ascertain what claims he may have against the bond or other *chose in action*, which he is about purchasing from the obligor; but he may not be able, with the utmost diligence, to ascertain the latent equity of some third person against the obligee. He has not any object to which he can direct his inquiries, and for this reason the claim of the assignee, without notice of a *chose in action*, in the

late case of *Redfearn v. Ferrier*, 1 Dow, 50, was preferred to that of a party setting up a secret equity against the assignor. Lord Eldon observed, in that case, that if it were not to be so, no assignment could ever be taken with safety. It would be utterly impossible to guard against combination by the mortgagor and mortgagee, particularly with the aid of the owner of the latent equity. If the defendant, the owner as he alleges of the moiety, loses his property, it is his own *laches*, for it was his duty to put his deed on record as notice of his title. Having neglected his duty he is postponed to the mortgagee, who is a purchaser within the Statute of Frauds. At law his title is available against the owner, who neglected to put his deed on record. The assignee stands in the position of the mortgagee so far as regards the legal title, but stands as the authorities evidently show, unaffected with an equity of which he had no knowledge, or possibility of knowledge, and against which it would be impossible for him, with the most careful diligence, to guard himself. If he had notice of the outstanding equity, he would be in the same position as the mortgagee, and equity in such case would relieve the owner of the estate, notwithstanding his neglect. The principle on which courts of equity act, is that actual notice is equivalent to constructive notice derived from the registry of the deed. The intention of the acts requiring deeds to be recorded, was to secure sub-

sequent purchasers and mortgagees against prior secret conveyances and fraudulent encumbrances; and therefore when a person has notice of a prior conveyance, it is not a secret conveyance by which he can be prejudiced; for he can be in no danger where he knows of another encumbrance, because then he might have stopped his hand from proceeding, and therefore is not the person whom the statute meant to relieve. The Court of Chancery affords relief, because it is against equity for him to protect himself by his legal title when he had express notice of a prior conveyance or encumbrance. But it is evident this must be personal to the mortgagee, and cannot affect his innocent assignee." This case was cited with approbation in *Phillips v. The Bank of Lewistown*, 6 Harris, 394, 403, where the court said that a mortgagee is a purchaser, and that his assignee, without notice, will take free from the equities of third persons. The same view was taken in *Connecticut v. Bradish*, 14 Mass. 206, and the assignment of a mortgage by a deed duly recorded, held to render the assignee a purchaser for value, and entitle him to protection against an unrecorded conveyance, which had been made known to the mortgagee, and would, consequently, have been entitled to priority but for the subsequent assignment.

It is well settled in England, that where a *chose in action* or chattel personal is held in trust, notice to the trustee, will give a purchaser

from the *cestui que trust* priority over an antecedent purchaser who has omitted to give notice; Sugden on Vendors, ch. 22, sect. 1, pl. 41. But this rule is limited to personal and does not apply to real estate; Sug. on Vend. Ib. pl. 46; *Jones v. Jones*, 8 Simons, 633. For even if notice of an equity, to the holder of the legal title, could render him a trustee for the party giving the notice, it would not bind the conscience of a subsequent purchaser, unless brought home to him at the time of the purchase. A violation of duty on the part of a trustee, only affects those who are cognizant of its commission. And this reasoning has led many of the courts of this country to reject the whole doctrine, both as it regards real estate and *choses in action*; see notes to *Row v. Dawson*, *post*, part 2d.

The acquisition of the right of property to chattels, is governed, in general, by the maxim which has been cited as regulating the transfer of the title to land, that one can confer no greater rights than he has; *Ventress v. Smith*, 10 Peters, 161; and the purchaser cannot rely on his good faith, and the payment of value in reliance on the possession and seeming right of a vendor, who sells without title, as an answer to the claim of the true owner; *M'Combie v. Davis*, 6 East, 538; 7 Id. 5; *Everett v. Saltus*, 15 Wend, 475; 20 Id. 265; *Copland v. Bosquet*, 4 W. C. C. R. 588, 594; *Agnew v. Johnson*, 10 Harris, 471; *Coggill v. The Hartford and New*

Haven Railroad Co., 3 Gray, 545; *Brown v. Peabody*, 3 Kernan, 121; 1 Smith's Lead. Cas. 1201, 7 Amer. ed.; and in *Agnew v. Johnson*, and *Coggill v. The Hartford and New Haven Railroad Co.*, this principle was carried to the extent of deciding that a condition that the right of property shall not pass unless the price is paid, may bind a *bona fide* purchaser from the vendee. But it is true here, as in the cases which have been considered, that one who wilfully or negligently enables another to hold himself out to the world as the owner, by furnishing him with the documentary evidence of title, or suffering the goods to be entered in his name on the books of the warehouse where they are deposited, will be estopped as against a purchaser who gives value in the belief that the apparent ownership is real; see *Dyer v. Pearson*, 3 B. & C. 38; *Saltus v. Everett*, 20 Wend. 267, 280; *Pickering v. Busk*, 15 East, 38; *Davies v. Bradly*, 24 Vermont, 55; *Copland v. Bosquet*, 4 Washington C. C. R. 588, 594; *M'Cauley v. Brown*, 2 Daly, 426; see *Porter v. Parks*, 49 New York, 564; *Dixon v. Rolards*, 17 Missouri, 580; *Keyser v. Harback*, 3 Duer, 373; *Carmichael v. Beck*, 10 Richardson, 332; and that a purchaser may rely on the acquisition of the legal title as a protection against a prior equity of which he was ignorant at the time of buying; *Clemson v. Davison*, 5 Binney, 392; *Albert v. The Saving Bank*, 1 Maryland, Ch. 40. Hence, a *bona fide* purchase of a chattel

from a trustee is valid against the *cestui que trust*; *Eaves v. Gillespie*, 1 Swan. 128. So, as between two purchasers whose title is in other respects equal, he who first obtains possession, will prevail; *Lanfair v. Sumner*, 17 Mass. 210; *Jewett v. Lincoln*, 16 Maine, 117; see *Packard v. Wood*, 4 Gray, 307; *The Bank v. Jones*, 4 Comstock, 497; *Brown v. Wilmerding*, 5 Duer, 520; *Shaw v. Long*, 17 S. & R. 99. Where an actual delivery is impracticable, a symbolic delivery may suffice; and it is enough in general as against creditors and subsequent purchasers, that all should be done to put the purchaser in possession, which the nature of the case permits; see *Davis v. Bradley*, 2 Williams, 118; *Holbrook v. Wright*, 24 Wend. 168; 1 Smith's Leading Cases, 56, 7 Am. ed. But it is as well established in the case of personal property as in that of real, that one who buys with notice of a prior contract of sale, or equity, will not acquire a title; *Smally v. Ellett*, 36 Illinois, 500; *Clark v. Flint*, 22 Pick. 251.

The mere circumstance that one is entrusted with the possession of a chattel by the owner, will not enable him to pass the title in the absence of an authority to that effect, although the purchaser gives value in the belief that the property belongs to the bailee, or that he is empowered to sell; *Copland v. Bosquet*; 1 Smith's Leading Cases, 1196, 7 ed; *Ballard v. Burgett*, 40 New York, 314; *Craig v. Marsh*, 2 Daly, 61. Chattels are constantly placed in

the custody of agents for safe-keeping, transportation or repair, and it has never been held that such a course will preclude a recovery against a purchaser, to whom they are wrongfully transferred. Such an estoppel will not arise, unless the bailor does some act giving a deceptive appearance of ownership, which transcends the ordinary course of business, and is not requisite to the end in view, as by confiding the written indicia of title to the bailee, or permitting him to have them made out in his name.

Although a defence resting on the ground of a purchase for a valuable consideration without notice, is favored in equity, it is, nevertheless, subject to restrictions which are intended to prevent it from defeating the end for which it was designed, and becoming a cloak for fraud and negligence, instead of an incentive to diligence, and a protection to good faith and fair dealing. These restrictions prevail with full force in England at the present day, but there is some doubt as to whether they are all equally applicable in this country. Yet the cases are numerous in which they have been recognized or adopted as integral parts of our equitable system. Among these is that of *Snelgrove v. Snelgrove*, 4 Dessausure, 274, where they were summed up as follows:

"From the decided cases these requisites seem to be indispensable to support a plea, that the defendant is a purchaser for valuable consideration, without notice In

the first place it must be sworn to; Sugden, 507; *Marshall v. Frank*, 8 Prec. Cha. 480. If the defendant answer to anything which he should plead, he overrules his plea, though he may answer anything in subsidium of his plea; 1 Ans. 14; *Blacket v. Langlands*, Sel. C. C. 51; Gilb. 58. The plea must state the deeds of purchase, setting forth the dates, parties and contents, briefly, and the time of their execution, for that is the peremptory matter in bar; 3 Atk. 302; *Walwyn v. Lee*, 9 Vesey, jr. 24. Such a plea must aver that the person who conveyed or mortgaged to the defendant, was seised in fee, or pretended to be seised; and was in possession, if the conveyance purported an immediate transfer of the possession, at the time when he executed the purchase or mortgage deed; 2 Atkins, 397; *Ib.* 631; *Story v. Lord Windsor*, 3 P. Wms. 279, 281; *Head v. Egerton*, 1 Vern. 246; *Trevanian v. Morse*, 3 Vesey, jr. 226; *Ib.* 32; Ambler, 421.

The plea must aver a conveyance and not articles merely; for if there are articles only, and the defendant should be injured, he may sue at law upon the covenant in the articles; 3 P. Wms. 281; 1 Atkins, 571.

The plea must distinctly aver that the consideration-money mentioned in the deed, was *bona fide* and truly paid, independently of the recital of the purchase deed; for, if the money be not paid, the plea will be overruled, as the purchaser is entitled to relief against payment of it. A consideration

secured to be paid, is not sufficient; 2 Atk. 241; 3 Atk. 304, 814. It is doubted if the particular consideration need be stated in the plea. The cases have been contrary; 2 Freem. 43; 2 C. C. 156; 1 C. C. 34; Hard. 510.

But if it be stated, there can be no objection to it, for if it be *bona fide* and valuable it need not be adequate to support the purchase and the plea; Ambler, 763, 767; Finch, 102. The plea must also deny notice of the plaintiff's title or claim, previous to the execution of the deeds, and payment of the consideration-money. And the notice so denied, must be of the existence of the plaintiff's title, and not merely of the person who could claim under such title; 1 Vern. 179; 2 Atk. 631; 3 Id. 304; 2 Eq. C. 685; 1 Atk. 522, which overruled *Brampton v. Banker*, Wilson's Ch. R. 125; 2 Vern. 159; 3 P. Wms. 243.

The notice must be positively and not evasively denied, and must be denied, whether charged in the bill or not; 2 Eq. C. Abr. 682; 3 P. Wms. 244; 6 Resolutions in 2 P. Wms. 491.

If particular instances of notice, or circumstances of fraud are charged, they must be denied as specially as charged; 3 Atk. 815; 2 Vesey, jr. 187; 4 Bro. C. C. 322; 2 Vesey, 430. The special and particular denial of notice or fraud, must be by way of answer, that the plaintiff may be at liberty to except to it for insufficiency; 1 Vern. 185; 2 C. C. 161.

But notice and fraud must also be denied in the plea; otherwise,

the fact of notice or fraud will not be in issue; 3 P. Wms. 91, 95; *Meadows v. The Duchess of Kingston*, Mitt. 277, n.; 5 Vesey, jr. 426.

"The title of a purchaser for valuable consideration without notice, is not a sword to attack the possession of others; Amb. 292; 3 Vesey, jr. 225. It is a shield to defend the possession of a purchaser. Whether it will protect his possession from a legal as well as an equitable title may be said to be doubtful. The cases have been contradictory on this point.

"In *Rogers and Searl*, 2 Freeman, 84, Lord Nottingham had been of opinion that the plea was not good against a legal estate. And in *Williams v. Lambe*, Lord Thurlow says expressly, that he thought where a party (complainant) is pursuing a legal title, the plea did not apply, it being a bar only to an equitable and not to a legal claim; 3 Bro. C. C. 264. On the other hand, in *Burlace v. Cook*, Lord Nottingham was of opinion that the plea was good to protect a purchaser against a complainant seeking to set up a legal estate; 2 Free. 24. And in *Parker v. Blythmore*, the Master of the Rolls threw out the same opinion, though he did not consider it necessary to decide it, as he thought the plea maintainable on other grounds; 2 Eq. C. Abr. 79; Pla. 1. And in *Jerand v. Saunders*, Lord Rosslyn decreed that the plea would stand against a legal, as well as an equitable title; 2 Vesey, jr. 454.

"It is evident that this doctrine remains unsettled, for it does not

appear that the cases have ever been collated, sifted, and a final conclusion drawn from such comparison. It is obvious from an inspection of the cases generally, that in most of them where the plea has been supported, it has been against an equitable and not a legal title.

"Mr. Sugden, in his judicious collection of the doctrine and authorities upon this subject, says, 'that to argue from principle, it seems clear, that the plea is a protection against a legal as well as an equitable claim; and as the authorities in favor of that doctrine certainly preponderate, we may perhaps venture to assert that it will protect against both.'"

"I am not entirely satisfied that this is a correct conclusion. The inclination of my mind is the other way. It should be remembered that the plea protects, by the court refusing to aid the complainant in setting up a title. Now when the title attempted to be set up is an equitable one, it seems very reasonable that the court should forbear to give its assistance in setting up such equitable title against another title set up by a fair purchaser. But when the complainant comes with a legal title, I do not perceive how he can be refused the aid of the court. It seems no longer to be optional. As there is, however, so much contradiction and doubt, I could wish this point would be carried up to the Court of Appeals, in any case where it fairly arose, and was the very point decided.

"To apply all that has been said

to the point under consideration, it is obvious, that if through indulgence, which I am willing to do, we should admit the answer of the purchasers to stand for a plea; that the answer does not comply with the various regulations which we have seen from the authorities must be pursued. The answers have not set forth the dates, parties and contents of the deeds of purchase, nor especially the time of their execution, which is essential. The answers have not set forth that the person from whom the defendants purchased was seized in fee, and was in possession, nor even from whom he purchased. The defendants have not set forth what kind of deeds they had, whether absolute conveyances, or only articles of agreements to convey, in which last case the plea would not protect. The answer has not stated that the consideration money was *bona fide*, truly and actually paid, which is essential to support the plea. The answer has not denied so explicitly as it should do, (though it has done so generally,) notice of the plaintiff's claim, or of the existence of his title. And finally the title of the complainant attempted to be resisted by the defendant's answer, (meant and considered to stand in the place of the plea,) is a legal and not an equitable one. On all these grounds, I am of opinion that the purchasers from William Snelgrove cannot be protected as purchasers for valuable consideration without notice, and bringing themselves within the

rules necessary to give effect to that defence."

A similar unqualified recognition of the English doctrine may be found in *Alexander v. Pendleton*, 8 Cranch, 462; *Boone v. Chilles*, 10 Peters, 177; *Hunter v. Sumrall*, 6 Littell, 22; *Blight's Heirs v. Banks*, 6 Monroe, 698; *Halstead v. The Bank of Kentucky*, 4 J. J. Marshall, 554; *Moore v. Clay*, 7 Alabama, 142; *Bush v. Bush*, 3 Strobbart's Equity, 131; *Nantz v. M'Pherson*, 7 Munford, 599; *Pillow's Heirs v. Shannon's Heirs*, 3 Yerger, 308. But there are other decisions of equal weight, in which it has been relaxed in one or more particulars.

The first and one of the most important requisites to such a defence, in England, is that which concerns the estate of the vendor, and it is that which has occasioned most discussion in the United States. Under the English authorities, it is essential to aver, that the vendor was seised, or pretended to be seised of an estate in fee simple, free from incumbrance, and that the defendant believed that the title was such as it was thus represented; and it must also be averred, that the vendor was in actual possession, unless the estate is professedly sold as a reversion; *Tompkins v. Anthon*, 4 Sandford's Ch. 97; *Baynard v. Norris*, 5 Gill, 468. The policy and good sense of this requirement are obvious, so far as it merely seeks to test the good faith of the purchaser, by requiring an averment, that the title appeared to be good, and that

it was acquired in the belief that the appearance was real, because good faith and diligence are essential to the validity of such a defence, as well as freedom from actual fraud, and the purchaser must swear to his belief, that the vendor had a good title, as well as to the absence of actual or constructive notice, that it was bad. And the averment of pretensions, true or false to such a title on his part, and of belief in their truth on that of the vendee, must be of such pretensions as might reasonably be believed; and of a belief founded on evidence sufficient to induce it, and not on appearances or allegations, which reasonable diligence and inquiry would have shown to be false or fraudulent; *Dillard v. Crocker*, 1 Spear, Eq. 20. Thus it was held in *Vattier v. Hinde*, 7 Peters, 252, 271, that where a purchase was made under an execution against a party who had no documentary title to the land, the purchaser was not entitled to the consideration which will only be afforded where the vendee has been deceived by such a semblance of title, as to justify the belief that it exists. And where the bill set forth a settlement on a husband and wife for their lives, remainder as they or the survivor of them should appoint, the death of the husband, an appointment by the widow to the plaintiff, her second marriage, and an entry by the heir of the second husband, with a prayer for relief against him, and he pleaded an ante nuptial settlement on his father on the faith of his mother's represen-

tations that she was seised in fee, it was held by the Vice-Chancellor, that as it appeared from the bill, that due inquiry on the part of the second husband would have shown that the wife had nothing more than a life estate under the original settlement, there was a failure to exercise the care and diligence which are essential to the character of a *bona fide* purchaser, although it was admitted that the case would have been different if she had been the apparent owner of an estate in fee, which had failed in consequence of some act on her part, or on that of those under whom she claimed; *Jackson v. Rowe*, 2 Simon & Stewart, 472. There may be some doubt whether the point was properly decided as one of pleading, and the chancellor, who declined to express any opinion upon it when the case subsequently came before him, affirmed the decision on other grounds; 4 Russell, 514; but there can be none as to the general rule that where the vendor wants the ordinary evidence and muniments of title, the purchaser will not be protected unless he is misled by fraudulent representations, which he has no adequate means of detecting; *Jones v. Powles*, 3 Mylne & Keene, 581.

But the English doctrine, as above stated, not only requires, that the vendor should have a title apparently good in itself and susceptible of being transferred, but that this title should be or appear to be a seisin in fee, thus shutting out equitable estates, even as it would seem where the trust

is executed, and the beneficial interest vested absolutely in the *cestui que trust* or, where, as in the case of a mortgagor, the equity is of such a nature as to be for most purposes equivalent to the legal fee. The reason of this distinction between the purchase of a legal and equitable interest seems to be that the protection accorded to *bona fide* purchasers is an exception to the general rule of jurisprudence, that no one can transfer a greater right than he has. The rule prevails in equity as well as at law, but a chancellor will not intervene to enforce the rule against one who having acquired a legal right in good faith, may enjoy it with a safe conscience. But where the purchase is of a mere equity, which owes its existence to the court of chancery, and cannot be enforced without its aid, the maxim, *nemo plus juris in alium transferre potest quam ipse habet*, applies with full force. In other words, the purchase of an equitable estate, is regarded by a chancellor as the purchase of a legal estate is viewed at law; it being true in both instances, that he who is first in point of time has the better right; *Sumner v. Waugh*, 56 Illinois, 531; *Parsons v. Jury*, 1 Yerger, 296; *Gallion v. M'Caslin*, 1 Blackford, 91; *Jones v. Jones*, 8 Simons, 633, 642; *Marles v. Cooper*, 22 Mississippi, 208; *Brown v. Wood*, 6 Richardson's Eq. 155; *Daniel v. Hollinshead*, 16 Georgia, 190. Hence, one who buys an equitable estate, or interest, with a knowledge of its real character, and without obtaining the legal title,

cannot rely on his good faith and the payment of value, as a reason why he should be exempt from any claim that could have been enforced irrespectively of the sale.

The doctrine that the vendor must have or appear to have a legal title, was, as we have seen, adopted in *Snelgrove v. Snelgrove*, ante, and is generally accepted in the United States; *Flagg v. Maun*, 2 Sumner, 486, 557. In *Shiras v. Craig*, 7 Cranch, 34, 48, Marshall, C. J., declared that the purchase of an equitable estate, is subject to existing equities, and in the subsequent case of *Vattier v. Hunde*, 7 Peters, 252, he refused on this ground to recognize the defendant as a *bona fide* purchaser. A real or pretended legal title in the vendor, was also held requisite in *Boon v. Chilles*, 10 Peters, 170, and all that is regarded as essential to the validity of such a defence in England treated as not less essential here. And although an equitable estate in land is regarded, in Pennsylvania, as the substance, and the legal title as a mere shadow, yet, the purchaser of a mere equity, cannot, as such, and where the recording acts do not intervene, claim protection on the ground of *bona fides*, and the payment of a valuable consideration. It is laid down in the able judgment of Chief Justice Gibson, in *Chew v. Barnett*, 12 S. & R. 389, "that a purchaser for valuable consideration takes the title, free of every trust of equity of which he has no notice, is intended of the purchase of a title perfect on its face; for every purchaser of an

imperfect title, takes it with all its imperfection on its head. It is his own fault, that he confides in a title which appears defective to his own eyes, and he does so at his own peril. Now every equitable title is incomplete on its face. It is in truth nothing more than a title to go into chancery to have the legal estate conveyed, and therefore, every purchaser of a mere equity takes it subject to every clog that may lie on it, whether he has had notice or not. But the purchaser of a legal title, takes it discharged of every trust or equity which does not appear on the face of the conveyance, and of which he has not had notice, either actual or constructive."

Similar language was held in *Reed v. Dickey*, 2 Watts, 459; *Kramer v. Arthurs*, 7 Barr, 165; and *Sergeant v. Ingersoll*, Ib. 340; 3 Harris, 343. It should however be read with the implied qualification that it is immaterial whether the title be legal or equitable, if the vendee buys in the belief that it is legal. One who takes a third mortgage, supposing it to be the first, acquires a mere equity of redemption, but he may still squeeze out the second, by taking an assignment from the first mortgagee.

The rule that the purchaser of an equitable estate or interest, is subject to every equity that attached to the premises while in the hands of the vendor, is modified by the statutes which require instruments affecting the title to the land to be registered, and render them invalid if they are not.

Hence the purchaser of an equity by deed duly recorded, is entitled to a preference over equities, growing out of the previous acts or agreements of the vendor, which have not been placed on record; *The Ohio Life Ins. Co. v. Ross*, 2 Maryland, Ch. 25; *The United States Ins. Co. v. Shriver*, 3 Id. 383; *Correy v. Caxton*, 4 Binney, 140; *Bellas v. M'Carty*, 10 Watts, 13. In *Bellas v. M'Carty*, a controversy between two grantees of equitable estate arising under a contract of sale, was accordingly decided in favor of the junior purchaser, because the elder had omitted to record his deed. "The language of the recording acts," said Rogers, J., in delivering the opinion of the court, "is sufficiently comprehensive to embrace equitable as well as legal titles, and the record of an equitable title is notice to all subsequent purchasers." "We are, therefore, of opinion that the *bona fide* purchaser of an estate, whether legal or equitable, without actual or constructive notice, who has recorded his deed in due time, and pursued his claim in other respects with diligence, is to be preferred to a prior purchaser claiming under an unregistered deed." For a like reason it has been held that where the purchaser of an equitable estate growing out of a contract of sale, obtains a recorded deed from the original vendor, he need not record the conveyance of the equity, because a subsequent purchaser of the equity ought to trace it back, and ascertain what has become of the legal title; *Cor-*

rey v. Caxton, 4 Binney, 40; *Belas v. M'Carty*, 10 Watts, 93; *Kramer v. Arthurs*, 7 Barr, 165, *ante*, vol. 1, 311. In *Kramer v. Arthurs*, land was sold by articles of agreement which were not recorded. The purchaser conveyed to one Havens, who was the manager of an unincorporated company, in trust to sell and divide the net proceeds among the stockholders. This trust was declared in a separate instrument, and did not appear on the face of the deed, or of record. A judgment was then obtained against Havens, under which the premises were sold by the sheriff, and a deed executed to the plaintiff. In the interval between the entry of the judgment and the sheriff's sale, Havens sold the premises to the defendant, who obtained a duly recorded conveyance from the original vendor. It was held that the defendant had the better right. The conveyance by which he acquired the legal title was recorded before the plaintiff bought, and although it was subsequent to the judgment, a judgment creditor as such, is subject to every equity that could have been enforced against the debtor. The trust under which Havens acted, gave him no interest in the land, and his interest in the proceeds was not susceptible of the lien of a judgment.

It has sometimes been laid down broadly, that a purchaser from a *cestui que trust* is affected with notice, and cannot perfect his title by obtaining a conveyance from the trustee. "No rule," said Gibson, C. J., in *Kramer v. Arthurs*, 7

Barr, 161, "is sounder or more imperative than that the purchaser of an inchoate or imperfect title, intimating, as it does, that something is kept back, must stand or fall by it, as it existed in the hands of his vendor." And he went on to hold that where an equitable estate, arising under an unrecorded agreement is sold, the purchaser will be subject to any grant or declaration of trust that may have been made by his immediate vendor. The case of *Ingersoll v. Sergeant*, 7 Barr, 340; 3 Harris, 343, went still further, and to the extent of determining that a purchase of real estate from one for whom it is held in trust, perfected by a conveyance from the trustee, is subject to rights and equities arising from the unrecorded contracts of the vendor, although the legal title is regularly deduced of record through the trustee. The knowledge of the purchaser that the title was outstanding in the hands of a trustee, was said to be notice not only of the equity of the *cestui que trust*, but of a covenant into which he had entered with a third person, and it was held immaterial that this was not recorded or made known to the trustee, *ante*, 49.

This conclusion seems to be unfounded in principle, and at variance with the recording acts of Pennsylvania. There can be no doubt that the purchaser of an equitable estate or interest cannot call for a conveyance by the holder of the legal title, without satisfying any claim that he may have against the vendor, growing out

of the transaction in which the equity originated; *Crawford v. Bartholf*, Sexton, 458. So one who buys with notice from a trustee, is subject to the equity of the *cestui que trust*. But this goes no part of the way towards establishing that a grant by a trustee, confirmed by the *cestui que trust*, or *vice versa*, will not confer a good title against the latent equities of third persons. Such a grantee has the law, and a court of equity will not deprive him of an advantage which he may retain consistently with conscience. It was said by Lord Hardwicke, in *Willoughby v. Willoughby*, 1 Term, 730, that notice that a term has been assigned to protect the inheritance, is not notice that the inheritance has been mortgaged, or is subject to special limitations. It is notice of nothing but that there is an inheritance to protect. For a like reason, notice that an estate is held in trust is not notice that it has been sold or incumbered by the beneficiary.

The true rule as stated in *Sumner v. Waugh*, 56 Illinois, 539, from a former edition of this work, is that the purchase of an equity passes the vendor's estate as it exists when bought, without giving it additional validity on the one hand, or precluding the vendee on the other, from strengthening his position by the acquisition of an outstanding right or title; *Zollman v. Moore*, 21 Grattan, 313; *Corey v. Caxton*, 4 Binney, 140; *Bellas v. M'Carty*, 10 Watts, 257; *Flagg v. Maurer*, 2 Sumner, 486, 518. In *Flagg v. Mann*, Story,

J., was of opinion, that a purchaser of an equity who has succeeded in completing his title at law, should not be affected with notice, and dispossessed by chancery, merely because he took a conveyance from the *cestui que trust* in the first instance, before obtaining the legal estate from the trustee; and that where a purchase for valuable consideration is set forth by way of answer, and attended with a full disclosure, the only question should be as to whether the purchase was made in good faith, and under circumstances showing an apparent right in the vendor to convey, whatever the rule may be where such a defence is pleaded in bar of the discovery sought by the bill. "If," said he, "a *cestui que trust* in fee conveys the estate to a purchaser, and the trustee afterwards confirms the sale and releases to the *cestui que trust* or to the purchaser, it seems to me that such a purchase is entitled to protection, against any antecedent secret trust, which is unknown to him at the time of the purchase; and the confirmation is operative, notwithstanding that in a strict legal sense, the *cestui que trust* was not seised in fee when he sold." Such obviously should be the rule where, as in *Ingersoll v. Sergeant*, the whole forms one transaction, and the purchaser pays the price to the *cestui que trust* on the faith of the conveyance from the trustee.

It has nevertheless been said, that a purchaser who knows that he is buying an equity, cannot secure himself by taking a convey-

ance of the legal title, after he has been informed of the claim of a prior purchaser, because he is then aware that the latter has the elder, and therefore better right, to call for the legal title. See *The Mutual Assurance Society v. Stone*, 3 Leigh, 218. This is entirely consistent with the doctrine that a purchaser from a *cestui que trust*, who obtains a release or confirmation from the trustee, without knowing that there is any prior or better right, will be preferred to a prior purchaser, who has omitted to complete his title; and it is well settled that if the vendor seems to have a good legal title, the appearance need not be real.

It has been contended that as between claimants whose equities are equal, he has the better right who was first in point of time, and that the holder of the junior equity cannot protect himself by obtaining a conveyance of the legal title after he has been notified of the prior right. This may be true of a purchaser, who knew that he was acquiring an imperfect title, or was not *bonæ fidei* in the full sense of the term; but cannot be carried further consistently with the well established rule that a first mortgage may be tacked to a mortgage of the equity of redemption for the purpose, and with the effect of excluding an intervening incumbrancer, who had filed a bill of foreclosure against the mortgagor; *Marsh v. Lee*, 2 Ventris, 337.

The preponderance of authority, moreover, seems to be that one who buys an equitable estate, knowing it to be such, but under the belief

that he is acquiring the first and best right, may protect himself by obtaining a conveyance of the legal title after he has received notice of an antecedent equity, of which he was ignorant at the time of buying. See *Zollman v. Moore*, 21 Grattan, 241, 321, *ante*, 48. In *Bowen v. Evans*, 1 Jones & Latouche, 178, 264, Chancellor Sugden observed that "whether the purchaser has the legal estate, or only an equitable interest, he may, by way of defence, avail himself of the character of a purchaser, without notice, and is entitled to have the bill dismissed, although he may, the next hour, be turned out by the legal title." It was held, in like manner, in *Campbell v. Brackinridge*, 8 Blackford, 471, that one "who purchases an equitable title without notice of a prior equity, and afterwards, with notice, buys in a legal title to support his equitable one, is entitled to protection as a *bona fide* purchaser." So it may be inferred from the dicta in *Belcher v. Butler*, 1 Eden, and *Burnett v. Willston*, 12 Vesey, 130, that a first mortgage may be tacked to a third to the exclusion of an intervening incumbrance, although the third mortgagee knew when he made the loan that the legal title had passed by the first mortgage.

The means through which the legal estate is acquired, should, nevertheless, be such as equity and good conscience can approve; and a purchaser cannot protect himself by taking a conveyance from a trustee, with knowledge that the act is in fraud of the trust; *Saunders v. Dicken*, 2 Vernon, 271.

In *Willoughby v. Willoughby*, 1 Term, 636, a mortgagee, who having notice of a marriage settlement, and of the jointure of the plaintiff under it, took an assignment of an outstanding term, which had been assigned to attend and wait upon the inheritance, was held not to be *bonæ fidei*, or entitled to set up the term to the exclusion of a mesne incumbrance, of which he was ignorant. But one who has a valid equity, will not forfeit it by taking undue means to obtain the legal title, or having it assigned to him with notice; see *Cox v. Osborn*, 1 A. K. Marsh. 311.

It is well settled, that deeds operating by way of grant, or under the Statute of Uses, confer such estate as the grantor has, and can do no more, so that the form of the conveyance is immaterial if it is so worded as to transfer the title, though not in the way the parties designed; *Flagg v. Mann*, 2 Sumner, 426, 561. It was accordingly held in *Flagg v. Mann*, that the right of the grantee to protection as a *bona fide* purchaser, was not affected by his claiming under a deed of release, because such an instrument will take effect as a bargain and sale, if made for a valuable consideration; 2 Smith's Lead. Cases, 472, 7 Am. ed. It has nevertheless been held that one who agrees to take the title as it stands, without stipulating or requiring that it shall be good, is not within a rule which only applies in favor of those who buy on the faith of a deceptive appearance, which proves to be unfounded; *Boone v. Chilles*, 10

Peters, 177; *Vattier v. Hinde*, 7 Id. 271; *Oliver v. Piatt*, 3 Howard, 333. Hence a deed, which simply purports to convey all the vendor's right, title and interest, will not defeat an unregistered mortgage; *Bragg v. Paulk*, 42 Maine, 502; because there is nothing in such a grant to indicate that he assumed to pass, or that the grantee expected to acquire, an unincumbered title, and the court will not impute a fraudulent design to injure the prior incumbrancer; *Smith's Heirs v. The Bank*, 21 Alabama, 24; and in *Oliver v. Piatt*, and *May v. Le Clerc*, 11 Wallace, 217, a deed of release or quit claim was said to be within this principle. For a like reason, an assignment of all the estate of a debtor for the benefit of his creditors, will not operate on land which he has sold, or holds as a trustee. See *Twelves v. Williams*, 3 Wharton, 485; *Ludwig v. Higly*, 5 Barr, 132. So, a grant of "all lots, tracts or parcels of land, situate in the borough of Pottsville, and county of Schuylkill, which we now possess, and are entitled to jointly or severally," will not pass the title to a lot which has been previously conveyed by an unrecorded deed, because the intention of the grantor presumably is to convey only such lots as are still his, and can be honestly sold; *Hetherington v. Clark*, 6 Casey, 393. The decision might have been different, if there had been but one lot to which the deed could apply, because the generality of the language would have been controlled by the subject-matter.

There is more difficulty in as-

senting to a dictum in *Oliver v. Piatt*, that taking a deed with a covenant of special warranty is sufficient to show a doubt of the warrantor's title. Such an inference would appear wholly inadmissible, and would be received with no little surprise in Pennsylvania, where covenants of general warranty are so unusual, that in *Cresson v. Miller*, 2 Watts, 272, the introduction of such a clause into a deed was made the ground of a presumption against the good faith of the purchaser. The true doctrine seems to be that where it is apparent, from the whole transaction, that the purchaser had no doubt of the goodness of the title, and gave a full price for what he believed to be the fee, it is immaterial whether the grant is by way of release or of bargain and sale, and whether it does or does not contain a warranty; *Flagg v. Mann*, 2 Sumner, 486, 562. This is the more obvious, because a lease and release was, and perhaps still is, the mode of conveyance ordinarily used in England, 2 Bl. Comm. 339.

It is essential in England to the character of a *bona fide* purchaser, that he should have paid the price in full and received a conveyance; and notice while the transaction is incomplete in either particular, will not only preclude any further step, but invalidate what has been already done; *Auketel v. Converse*, 18 Ohio, N.S. 11; *Wells v. Morrow*, 38 Alabama, 120; *Simons v. Richardson*, 2 Littell, 229; *Neutz v. M'Pherson*, 7 Mumford, 599; *Pillow v. Shannon*, 3 Yerger, 308;

Bush v. Bush, 3 Strobhart's Eq. 301; *Duncan v. Johnson*, 13 Arkansas, 190; *Moore v. Clay*, 7 Alabama, 142; *Blight's Heirs v. Bond*, 6 Monroe, 198; *Halstead v. The Bank of Kentucky*, 4 J. J. Marshall, 554; *Blair v. Owles*, 1 Munford, 38; *The Mutual Assurance Society v. Stowe*, 3 Leigh, 218; *Doswell v. Buchanan*, Ib. 365; *The Union Canal Co. v. Young*, 1 Wharton, 410, 452; *Blight v. Banks*, 6 Monroe, 669. One reason which has been assigned for so much of the rule as requires that the land should actually have been conveyed before notice, is that a vendee, under articles to convey, has a remedy against the vendor if the title proves to be defective, which may be just when the latter is solvent and able to respond in damages. It has also been said, that however great the hardship may be to a vendee who gives value in the belief that the vendor has a good title, he still has but an equity, and must consequently yield to one whose right is older, and, therefore, better than his own. And as good faith is indispensable in every such transaction, he cannot obtain a conveyance for the purpose of defeating the prior right, after he has learned that it exists. This, however, is hardly consistent with the established doctrine, that one who buys from a grantor who has already parted with his right, may exclude the grantee by getting in an outstanding legal title after he has been apprised of the prior grant.

Here the equity arises from the payment of the purchase-money,

and the deed which passes nothing is merely formal. In *Phillips v. Morrison*, 9 C. E. Green, 195, a husband made a post nuptial settlement in fraud of his creditors. The wife subsequently sold and conveyed the land to a *bona fide* purchaser, and received the price. A bill was then filed to set the settlement aside, and it was held, that though the conveyance to the purchaser was void as being the act of a *feme covert*, and conferred no title on the purchaser, he was still entitled to compensation for the sum which he had paid in ignorance of the fraud. So in *Wheaton v. Dyer*, 15 Conn. 310, Waite, J., observed, "if a person were induced to loan his money upon an agreement that he should be secured by a mortgage of certain lands, he would not be deprived of his security by notice of an outstanding unrecorded deed, given him after he had parted with his money, and before he had obtained his mortgage deed. Under such circumstances, he would not be chargeable with fraud in perfecting the security. The case would be different, if he had notice before parting with his money, or in time to reclaim it."

These authorities indicate that notice will not bind the conscience of a purchaser who has given value in good faith, or preclude him from going on to obtain a deed.

In *Stanhope v. Varney*, 2 Eden, 81, Lord Northington declared it to be "immaterial when the legal advantage is obtained, if the purchase is made and the money paid without notice." A purchaser

will be protected, not only where he has the legal estate, but when he is better entitled to it than his adversary, and there can be little doubt that such a better right may arise from the expenditure of money in the purchase of a seeming right which proves not to be real; especially where the false appearance arises from the laches of the adverse claimant. If A. fails to record his deed, and the grantor sells the premises again to B., notice from A. comes too late after B. has paid the price, and he may justly ask for reimbursement before withdrawing, to make room for A. See *Youst v. Martin*, 3 S. & R. 423, 430.

The principle is the same when a vendee goes into possession under a written or oral contract of sale and makes valuable improvements, in ignorance that the grantor has parted with the title by an unrecorded deed; *Boggs v. Warner*, 6 W. & S. 469.

The argument is nearly, if not quite, as strong when one furnishes the consideration, and the conveyance is made to another, who sells and receives the price without giving a deed, because it is the folly of the *cestui que trust* not to take the conveyance in his own name; and the case falls within the rule, that where two innocent parties suffer from the fraud of a third person, the loss shall be thrown on him who gave occasion for it, by reposing an undue or misplaced confidence. Where the trust arises *ex maleficio*, and the party beneficially interested is not chargeable with laches, he may with more rea-

son allege that his equity is superior to that of a subsequent purchaser who has paid in full without obtaining the legal title; but it may be contended, even under these circumstances, that one who gives value on the faith of the record should not be compelled to yield to an unrecorded equity.

It results from what has been said, that to exonerate a purchaser from antecedent equities, he must have given value, or changed his position for the worse, in the belief that the vendor was entitled to convey; *Martin v. Sale*, 1 Bailey's Eq. 11. When the transfer is merely voluntary, as in the case of a gift to a friend or relative, or of a post nuptial settlement on a wife or child, the title will be subject in the hands of the grantee to every claim that could have been enforced before the grant; *Frost v. Beekman*, 1 Johnson's Ch. 288; *Everts v. Agnes*, 4 Wisconsin, 343; *Patton v. Moore*, 32 New Hampshire, 382; *Swan v. Ligan*, 1 M'Cord's Chancery, 232; *Boone v. Baines*, 23 Mississippi, 136; *Upshaw v. Hargrove*, 6 Smedes & Marshall, 292; and the principle is the same where a purchaser who has agreed to give value receives notice while the purchase money is wholly or in part unpaid, because it then becomes his duty not to proceed with a transaction which cannot be carried through without injury to others. It has accordingly been held, that to entitle one to protection as a *bona fide* purchaser, he must have paid the price in full

before notice; *The Union Canal Co. v. Young*, 1 Wharton, 410, 432; *Palmer v. Williams*, 24 Michigan, 328; *Pinfield v. Dunbar*, 64 Barbour, 239; *Brown v. Welsh*, 18 Illinois, 343; *Keys v. West*, 33 Id. 316.

The weight of authority is, that where the defence is made by plea, and will lead, if sustained, to a dismissal of the bill, it must be averred that the price was paid in full; but the defendant may allege a part payment in his answer as a ground for compensation, or even for requiring the complainant to look to the unpaid purchase-money instead of the land; *Youst v. Martin*, 3 S. & R. 423; *The Farmer's Loan Co. v. Maltby*, 8 Paige, 563; *Doswell v. Buchanan's Ex'ors*, 3 Leigh, 361; *Frost v. Beekman*, 1 Johnson, Ch. 288; *Everts v. Agnes*, 4 Wisconsin, 343; *Flagg v. Mann*, 2 Sumner, 486. The rule was down in *Haughwout v. Murphy*, 6 C. E. Green, 118; Id. 531, in the following terms: "The defence of a *bona fide* purchase may be made by plea, in bar of discovery and relief, or by answer, in bar of relief only. If made by plea, the payment of the whole of the consideration money must be averred. An averment that part was paid and the balance secured by mortgage, will not be sufficient; *Wood v. Mann*, 1 Sumner, 506. Proof of the payment of the whole purchase money is essential to the defence, whether it be made by plea or answer; *Jewett v. Palmer*, 7 Johns. Ch. 65; *Malony v. Kernan*, 2 Drury & Warren, 31; *Losey v. Simpson*, 3 Stockton, 246. Notice

before actual payment of all the purchase money, although it be secured and the conveyance executed, or before the execution of the conveyance, notwithstanding the money is paid, is equivalent to notice before the contract; 2 Sug. V. & P. 533 (1037); Hill on Trustees, 165. If the defendant has paid part only, he will be protected *pro tanto* only; 1 Story's Eq. § 64, c.; Story's Eq. Pl. § 604, a."

It results from the American decisions, that where the bill seeks to fasten a trust on one who has made a partial payment in good faith, or to compel him to convey, the complainant should be put on terms, and required to do equity by indemnifying the defendant for the amount actually expended. Such at least should be the rule when an unrecorded deed or equity is set up against a duly recorded conveyance, because the defendant has the law, and at least an equal claim to the consideration of a chancellor. In *Youst v. Martin*, where the controversy lay between a vendee (Martin), under an unrecorded contract of sale, and a subsequent purchaser (Youst), who had made a payment on account, and received a deed, Tilghman, C., said: "Youst had paid a large part of his purchase-money before he received notice of the agreement between M'Lene and John Martin. It was a question what was the effect of such notice. The Court charged, that the notice was sufficient, provided it was received before the execution of the deed of conveyance from McLene to Youst, and before payment of the

whole purchase-money. To this broad proposition I cannot assent. It would lead to consequences very alarming. It has been much the custom in Pennsylvania to make sales of land under articles of agreement, by which the purchaser paying part of the money in hand, enters into possession, and pays the residue by instalments. Suppose, in a case of this kind, after many years' possession and improvements made, part of the purchase money being still due, and a conveyance of the legal estate unexecuted, notice should be given of a prior contract for sale of the same land, can it be said that it would be against equity for the man in possession to obtain a conveyance of the legal estate? or, that a Court of Equity would force him to give it up, till he had at least been reimbursed the money which he had paid before he received notice? or, if the improvements had been expensive, or the lapse of time considerable, would he be compelled to give it up at all? In cases of this kind, equity depends very much on circumstances. We should be cautious, therefore, in laying down general rules. I would only say, at present, that before the defendant, Youst, was forced to give up the possession, he ought to be reimbursed the money which he had paid before he received notice. He had paid his money on the faith of the legal title, which, together with the possession, he found in McLene, who had recovered the land by an ejectment. The persons who now call for equity were the cause of his pay-

ing this money; he has suffered by their negligence; his equity, therefore, is stronger than theirs. When he found that he had been deceived by McLene, there was nothing against conscience in his procuring the legal title, in order to cover himself against the damage he had sustained through the fault of the plaintiffs. And they, having drawn him into this embarrassment, ought not to object to indemnify him to the amount of the damage sustained through their negligence; that is to say, the amount of the money paid before notice. I am aware that the law is laid down in Sugden's Law of Vendors, 487, precisely in the terms in which it was stated in the charge of the Court. I have examined the cases to which Sugden refers, but do not find that the exact point now in question came under consideration. Those cases do say, that notice before payment of the whole purchase money is sufficient, for the purpose of compelling the person who receives notice, to give up the estate; but upon what terms, and whether he is not to be indemnified, does not clearly appear. There is, besides, an important difference between the law of England and Pennsylvania. By our recording act, 18th March, 1775, every man who has articles of agreement affecting the title of land, may place them upon record, which will be notice to all the world, so that he who does not place them on record is guilty of laches. In consequence of this law, it is the custom of purchasers to search the records before they

pay their money; and if they find nothing there, they conclude that they are safe. But in England, such articles are not recorded, and the purchaser relies on the possession of the title papers."

"The principle," said Rogers, J., in *The Union Coal Company v. Young*, 1 Wharton, 431, of this plea, as Lord Eldon observes, in *Wallwyn v. Lee*, 9 Vesey, 24, and Justice Spencer, in 18 Johns. 562, is, "I have honestly and *bona fide* paid for this estate, in order to make myself the owner of it; and you shall have no information from me as to the perfection or imperfection of my title, until you deliver me from the peril in which you state I have placed myself, in the article of purchasing *bona fide*." To the validity of such a plea, a number of particulars are absolutely essential, all of which are enumerated in Sugd. 553; and in 4 Dessaussure R. 280. The plea must distinctly aver that the consideration money mentioned in the deed, was *bona fide* and truly paid, independently of the recital of the purchase in the deed; for if the money be not paid, the plea will be overruled, or the purchaser is entitled to relief against the payment. A consideration secured to be paid is not sufficient. It seems clear from the authorities, that such a plea will protect the possession of a *bona fide* purchaser, without notice from an equitable title, although even that has been sometimes questioned; but whether it will avail against a legal title, is more doubtful. From a review of all the authorities, Sugden in his

treatise, seems to think it clear, that the plea is a protection against a legal as well as an equitable claim, although this conclusion has been doubted by Chancellor Dessausure in *Snelgrove*, who observes, that when the title attempted to be set up is an equitable one, it seems very reasonable that the court should forbear to give its assistance in setting up such equitable title against another title set up by a fair purchaser. But when the complainant comes with a legal title, I do not perceive how he can be refused the aid of the court. In Pennsylvania, under our recording acts, it cannot well be doubted that it would be a valid defence, as well against a legal as an equitable title; *More v. Mahon*, 1 Chan. Cases, 34; *Maitland v. Wilson*, 2 Atk. 241; 3 Atk. 314; *Hardington v. Nichols*, 3 Atk. 304; *Snelgrove v. Snelgrove*, 4 Des. R. 287; *Murray v. Finister*, 2 Johns. C. R. 157."

"The purchaser is not protected, if he has notice previously to the execution of the deeds and payment of the purchase money; for till then the transaction is not complete; and, therefore, if the purchaser had notice previously to that time, he will be bound by it."

"In England the rule is carried to a greater extent; for it would seem that a purchaser is not protected, unless the whole purchase-money has been paid. The precise point came before this court in *Youst v. Martin*, 3 S. & R. 423, where the English doctrine was overruled; and it was held, that where the purchaser has paid part

of the purchase-money, the owner of the equitable title cannot recover the land without repaying the money paid by the purchaser, before receiving notice. With this equitable qualification, the rule itself is distinctly affirmed. The burthen of proof is thrown upon the purchasers; and in this instance the defendants have failed to prove payment in whole or in part of the consideration, independently of the recital in the purchase deed."

"The consideration is secured by mortgage on the property; but that, as has been seen, is not sufficient, inasmuch as equity will protect the purchaser against payment of it."

The recent case of *Haughwout v. Murphy*, 6 C. E. Green, 118; 7 Id. 531, was also a suit for specific performance against the vendor, and a subsequent purchaser from him. It appeared in evidence that the latter bought in good faith, but received notice before he had paid the whole of the purchase-money. It was held, that the complainant's laches in suffering two years to pass before he filed the bill, rendered it inequitable to execute the contract specifically against one whom the delay had contributed to mislead, and that the only relief that could be afforded under the circumstances, was by a decree for so much of the purchase-money as had not been paid at the time of notice. Depue, J., said that the rule which deprives a purchaser who has contracted and accepted a conveyance, and paid part of the

purchase-money in good faith, of the fruits of his purchase without indemnity, was harsh, and not unfrequently oppressive, and might operate inequitably, even when mitigated by the obligation to make indemnity for payments and expenditures before notice. A party who sought to enforce such a rule against a purchaser who was innocent of actual fraud, must seek his remedy promptly, and might lose the right to a specific relief against the lands by laches, and be remitted to the unpaid purchase-money. In like manner, where the bill sought to fasten an unrecorded trust on land which had been sold to a *bona fide* purchaser, who obtained a deed and paid part of the purchase-money before notice, it was held that he might retain the land with a safe conscience, and that the complainant could only look to him for so much of the price as remained unpaid when he was informed of the trust; *Flagg v. Mann*, 2 Sumner, 486, 564.

It was said in like manner, in *Juvenal v. Jackson*, 2 Harris, 519, 524, that to protect a purchaser under the English rule, "there must be execution, and the payment of the entire purchase-money; by our own, it is otherwise. If the purchaser pays the whole before receiving notice, he will be protected for the whole; if part only, he will be protected for so much; if he has paid nothing, he is not entitled to protection."

The doctrine applies *a fortiori* where an unrecorded deed or mort-

gage is set up against a subsequent purchaser, because there is some degree of negligence on the part of the plaintiff, and the defendant will not only be entitled to compensation for payments made before notice, but may, if the case results in an order of sale, have the first claim on the proceeds. See *Duphey v. Frenaye*, 5 Stewart & Porter, 215; *Frost v. Beekman*, 1 Johnson, 288. The question is to a great extent one of circumstances; *Youst v. Martin*; *Duphey v. Frenaye*, 2 Stewart & Porter, 215; but it may be said in general, that when the complainant is not chargeable with laches, the purchaser ought to convey on being indemnified for his outlay before notice; and it follows that if the rents, issues and profits equal or exceed the amount of such expenditure, there can be no further right on his part to compensation, and a decree should be made unconditionally in accordance with the prayer of the bill; *Beck v. Ulrick*, 1 Harris, 636, 639; 4 Id. 499; *Kunkle v. Wolfsberger*, 6 Watts, 126.

A right to compensation may also grow out of the expenditure of money on the land in ignorance of an unrecorded deed, such a grantee being a purchaser *pro tanto*, although the price has not been paid; *Boggs v. Warner*, 6 W. & S. 469, 472.

The payment must be actual, and giving a bond or covenant will not entitle the grantee as a purchaser, because a court of equity will set the obligation aside, if it appears that the title

is defective by reason of an outstanding equity. If the consideration is valuable, it need not consist of money, and payment in the notes of a third person, in goods, or even in other land, may be as effectual as if it were made cash; *Jewett v. Palmer*, 7 Johnson, Ch. 65. So a contract which is irrevocable in its own nature, or through the force of circumstances, may entitle the vendee to protection as against antecedent equities, by placing him under an obligation from which there is no escape. Such is the position of one who becomes bail in a civil or criminal proceeding, and receives a deed from the principal as an indemnity; or of a trustee in a deed of separation, to whom land or chattels are conveyed by the husband in consideration of a covenant to save him harmless from the wife's liabilities. The principle is the same when the purchaser gives a promissory note which is negotiated by the vendor, and payment to the holder of the instrument will then be equally valid, whether made before or after notice; *Freeman v. Deming*, 1 Sandford, Ch. 327. So assuming the vendor's debt to a third person, or giving the purchaser's note to a third person to whom the vendor has assigned his right to the purchase-money, may be equivalent to actual payment; *Frost v. Beekman*, 1 Johnson, Ch. 288; *Jackson v. Winslow*, 9 Cowen, 13.

There is another instance of the rule, that if the obligation be irrevocable, it need not have been

performed. Where a bid has been accepted at a sheriff's sale, a subsequent notice comes too late. For as the vendee is subject to the rule of *caveat emptor*, and must pay the price, although the title proves to be defective, he may claim the favor which a court of equity shows to purchasers.

The limits of the doctrine are ill-defined. In general, one who has accepted a deed cannot refuse to pay the purchase-money on the ground of a defect of title. Fraud is an exception to the rule, and the conscience of a purchaser can seldom be affected by notice, unless the vendor has been fraudulent in disposing of that which is not equitably his. A decree against the purchaser on equitable grounds, therefore, almost necessarily implies that the vendor is not entitled to the price. Where the defect is legal, the purchaser may be dispossessed in the ordinary course of law, and the case is not one for equitable jurisdiction.

Under the revised statutes of New York, an unrecorded conveyance or mortgage is void against a subsequent purchaser in good faith and for value, whose conveyance is first duly recorded. In Pennsylvania, all deeds and conveyances "are to be recorded within six months after execution, and if not recorded as aforesaid, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such deed or conveyance be recorded as aforesaid, before the proving and recording

of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim."

It has been held, under the latter statute, that between successive grantees of the same premises, he is entitled to a preference whose deed is first registered, although not until after the second purchaser has not only paid the price in full, but obtained a conveyance which is subsequently recorded within the time prescribed by law; *Lightner v. Mooney*, 10 Watts, 407; *The Pennsylvania Manufacturing Co. v. Neel*, 4 P. F. Smith. In the case last cited, one Clark conveyed to Kennedy on the 13th of March, 1832, by a deed, which was not recorded until December 24th, 1834. Clarke continued in possession, and on the 26th of February, 1834, sold to Neel for the price of \$750, which was paid in full. Subsequently to this payment, on the 24th of December, 1834, Kennedy recorded his deed, and on the 10th of January, 1835, Neel obtained a deed which was recorded in the following April. The Court below held that as Neel had recorded his deed within six months, he had a better right than Kennedy, who did not record his deed until nearly three years after it was executed, and should, at all events, be reimbursed for the payment, which he had been led to make through Kennedy's negligence. This decision was reversed by the court above. Thompson Justice, said, "the plain teaching of the act is, that in order to be first in right against a prior purchaser's deed, the subsequent purchaser must be

first in time on the record. We have many decisions to this effect in our books, such as *Lightner v. Mooney*, 10 Watts, 407; *Potts v. Anstatt*, 4 W. & S. 307; *Ebner v. Goundie*, 5 Id. 49; *Hetherington v. Clark*, 6 Casey, 393; and *Souder v. Morrow*, 9 Id. 85, where Lowrie, C. J., said: "Purchasers ought to know that they have only a conditional title dependent on the honesty of their vendors, so long as they neglect to record their deeds. They are not safe, merely because of the neglect of a former purchaser to record within six months, and there being no subsequent deed to oppose them, but because among several deceived purchasers, they are first to obey the law." Nor does the possession by the subsequent purchaser, and the making of improvements, alter the case, or change the necessity for the recording the deed to render the title effective against the first purchaser's deed if recorded first. This is clearly shown by some of the cases already cited, and especially in *Goundie v. The Northampton Water Company*, 7 Barr, 233; *Mott v. Clark*, 9 Id. 405, and *Ebner v. Goundie*, 5 W. & S., *supra*."

It results from what is thus said, that a purchaser is not entitled to protection in Pennsylvania for payments made on the faith of the vendor's possession, and in ignorance of a prior deed, which has not been recorded. It is not easy to reconcile such a decision with the cases which establish that a trust arising *ex maleficio*, or from the payment of the consideration,

cannot be enforced against a purchaser, without reimbursing what he has actually paid, although he has not perfected his title or received a conveyance. Under these circumstances, the complainant is not in default, which cannot be said where a grantee omits to record his deed.

It results from what has been said, that giving a bond or other security for the price, will not free the purchaser from antecedent equities, because a chancellor will afford relief by enjoining the vendor; *Beck v. Ulrich*, 1 Harris, 639; 4 Id. 499; *Kunkle v. Wolfsberger*, 6 Watts, 126. Payment in the notes of a third person or of a bank, will, however, be equivalent to actual payment; see *High v. Batte*, 10 Yerger, 555; *Christie v. Bishop*, 1 Barbour, Ch. 105; *Murray v. Ballou*, 1 Johnson, Ch. 566; *Heatley v. Finster*, 2 Id. 15; *Jewett v. Palmer*, 7 Id. 65; *Christie v. Bishop*, 1 Barbour, Ch. 105; *Jackson v. Cadwell*, 1 Cowen, 622; *M'Bee v. Loftis*, 1 Strobhart's Equity, 90; *Hunter v. Sumrall*, 3 Littell, 62; *Harris v. Norton*, 16 Barb. 264; *Patten v. Moore*, 32 New Hampshire, 382; and the same result may follow where the notes of the purchaser are given at the time and negotiated for value; *Frost v. Beekman*, Johnson's Ch.; *Freeman v. Deming*, 3 Sandford's Ch. 327. So the assumption of a debt due by the vendor to a third person, may be a valuable consideration, by imposing an absolute obligation; *Jackson v. Winslow*, 9 Cowen, 13. For a like reason, a purchaser at a sheriff's sale will

not be affected by notice given after his bid has been accepted, although before the execution of the deed and payment of the purchase money, because he is subject to the rule *caveat emptor*, and cannot escape on the ground that the title is defective; *Stuart v. Freeman*, 10 Harris, 120. "In this respect," said Lewis, J., "a sheriff's vendee stands upon a different footing from other purchasers. The latter may be relieved for failure of consideration at any time before payment of the purchase-money. The former is not entitled to such relief, but is bound the moment the sale is made to him. Hence it follows, that although his title is not perfect before the acknowledgment of the sheriff's deed, it is sufficiently so to vest in him an interest in the land, and to bind him for the money. It is, therefore, sufficient to protect him in the payment of it."

The authorities agree in general as to what constitutes a valuable consideration, although not without some divergence. One who pays for land and receives a deed, is obviously a purchaser for value, and so is one who takes a pledge or mortgage as a principal or collateral security for a contemporaneous advance, *ante*, 32. See *Roxborough v. Messick*, 6 Ohio, N. S. 448; *Munn v. M'Donald*, 10 Watts, 270. The case is virtually the same where a valuable right is relinquished, or a new irrevocable obligation assumed, in consideration of the transfer of land or chattels; see *Williams v. Shelby*, 37 New York, 375. Marriage is, there-

fore, a valuable consideration; and where a settlement is made in anticipation of marriage, the wife, and children claiming through her, take as purchasers. So also a conveyance to a trustee in a deed of separation, in consideration of a covenant on his part to indemnify the husband against the wife's liabilities, may be good against antecedent equities, because a chancellor cannot exonerate the covenantor, or compel the principals to live together as man and wife; *Reed v. Garman*, 3 Daly, 414.

Although it is not requisite that money or money's worth should actually have been given by the purchaser, it must at least appear that he did some act on the faith of the sale, by which his position was varied for the worse, and which cannot be retracted; *M'Leod v. The National Bank*, 42 Mississippi, 99. The main current of decision is that the existence of an antecedent debt is not a valuable consideration for the transfer of real or personal estate as security for its payment; *Morse v. Godfrey*, 3 Story, 364, 369. There is no consideration moving from the creditor, who gives nothing for what he receives; *Johnson v. Graves*, 27 Arkansas, 557; *Halstead v. The Bank of Kentucky*, 4 J. J. Marsh. 554; *Morse v. Godfrey*, 3 Story, 363, 390; *Garrard v. The Pittsburgh & Connellsville R. R. Co.*, 5 Casey, 154, 159, 164; *Cary v. White*, 52 New York, 138; *Painter v. Zane*, 2 Gratton, 262; *Upshaw v. Hargrove*, 6 Smedes & Marshall, 292;

Boone v. Barnes, 23 Mississippi, 136.

In *Garrard v. The Railroad Co.*, 5 Casey, 154, 160, Lewis, J. C., said, "There is no evidence to show that any valuable consideration passed from Garrard at the time of the delivery of the bond to him. It is not pretended that he paid anything for it, nor is it alleged that he received it in payment of the pre-existing debt. It was received merely as collateral security for it, without any agreement whatever to forbear or to extend the time of payment. His right of action was not suspended for an instant. If he loses the bond, he sustains no actual loss, because he is left in the condition he was in before he took it. If he delayed recovering his deposit from Larimer, it was his own voluntary act, and, under the evidence, cannot be placed to the account of the bond. The law of Pennsylvania is well settled, that the holder of a negotiable instrument, received merely as collateral security for a pre-existing debt, without any new and distinct consideration, is not a holder for a valuable consideration, so as to exclude a recovery by the owner on showing that the transfer was made without authority." The subject matter in this instance was a bond payable to bearer, but the principle applies *a fortiori* where land is in question. In *Ashton's Appeal*, 23 P. F. Smith, 153, 162, Sharswood, J., said, "that a creditor who takes a mortgage, note, or other security, merely as a security for a pre-existing indebtedness,

and not for money advanced at the time, is not a purchaser for value."

In like manner, a creditor who receives a chattel as security for a pre-existing debt, must stand or fall by the debtor's title, and acquires no right as against the true owner, or one from whom the chattel was obtained by fraud; *Buffington v. Gerrish*, 15 Mass. 156; *Hodgden v. Hubbard*, 18 Vermont, 504; *Poor v. Woodburn*, 25 Id. 235; *Clark v. Flint*, 22 Pick. 231.

It is, nevertheless, held, in some of the States, that the endorsement of a bill or note as security for a pre-existing debt, is a negotiation for value, which frees the instrument from antecedent equities; *Culver v. Benedict*, 14 Gray, 7; 2 Am. Lead. Cases, 251, 5 ed.; *Allaire v. Hartshorne*, 1 Zabriskie, 665; see *Baggaly v. Gaither*, 2 Jones' Eq. 80; *Reddick v. Jones*, 6 Iredell, 109; *Ingham v. Kirkpatrick*, 6 Iredell's Eq. 465; *Halderby v. Blum*, 2 Dev. & Bat. Eq. 51; but these decisions turn on the favor shown to the circulation of commercial paper, and are not in point when the subject matter is not negotiable in the sense of the law merchant. See *Hart v. The Bank*, 33 Vermont, 252; *Myers v. Condit*, 8 C. E. Green, 313; *Manning v. M'Clure*, 36 Illinois, 490.

In *Babcock v. Jordan*, 24 Indiana, 14, the execution of a mortgage as security for an antecedent debt, was, nevertheless, held to render the mortgagee a purchaser for value, within the meaning of the recording acts. See *Anketel v. Converse*, 18 Ohio, N. S.

The question, whether a convey-

ance from a debtor to a creditor is security or payment, is to some extent one of fact; but satisfaction can only result from an agreement to that effect, and if all that appears is that a deed was executed by one party and accepted by the other, in consideration of an antecedent debt, the latter cannot be regarded as a purchaser for value. See *Upshaw v. Hargrove*, 6 Smedes & Marshall, 292; *Boone v. Barnes*, 23 Mississippi, 136; 2 Am. Lead. Cases, 268, 5 ed. *Prima facie*, such a transfer is collateral security, and the onus is on him who sets it up as payment; *Ashton's Appeal*, 23 P. F. Smith, 153, 162; *The Bank v. Godfrey*, 23 Illinois. So one who alleges that he gave time in consideration of the transfer of land, goods, or securities, must make out his case affirmatively; and the mere fact that the property was delivered on account of the debt, is not sufficient; *Kirkpatrick v. Muirhead*, 4 Harris, 123; *Gerrard v. The Railroad Co.*, 5 Casey, 154; *The Pittsburg Railroad Co. v. Barker*, Ib. 160; *Ashton's Appeal*.

It is universally conceded that a cotemporaneous loan or sale, is a valuable consideration for any transfer that may be made as security, *ante*, 32; *Conard v. The Atlantic Ins. Co.*, 1 Peters, 84; *Kiersted v. Avery*, 4 Paige, 114; *Martin v. Jackson*, 3 Casey, 504, 509; 2 American Lead. Cases, 235, 5 ed. It is on this ground that an advance on the faith of a mortgage, operates as a purchase for value, and the principle does not apply to a pledge or mortgage for an antecede-

dent debt, unless there is some new consideration; *The Railroad Co. v. Barker*, 5 Casey, 160; *The Railroad Co. v. Garrard*, Ib. 154. In *Glidden v. Hunt*, 24 Pick. 221, a mortgagee with notice of a prior unregistered deed, assigned the mortgage as security for a pre-existing debt and a sum advanced at the time, and it was held that the grantee in the deed could not redeem without paying both demands, because the presumption was that the assignee made the new advance for the purpose of obtaining an additional security for the amount already due.

Whatever the rule may be under these circumstances, it is clear that the payment of a substantial part of the price of land in cash, will render the grantor a purchaser for value, although the consideration consists as to the residue of an antecedent debt which is satisfied by the conveyance. See *Percival v. Frampton*, 2 Crompton M. & R. 180; *Curtis v. Leavett*, 15 New York, 13, 179; *Baggaly v. Gaither*, 2 Jones' Eq. 80.

It is well settled that the surrender or abatement of a valuable right, is a valuable consideration for any right that may be received as an indemnity or compensation. Where time is given for the payment of a pre-existing debt in consideration of the transfer of real or personal property, and *a fortiori* where such property is received in satisfaction, the transaction will enure as a purchase for value. See *Nugent v. Gifford*, 1 Atkins, 463; *Mead v. Lord Orrery*, 3 Id. 235; *Ruth v. Ford*, 9

Kansas, 17; *Donaldson v. The State Bank*, 1 Devereux, 103; *The Ohio Life Ins. Co. v. Ledyard*, 8 Alabama, 866; *Field v. Schiefelin*, 7 Johnson, 150, *ante*, vol. 1. In the leading case of *Petrie v. Clark*, 11 S. & R. 371, this branch of the law was defined by Ch. J. Gibson, and a transfer of a note which formed part of the assets of the estate, by an executor in payment of his own debt, held to give the creditor a valid title as against the creditors and legatees, if he took the instrument in good faith and without notice of the breach of faith on the part of the executor. The weight of authority is in accordance with this decision, that a conveyance of land in satisfaction, will free it from equities that attached while the title was held by the debtor; *Love v. Taylor*, 24 Mississippi, 567; *The Bank v. Godfrey*, 23 Illinois, 579, 606; *Donaldson v. The State Bank*; *The Ohio Life Ins. Co. v. Ledyard*. See *Thompson v. Blanchard*, 4 Comstock, New York, 303.

It was also said in *Petrie v. Clark*, that although a pledge or mortgage as security for an antecedent debt, does not render the creditor a purchaser for value, the case is different when the time of payment is extended by entering into an agreement for forbearance. This conclusion is entirely consistent with principle, and with the authorities as to the negotiation of commercial paper. Gross inadequacy of consideration is a badge of fraud, and therefore at variance with the character of a *bona fide*

purchaser. But such an inference will not be drawn, unless there is a manifest disproportion between what is given and what is received. This cannot be said when time is given for the performance of an obligation in consideration of a pledge or mortgage, because the delay may result in the loss of the debt.

It is, notwithstanding, established in New York, that taking a bill or note in satisfaction of a pre-existing debt, or in consideration of an agreement for time, is not a negotiation for value; and the principle applies *a fortiori* where the subject matter is goods or land; *Bay v. Coddington*, 5 Johnson, Ch. 54; 20 Johnson, 637; *Evertson v. Evertson*, 5 Paige, 644; *Dickerson v. Tillinghast*, 4 Id. 215; *Lawrence v. Clark*, 39 New York, 128; *Van Henson v. Radcliff*, 17 Id. 580. The same rule has been laid down in some of the other States. See *Powel v. Jeffries*, 4 Scammon, 387; *Clark v. Flint*, 22 Pick. 231; *Wormley v. Lowry*, 1 Humphrey, 468; *Ingram v. Morgan*, 4 Id. 66; *Sargent v. Sterne*, 22 California, 159. And the dicta in *Mungis v. Cordett*, 8 C. E. Green, 313, indicate that it prevails in New Jersey when the question grows out of the conveyance of real estate, although not when a negotiable instrument is involved. See *Wheeler v. Kirtland*, 9 C. E. Green, 555; *Allaire v. Harts-horne*, 1 Zabriskie, 665; *Orme v. Roberts*, 33 Texas, 68. But it is admitted even under the course of decision, that where the creditor cancels or surrenders one se-

curity in consideration of the transfer of another, in the shape of a mortgage or negotiable promissory note, it is a purchase for value; *Padget v. Lawrence*, 10 Paige, 170; *Youngs v. Lee*, 12 New York, 551; *Meads v. The Merchants' Bank*, 25 Id. 240; *Struthers v. Kendall*, 5 Wright, 214, 218; see 2 Am. Lead. Cases, 223, 240, 5 Am. ed.; *Goodman v. Simonds*, 20 Howard, 343, 371. The distinction seems to have originated in the wish to prevent fraud and perjury, and can hardly be sustained on any other ground. The right to proceed to judgment and execution against a debtor, is a security that may be as effectual as a bond or a note; and when it is extinguished by taking land or goods in satisfaction, the creditor ceases to be such and becomes a purchaser. See *Purcell v. Dunbar*, 64 Barb. 239; *Thompson v. Blanchard*, 4 New York, 303. Accordingly, where the recitals in a deed of confirmation showed that the previous conveyance was given in satisfaction, the Vice Chancellor said, that the creditor had parted with his remedy against the debtor, and was consequently a purchaser for a valuable consideration, although the consideration was the cancellation of a precedent debt; *Gouverneur v. Titus*, 1 Edward's Ch. 477; 6 Paige, 345; but the case was determined on another ground in the court above.

To render a promise to give time effectual as a consideration, it must specify how long the delay is to endure, and a promise to forbear for a short time, or for some time,

or even for a reasonable time, is not valid, because there are no means of reducing it to certainty, and the creditor may bring suit the next hour; *Sidwell v. Evans*, 1 Penrose, & Watts, 385; *Lansdale v. Brown*, 4 Washington C. C. R. 151; *The Railroad Co. v. Barker*, 5 Casey, 160, 166. It would, nevertheless, appear, that forbearance in pursuance of request to that effect, may be a valuable consideration for the pledge of goods, land, or securities as an inducement to comply with the request, although the creditor did not promise to forbear, and might have proceeded to collect the debt; *Atkinson v. Brooks*, 28 Vermont, 569; *Griswold v. Davis*, 31 Id. 394; *Whiting v. The Springfield Bank*, 3 Sandford, 222. A request followed by performance, constitutes a contract. See *Powers v. Bumcratz*, 10 Ohio, N. S. 272; 2 American Lead. Cases, 110, 5 ed.; *Rowan v. Adams*, 1 Smedes & Marshall's Ch. 45.

The principle is the same whether the conveyance is directly to the creditor or to one in trust for him; and it is accordingly well settled, that an assignee for the benefit of creditors is subject to all equities that would have been valid as against the assignor; 1 American Leading Cases, 52, 5 ed.; *Willis v. Henderson*, 4 Scammon, 13; *Twelves v. Williams*, 3 Wharton, 485; *In re Fulton's Estate*, 1 P. F. Smith, 211; *Spackman v. Ott*, 15 Id. 131; *Griffin v. Marquandt*, 17 New York R.; *Van Heusen v. Radcliff*, Ib. 580; *Haggerty v. Palmer*, 6 Johnson's Ch. 437; *Johnson v. Cowen*, 60 Barb. 48;

Holland v. Craft, 20 Pick. 32; *Clark v. Flint*, 22 Id. 231; *Mellon's Appeal*, 8 Casey, 121. "The creditors," said Gibson, C. J., in delivering the opinion of the court in *Twelves v. Williams*, "have not released; and the interests of the parties remain as they were at the date of the assignment. The assignees being instruments selected by the debtor, and having no beneficial interest as such, stand in no personal or distinctive equity; for though a pecuniary consideration is always inserted in the deed, where they are not creditors (the necessity of which, to protect the transaction from the statutes of Elizabeth, is shown in *Roberts on Fraudulent Conveyances*, 429, and recognized in *Howry v. Miller*, 3 Penn. Rep. 381), it is merely nominal, and not that substantial sort of equivalent which gives a claim to something in return. Their equity, if any, must be the equity of the creditors represented by them; and what substantive or formal advantages have these surrendered in compensation for the benefits expected from the assignment? No such surrender is pretended. Nor are they placed in the category of purchasers by their character or position. That they are not protected as such by the recording acts, was declared in *Heister v. Fortner* (2 Binn. 40); and though it was said in *Petrie v. Clark* (11 Sergeant & Rawle, 377), that the extinguishment of a debt is a valuable consideration for a thing taken in satisfaction of it, the acceptance of it as a security without a stipulation for for-

bearance, was held to be otherwise. So also in *Ramsay's Appeal* (2 Watts, 232), creditors were held to stand exactly in the equity of their debtor. I know of no case in which the abstract existence of debts was held to be a valuable consideration for a transfer of property to trustees for distributive payment, except *Bayley v. Greenleaf*, to be presently noticed.

"In *Lord Paget's Case* (1 Leon. 194), it was held, that the mere destination of property to payment of the grantor's debts, by a general assignment to a stranger, is not a consideration even to raise a use on a covenant to stand seised, and consequently, not to pass even the legal title; and there is therefore nothing to sustain it, under the statute of Elizabeth, against a creditor or a purchaser, though it is good against an heir; *Leach v. Leach* (Ch. Ca. 249). But where the creditors are party to the deed, there is a clear valuable consideration in the forbearance of suit and mutual accommodation expressed by the terms, or implied by the nature of the transaction; *Roberts on Fraud*, Con. 431. In the case before us, the creditors not having become parties to the transaction, by performance of the condition, which alone could make them so, were bound in the meantime to no forbearance or accommodation whatever."

This language must be taken with some qualification. It is immaterial that the creditors are parties to the transaction, or that it is ratified by them, unless they relinquish some right or enter into

an engagement on the faith of the assignment. A release of the debt in consideration of such a transfer, may on a principle, already stated, be a valuable consideration; but it must still appear that the assignment purported to confer a good title to the specific land or chattels which the assignee claims to hold as a purchaser. In *Clark v. Flint*, 22 Pick. 231, a bill was filed to enforce an equitable lien on a vessel, arising under a contract with one Flint, and the answer averred that Flint made a general assignment of his property, including the vessel, in trust for the benefit of his creditors, and that the defendants thereupon accepted the property and released the debt; and it was held, that as the assignment was general of Flint's right and title, it could not be inferred either that he meant to confer a right to the vessel discharged from the trust, or that the defendants would not have released if they had known that the trust existed.

It is, moreover, plain, that a release by a creditor will not entitle him as a purchaser, unless it is so worded as to take effect at once, for if it rests merely in the covenant, and the assignor's title fails, equity will give relief by declaring the covenant invalid. Such a covenantor is at the most in the situation of a purchaser who has given a bond or other security instead of paying; *Ludwig v. Highley*, 5 Barr, 132, 140. It would also appear from the language held in this instance, that a general assignment of all a debtor's property

will not pass the title to lands or chattels which he holds in trust, or that belong in right and equity to another, unless they are so clearly designated or described as to leave no doubt of the design; because the court will not infer that an instrument was made with fraudulent intent where the language admits of a different interpretation; *ante*, 72; *Smith v. The Bank*, 21 Alabama, 125.

"It is," said Bartley, J., in *White v. Denman*, 1 Ohio, N. S. 112, "a principle of familiar application in equity jurisprudence, that a specific equitable interest in real estate, whether it be created by an executory agreement for the sale and conveyance of land, or by a deed so defectively executed, as not to pass the legal estate, but treated in equity as a contract to convey, or even a vendor's lien, is upheld by courts of equity, and uniformly takes priority, not only over judgment liens, and assignments in bankruptcy, but also assignments for the benefit of creditors generally. This doctrine was recognized in *Manley v. Hunt et al.*, 1 Ohio, 257, and has been affirmed by a series of adjudications in this State ever since; *Norton v. Beaver*, 5 Ohio, 181; *Barr v. Hatch*, 3 Ohio, 538; *Minns v. Morse*, 18 Ohio, 568. The same principle is well established in other states; *Ellis v. Townsley*, 1 Paige, 280; *Gouveneur v. Titus*, 6 Paige, 347; *Hoagland v. Latourrette*, 1 Green's Ch. 254; *Eppes v. Randolph*, 2 Calls, 103, 154; *Everett v. Stone*, 3 Story, 447; *Lodge v. Tysley*, 4 Simons, 70; 2 Story's

Eq. § 1503; and has always prevailed in England; *Finch v. Winchelsea*, 1 Pere Wms. 277; *Prior v. Panpraze*, 4 Price, 99; *Legard v. Hodges*, 1 Vesey, Jr. 477."

In *Bayley v. Greenleaf*, 7 Wheaton, 46, a vendor's lien for unpaid purchase money was held to be invalid as against creditors, and, therefore, against one to whom the vendee made an assignment in trust for the payment of his debts, and the same rule prevails in some of the State tribunals; *Dunlap v. Barnet*, 5 Smedes & Marshall, 702; *Richson v. Richson*, 2 Grattan, 497; vol. 1, notes to *Mackreth v. Symmons*; but these decisions proceed on the notion that a court of equity ought not to give a preference in a contest between creditors, and do not necessarily conflict with the main current of decision. But this cannot be said of *Wickham v. Martin*, 13 Grattan, 427, where it was held that a fraudulent sale could not be avoided, after the goods had been transferred to an assignee for the benefit of creditors. "Such an assignee had always been regarded in Virginia as a purchaser for value."

It is equally well settled, that a creditor does not become a purchaser by obtaining judgment, or levying on the real or personal estate of a debtor. Such a lien is therefore subject to every claim that could have been maintained against the defendant in the judgment; *Jackson v. Town*, 4 Cowen, 599; *Jackson v. Post*, 9 Id. 120; 15 Wend. 588; *Buchan v. Sumner*, 2 Barbour's Chancery, 165; *White*

v. Denman, 1 Ohio, N. S. 110; *Coleman v. Cock*, 6 Randolph, 618; *Ash v. Livingston*, 2 Bay, 80; *Massey v. M'Ilvain*, 2 Hill's Ch. 426; *Orth v. Jennings*, 8 Blackford, 420; *Williams v. Hollingsworth*, 1 Strobhart's Equity, 103; *The Bank v. Gourdin*, 1 Spear's Equity, 20; *The Bank v. Campbell*, 2 Richardson's Equity, 179; *Jackson v. Dubois*, 4 Johnson, 216; *Cover v. Black*, 1 Barr, 493; *Shryock v. Wagoner*, 4 Casey, 430; *Watkins v. Wassell*, 15 Arkansas, 73, 95; *Hacket v. Colladay*, 32 Vermont, 97; *Hart v. The Bank*, 33 Id. 252; *Field v. Kearns*, 42 Id. 106; *Green v. Allen*, 45 Georgia, 205.

It is not just that property which belongs in equity and good conscience to A., should be taken for the debt of B., and a chancellor will not suffer the lien which the judgment creditor has acquired on the legal title, to be used as a means of producing such a result; *Arnold v. Patrick*, 6 Paige, 310, 315; *Lane v. Ludlow*, Ib. 316, note; *Thompson v. Edelin*, 2 Harris & Johnson, 64; *Wilks v. Harper*, 2 Barb. Ch. 338, 355; *Brown v. Pierce*, 7 Wallace, 205; *Baker v. Morton*, 12 Id. 150; *Brace v. The Duchess of Marlborough*, 2 P. Wms. 491; *ante*, vol. 1, 599; *Conrad v. The Atlantic Ins. Co.*, 1 Peters, 384, 444; *Martin v. Jackson*, 3 Casey, 504; *Cover v. Black*; *Kiersted v. Avery*, 4 Paige, 14; *Mooney v. Dorsy*, 7 Smedes & Marshall, 22; *Rogers v. Gibson*, 4 Yeates, 111; *Heister v. Fortner*, 2 Binney, 40.

"At law a judgment is a gene-

ral lien upon all the legal interest of the debtor in his real estate, but in chancery that general lien is controlled by equity, so as to protect the rights of those who are entitled to an equitable interest in the land or in the proceeds thereof;" *White v. Carpenter*, 3 Paige, 217, 266. *In re Howe*, 1 Id. 125.

It follows that a purchaser under an execution issued on the judgment, is subject to every equity of which he had notice, and that would have been valid as against the judgment debtor; *White v. Carpenter*; *Moyer v. Hinman*, 3 Kernan, 180; *Sieman v. Schurk*, 29 New York, 598, 613. This is equally true whether the purchase is made by a third person or by the plaintiff in the judgment; *Eells v. Towsley*, 1 Paige, 280; *Gouverneur v. Titus*, 6 Id. 347. In *Gouverneur v. Titus*, a deed was accordingly reformed so as to include land which had been omitted by mistake, as against one who bought with notice, at a sheriff's sale, under a judgment which had been obtained against the grantor subsequently to the execution of the deed.

The rule applies even when the judgment is confessed for advances made or goods sold at the time. Such a transaction may operate as a purchase, but if so, it is a purchase of all the debtor's right title, and interest, which consequently does not confer any right that could not have been enforced by him. This distinguishes a judgment creditor from one who parts with value on the faith of a pledge or mortgage of a specific

or ascertained tract of land, or chattel; *Cover v. Black*, 1 Barr, 493. See *Hubett v. Whipple*, 57 Barb. 224. A judgment creditor may, therefore, be restrained by injunction from proceeding to levy and sell the legal estate to the prejudice of one who is equitably entitled, or the latter may give notice at the sale, and thus affect the conscience of the purchaser.

It does not vary the application of this principle that the judgment creditor is ignorant of the prior equity or unregistered deed, and could not ascertain its existence by consulting the record or in any other way; *Rodgers v. Bonner*, 45 New York, 379. The rule and its reason were clearly stated by Chief Justice Gibson in *Cover v. Black*, 1 Barr, 493. "It was," said he, "ruled in *Rogers v. Gibson*, 4 Yeates, 111, and *Huston v. Fortner*, 2 Bin. 40, that a judgment creditor is not a purchaser within the recording act of 1775, and I take the consequence to be that he is not entitled to notice. Mr. Justice Yeates took the broad ground, that the judgment creditor was not within the purview, because he had lent his money, not specifically on the security of the land, as a mortgagee lends, but on the security of both person and property; and his principle is fully borne out by the cases to which he refers for it. In *Finch v. Winchelsea*, 1 P. Wms. 227, it was held, that an agreement, on valuable consideration, to convey, defeats a subsequent judgment in equity; and I, consequently, take it, that an actual conveyance, though not recorded,

defeats it at law. 'It was granted,' says the reporter, 'that if Lord Winchelsea, the covenantor, had made a mortgage of the premises for valuable consideration, and without notice, such mortgage, in regard that he might have pleaded his mortgage, and would have been as a purchaser without notice, should have held place against the intended purchaser, for then the money would have been lent on the title and credit of the land, and would have attached on the land; which would not be so in the case of a judgment creditor, who (for aught that appears) might have taken out execution against the person or goods of the party that gave the judgment; and a judgment is only a general security, not a specific lien on the land.'"

"In *Brace v. The Duchess of Marlborough*, 2 P. Wms. 491, the principle is expressed in still more pointed terms. 'No man,' it is said, 'can call a judgment creditor a purchaser; nor has such creditor any right to the land; he has neither *jus in re*, nor *ad rem*; and, therefore, though he release all right to the land, he may extend it afterwards. All that he has by the judgment is a lien on the land, but *non constat* that he will ever make use thereof, for he may recover the debt out of the goods of the cognisor by *fiery facias*; or he may take the body, and then, during the defendant's life, he can have no other execution; besides, the judgment creditor does not lend his money on the immediate view or contempla-

tion of the cognisor's real estate; nor is he deceived or defrauded, though the cognisor of the judgment had before made twenty mortgages of his real estate.' The same principle is found in an anonymous case, 2 Ves. Sen. 662. From these authorities it follows, that a judgment creditor stands on the foot of his debtor."

It is established, in accordance with these decisions, that a judgment against a vendor who has entered into a written contract of sale is valid only as it regards the unpaid purchase-money. On tendering the amount due, the vendee is entitled to a conveyance free from the judgment lien, and will be credited with payments made subsequently to the judgment, unless he had actual notice; *Thompson v. Edelin*, 2 Harris & Johnson, 64; *Parkes v. Jackson*, 11 Wend. 442; *Moyer v. Henman*, 3 Kernan, 180.

It results from the same principle that an equitable or imperfect lien or title which would be good against the defendant in a judgment, is equally good against the plaintiff, or a purchaser with notice, under the judgment. *Morris v. Mowatt*, 2 Paige's Ch. 586; *Churchill v. Morse*, 23 Iowa, 229; *Coster v. The Bank of Georgia*, 24 Alabama, 371; *O'Rourke v. Conner*, 39 California, 442. An unrecorded deed is within this rule, and so is an unrecorded mortgage, where a different rule has not been established by the Legislature; *Lappington v. Oeschli*, 49 Missouri, 244; *Knell v. The Building Association*, 34 Mary-

land, 67; *Severs v. Delaschumitti*, 11 Iowa, 174; *Hampton v. Levy*, 1 M'Cord, Ch. 107, 111; *Valentine v. Havener*, 20 Id. 133; *Porter v. M'Dowell*, 43 Id. 93; *Stillwell v. M'Donald*, 39 Id. 282; *Bell v. Evans*, 10 Iowa, 353. A failure to record a grant or incumbrance is material only as it regards one who has been injured by the omission. A purchaser may justly complain of such a neglect, because he presumably gave value on the faith of the record, but such an allegation cannot be made by a judgment creditor. For a like reason, an equitable appropriation or assignment of a chattel, may be valid against assignees in bankruptcy, and judgment creditors, where it would be set aside at the instance of a purchaser; *Langton v. Horton*, 1 Hare, 549; *Mitchell v. Winslow*, 2 Story, 260.

It was, nevertheless, held in *Wheeler v. Kortland*, 9 C. E. Green, 555, that the equity of a judgment creditor is equal to that of a prior equitable mortgagee for a precedent debt, and that he is consequently entitled to priority as having the law, although the rule is different where the consideration of the mortgage is a cotemporaneous sale or advance. The same point was decided in *Dwight v. Newell*, 3 New York, 185. It is no doubt true that creditors at large have an equal claim on the consideration of a chancellor, although their demands originated at different periods. But it is not less well established under the authorities, that a specific transfer or appropriation, al-

be it as a security for an existing debt, should be preferred to a subsequent general lien. For as the debtor cannot rightfully transfer to a third person what he has already bestowed on the creditor, so such a wrong will not be done through the act of the law.

The subject is within the control of the Legislature, which may provide that deeds or mortgages shall not take effect as against creditors until they are placed on record. Such is the rule as it regards mortgages in Pennsylvania, Ohio, and Illinois; *Mayham v. Coombs*, 14 Ohio, 428; *Jacques v. Weeks*, 7 Watts, 261; *Uhler v. Sanderson*, 11 Harris, 110; *Stanley v. Roberts*, 13 Id. 148; *Bloom v. Noggle*, 4 Id. 45; *Holliday v. The Bank*, 16 Id. 533; *White v. Denman*, 1 Ohio N. S. 110; *McFadden v. Worthington*, 45 Illinois, 362; *Genter v. Wiseley*, 47 Id. 433; and it extends in some of the States to all instruments which affect the title to real estate; *Davidson v. Cowen*, 1 Devereaux, Eq. 470; *Stanley v. Perley*, 5 Maine, 399; *Odiorne v. Mason*, 9 New Hampshire, 24; *Coffin v. Ray*, 1 Metcalf, 212; *M'Clure v. Thistle's Ex'ors*, 2 Grattan, 182; *Hopping v. Burnam*, 2 Iowa, 109; *Brown v. Tuthall*, 1 Id. 189; *Hays v. M'Guire*, 8 Yerger, 92; *Miller v. Estell*, Ib. 452; *Edwards v. Brinker*, 9 Dana, 69; *M'Cullough v. Somerville*, 8 Leigh, 415; *Mallory v. Stodder*, 6 Alabama, 801; *Smith v. Lurch*, 9 Id. 208; *Center v. The Bank*, 22 Id. 743. But as such an interpretation contravenes the rule that creditors

are not purchasers, it will not be adopted unless such is clearly the meaning of the statute; *The Bank of Michigan v. Carpenter*, 7 Ohio, 21; *Lake v. Dove*, 10 Id. 415; *Valentine v. Havener*, 20 Missouri, 133; *Davis v. Ownsby*, 14 Id. 176.

In applying such an enactment, those only are to be regarded as creditors who obtain a lien by judgment or attachment before an antecedent deed or mortgage is recorded, unless the words are so broad as manifestly to include creditors at large; *Martin v. Dryden*, 1 Gilman, 177; *Massey v. Westcott*, 40 Illinois, 160.

The decisions vary in each State with the language of the recording acts, and while a judgment creditor has precedence in Illinois of equities which do not appear of record; *Massey v. Westcott*, 40 Illinois, 160, an unregistered equitable mortgage may be valid in Alabama against the lien of a judgment, although registry is essential to the validity of a mortgage which is so executed as to pass the legal title; *Fash v. Ravesies*, 32 Alabama, 451.

Although the lien of a judgment is limited to the estate of the debtor, and does not bind any right that could not have been enforced by him, this rule does not unnecessarily apply to a purchaser under the judgment. The right of a buyer to protection against latent defects, which he has no means of ascertaining, is the same whether the sale is voluntary or the act of the law. It follows that a purchase at a judicial sale perfected

by the execution of a deed discharges prior equities, and antecedent grants or mortgages which have not been duly recorded, and are not brought home to the purchaser by notice; *Gouverneur v. Titus*, 6 Paige, 251; *Jackson v. Town*, 4 Cowen, 599; *Jackson v. Post*, 9 Id. 120; 15 Wend. 588; *Jackson v. Chamberlain*, 8 Id. 620; *Waldo v. Russell*, 5 Missouri, 387; *Harrison v. Carhelin*, 23 Id. 126; *Den v. Rickman*, 1 Green, 43; *Scribner v. Lockwood*, 9 Ohio, 184; *The Ohio Life Ins. Co. v. Ledyard*, 8 Alabama, 866; *Orth v. Jennings*, 8 Blackford, 420; *Heister v. Fortner*, 2 Binney, 40, 45; *Mann's Appeal*, 1 Barr, 24; *Kellam v. Janson*, 5 Harris, 467; *Stewart v. Freeman*, 10 Harris, 120, 123; *Paine v. Moreland*, 15 Ohio, 435; *Rogers v. Hassey*, 36 Iowa, 66. The rule applies although the judgment creditor becomes the purchaser; and exchanges receipts with the sheriff, or pays the money to him, and receives it back in payment of the judgment debt; *Wood v. Chapin*, 3 Kernan, 505; *Gower v. Doheny*, 33 Iowa, 39. Such a payment not only includes costs in addition to the amount originally due, but changes the position of the creditor for the worse by satisfying the judgment. In *Gower v. Doheny*, Day, C. J., said that a purchaser at sheriff's sale takes the land discharged of every claim or equity which would be invalid against an ordinary purchaser, and that the rule applies whether the judgment creditor is the purchaser, or the premises are sold to a stranger. The

point has been decided the other way in several instances; *Arnold v. Patrick*, 6 Paige, 310, 316; *Sargent v. Storm*, 22 California, 359; *Williams v. Hollingsworth*, Strohart's Eq. 103; but seemingly without sufficient consideration.

The question could not arise at common law where the right of a judgment creditor did not extend beyond the debtor's, and was limited to taking the rents and profits under a *levari facias* or *elegit*. Such a remedy is not analogous to that afforded in the United States, where land is assets for the payment of debts, and may be sold absolutely under a *fi. fa.* or *venditioni exponas*. The common law doctrine was, nevertheless, invoked in *Freeman v. Hill*, 1 Dev. & Bat. Eq. 389; *Polk v. Gallant*, 2 Id. 395, as a reason for holding that a purchaser under an execution is subject to every equity that would have been binding on the defendant in the judgment, and is not precluded by its lien; *Freeman v. Mibani*, 2 Jones Eq. 44. A similar view was taken in *The Bank of South Carolina v. Campbell*, 2 Richardson, Eq. 279. See *Williams v. Hollingsworth*. The policy of this doctrine is exceedingly questionable, because it has a manifest tendency to discourage bidding, and cause the property to be sold under value.

A purchaser under a judgment is not entitled as such to protection against any equity or imperfect title, of which he had notice at or before the sale; *Prescott v. Heard*, 10 Mass. 60; *Davis v. Ownsby*, 14 Missouri, 170; *Valen-*

tine v. Havener, 20 Id. 133; *Chapman v. Coats*, 26 Iowa, 288. A mortgage may consequently be valid as against such a purchaser, although not registered until after the judgment; *Sappington v. Oeschli*, 49 Missouri, 246. So he will not acquire a title as against a grantee who is in possession, although under an unrecorded deed.

It is, nevertheless, well settled, that the title of a purchaser at a judicial sale relates back to the judgment, and is co-extensive with the judgment lien. It will not, therefore, be impaired by notice that the premises are subject to an unrecorded mortgage, which is invalid as against the judgment creditor; *Uhler v. Hutchinson*, 11 Harris, 110; *Calder v. Chapman*, 2 P. F. Smith, 359, 362; *Jacques v. Weeks*, 7 Watts, 261, 270; *Henderson v. Downing*, 24 Mississippi, 106. Notice is material only where the sale is wrongful or will prejudice some right that ought to be preserved. The rule that what can rightfully be sold may as rightfully be bought, is as true of a purchaser with notice at a judicial sale, as it is of a purchaser with notice from a purchaser without notice; *Pollard v. Cocke*, 19 Ala. 188; *De Vendel v. Hamilton*, 27 Id. 156; *Fash v. Ravesies*, 32 Id. 451; *M'Fadden v. Worthington*, 45 Illinois 362; *Massey v. Westcott*, 40 Id. 160; *Gintean v. Wisely*, 47 Id. 433. "The notice given at the sheriff's sale," said Knox, J., in *Uhler v. Hutchinson*, 11 Harris, 110, 113, "could not affect the judgment creditor or the purchaser.

As the one had the legal power to sell the estate without reference to the mortgage, so the other had the right to buy in disregard of it, either as a conveyance or a lien."

"It has been adjudicated by this court," said Sergeant, J., in *Jacques v. Weeks*, 261, 270, "that a judgment creditor takes priority over an unrecorded mortgage; *Semple v. Burd*, 7 Serg. & Rawle, 290; *Friedly v. Hamilton*, 17 Id. 70. If so, a purchaser at sheriff's sale, under such judgment, cannot be affected by a notice of a mortgage, which notice is given subsequently to the judgment; for if he could, it would render the mortgage not available. It would give it a priority over the judgment, and take away the value of the judgment to the amount of the mortgage. Notice to a purchaser at sheriff's sale may affect him with a trust, as in *Barnes v. M'Clinton*, 3 P. R. 67, because that is in nature of a conveyance, and conveyances, though not recorded, transfer the land free of subsequent judgments. But it is otherwise with an unrecorded mortgage. The judgment binds the land, as if it remained in the mortgagor, and the purchaser at sheriff's sale is not affected by notice of an unrecorded mortgage given after the entry of the judgment, but takes the land as clear of it as he does of a trust of which he has no notice." For a like reason such a purchaser will not be affected by an equity which was obligatory on the defendant in the judgment, unless it was also obligatory on the judgment creditor. Or to state the rule somewhat dif-

ferently, it must appear not only that the purchaser had notice, but that notice was also given to the judgment creditor in a way to bind his conscience, or that the equity was valid as against him without notice. It is, therefore, material to determine when notice to the plaintiff in a judgment will be restrictive of his right, and thus indirectly affect one who buys subsequently at a sheriff's sale.

In general, notice does not preclude any step that may be requisite to vindicate or perfect an interest that has been already acquired. What a chancellor regards as wrongful is the acquisition of a right with knowledge that it cannot be exercised consistently with the rights of others. It is because notice does not operate retroactively, that a *bona fide* purchaser or mortgagee may take a conveyance of an outstanding legal title for the purpose of excluding an equity which is not made known to him until after the completion of the sale; *ante*; The principle is stated by Lord Keeper Henly, in *Belchier v. Butler*, 1 Eden, 523, 530: "The rule of equity requires no more than that the third mortgagee should not have had notice of the second at the time of lending the money; for it is by the lending the money without notice, that he becomes an honest creditor, and acquires the right to protect his debt. But he is not compelled to look for this protection till his debt is in danger of being prejudiced; and, therefore, when that danger is first discovered to him (whether it be

by suit in equity, or by any extra judicial means), as the honesty of his debt is not affected by the discovery, so the right of protecting that debt, and the efficacy of such protection, are not prejudiced. Hence arose the rule which permits the subsequent incumbrancer to purchase *pendente lite*."

For a like reason, if a creditor can be affected by notice, it must be given before the debt is contracted, or at all events, before it has passed into judgment. Where a judgment lien has attached to the exclusion of an unrecorded deed or mortgage, it will not be displaced by notice, nor will notice render it inequitable to enforce the lien; *Uhler v. Hutchinson*, 11 Harris, 110; *Calder v. Chapman*, 2 P. F. Smith, 359, 362; *Davey v. Littlejohn*, 2 Iredell's Equity, 495; *Pendleton v. Batton*, 3 Conn. 406; *Washington's Lessee v. Trousdale*, *Martin v. Yerger*, 385; *Lillard v. Ruckers*, 9 Yerger, 64; *Guerrent v. Anderson*, 4 Randolph, 208; *De Vendell v. Hamilton*, 27 Alabama, 156; *Pollard v. Cocke*, 19 Id. 188; *Gintean v. Wisely*, 47 Illinois, 433. The better opinion therefore seems to be that the judgment creditor may take the debtor's land in execution, although he knew of the mortgage before the case went to judgment; and a purchaser under the writ will not be affected by a notice given at the sale. So notice will not operate retroactively to defeat the lien of an attachment; *Stanly v. Perley*, 5 Maine 369; *Emmer-son v. Littlefield*, 12 Id. 148;

Matthews v. Demeritt, 22 Id. 312; *Coffin v. Ray*, 1 Metcalf, 212; *Curtis v. Mundy*, 3 Id. 405; *Priest v. Rice*, 1 Pick. 164; *Carter v. Champion*, 8 Conn. 548; *Rogers v. Jones*, 8 New Hampshire, 264; *Garwood v. Garwood*, 4 Halsted, 193; *Martin v. Dryden*, 1 Gilman, 187. And the weight of authority is, that in a struggle for priority among creditors at large, or between such a creditor and purchaser, each may conscientiously retain every legal advantage arising from his diligence or his opponent's neglect; *Davidson v. Cowan*, 1 Devereux's Eq. 470; *Mayham v. Coombs*, 14 Ohio, 428; *Davey v. Littlejohn*, 2 Jubell Eq. 495; *Pendleton v. Batten*, 3 Conn. 406; *Washington v. Trousdale*, Martin & Yerger, 385; *Lillard v. Ruckers*, 9 Yerger, 64.

"There is no equity," said Ruffin, J., in *Davidson v. Cowan*, 1 Devereux's Equity, 470, "against a creditor, restraining him from using all legal means to obtain a preference and ultimate satisfaction of his debt. The period of contracting the debt is wholly immaterial. One creditor may justly obtain satisfaction, although he knows that he thereby deprives his debtor of the means of paying a debt previously contracted. Nothing but the actual divesting of the debtor's estate, or a specific valid lien on it at law, can defeat a creditor. If he obtains his execution before an elder debt is ripened into judgment, he may satisfy himself. If he gets the legal preference by his execution before a creditor by a mortgage per-

fects his title by registration, he may likewise satisfy himself. Each has an equal equity, and one has the law. He may keep it. The case of a purchaser is entirely different. He has no equity if he buys what he knows another cannot sell."

The principle was stated with equal clearness in *Muse v. Letterman*, 13 S. & R. 167. "The intention," said Duncan, J., "of the registering act, as to mortgages, would be entirely frustrated, if notice after subsequent debts contracted, or security given, were to postpone. If one, having notice of an unregistered, unsatisfied mortgage, colludes with the mortgagor, and gives him a credit for the purpose of defeating such mortgage, and obtains a security on the mortgaged premises, this would be a manifest fraud, and ought not to prevail. But such fact was not offered to be proved, but merely that Smith had notice of the unrecorded mortgage, after the debt was contracted, and after he had obtained his judgment bond, but before it was entered on record. His equity is equal, if not superior to the equity of the mortgagee. He has the law on his side, and his lien ought to prevail. Where a man is affected with notice of an unregistered instrument, which the law requires should be registered, it is on the ground of fraud. A man cannot be said to be guilty of fraud, who obtains security for a debt contracted before he had notice, and equity will not take from a fair creditor, any legal priority, or even a plank,

which, in a struggle between him and another creditor, he has laid hold of as a security."

The *dicta* in Pennsylvania are to the same effect; *Jacques v. Weeks*, 7 Watts, 261, 270; *Hulings v. Guthrie*, 4 Barr, 123; *Muse v. Letterman*, 13 S. & R. 167; *Uhler v. Hutchinson*, 11 Harris, 110; *Calder v. Chapman*, 2 P. F. Smith, 359, 362; but the point was not actually before the court in these instances, and what they actually determine is, that notice after judgment is inoperative. It was accordingly held in *Britton's Appeal*, 9 Wright, 172, that notice of a mortgage before credit is given, will supply the want of registry, although the words of the statute are express that "no mortgage, except for purchase-money, shall be a lien until it is left for record." Strong, J., said, that if "the party has notice before changing his position, it is immaterial whether he is a creditor or a purchaser; and that, in the opinion of the court, to give credit, knowing that the debtor's estate is subject to encumbrances which have not been recorded, and then proceed to a judgment and execution which will render them invalid, is as much at variance with equity and good conscience as if the same end was attained by taking a deed or mortgage." It is, nevertheless, conceded that notice to the creditor, will not affect a *bona fide* purchaser under a judgment obtained subsequently for the debt, and it seems that notice to the purchaser will not be sufficient, unless he is also informed that the creditor had notice.

It is held in like manner in Alabama, that if the plaintiff in a judgment has notice of a mortgage before he acquires a lien, it will be valid and operative against him, notwithstanding the want of registration; but this course of decision depends on the language of the statutes of that State; *Smith v. Zurcher*, 9 Ala. 208; *Daniel v. Sorrels*, *Ib.* 436; *Wallis v. Rhea*, 10 *Id.* 451; 12 *Id.* 646; *Jordan v. Mead*, *Ib.* 247; *Wyatt v. Stewart*, 34 *Id.* 720.

A different view prevails in Virginia, where notice, whenever given, does not affect a creditor so as to preclude him from exercising any right which the law confers; *Guerrent v. Anderson*, 4 Randolph, 198. "Though," said Carr, J., "a creditor has notice of an unrecorded deed, he commits no fraud by crediting the grantor upon his general responsibility. If, in the lawful pursuit of his rights, he gets a lien on the property by the delivery of an execution to the proper officer, as in the case before us, or otherwise, having equal equity with the party claiming under the deed, he falls within the settled rule of equity; that between parties having equal equity, he who has the law also, shall prevail. That the second instruction of the judge would violate this rule, is perfectly clear; for, though the appellee was a purchaser, and not a creditor, and in that character, in an ordinary case, would fall within the provisions of the act in regard to purchasers, yet being a purchaser under a sale in behalf of a creditor, he holds

his rights and occupies his place in this controversy; otherwise, the rights of a creditor would be of no avail."

It has been held that even where the statute expressly or impliedly declares unregistered deeds and mortgages valid as against creditors and purchasers with notice, still notice must be given before a lien is obtained by judgment or attachment; *Daniels v. Sorrels*, 9 Alabama, 436; *The Ohio Life Ins. Co. v. Ledyard*, 8 Id. 866; *Burt v. Cassity*, 12 Id. 734; *Center v. The Bank*, 22 Id. 743; *Dixon v. Doe*, 1 Smedes & Marshall, 70; *Taylor v. Eckford*, 11 Id. 21; *Clement v. Rich*, 9 Id. 535; *Walker v. Gilbert*, Freeman, 85; and if it is not, a purchaser under the judgment, will acquire an unincumbered title, although he has notice at or before the sale; *Henderson v. Downing*, 29 Mississippi, 106; and such would also seem to be the rule in Kentucky; *Helm v. Logan*, 4 Bibb. 78; *Graham v. Samuel*, 1 Dana, 166; *Edwards v. Drinker*, 9 Id. 69; although in *Morton v. Robards*, 4 Dana, 258, notice after judgment was held to be in time.

The authorities agree that the defendant must prove that he gave value, as alleged in the plea or answer, and that unless the evidence on this head is precise and full, the defence will fail; *Lloyd v. Lynch*, 4 Casey, 419; *Ashton's Appeal*, 23 P. F. Smith, 153, 162; *Garrard v. The R. R. Co.*, 5 Casey, 154; *The Pittsburgh R. R. Co. v. Barker*, Ib. 160; But it is equally well settled that he need not adduce testimony

in the first instance in support of the denial of notice in the plea or answer. This results from the presumption in favor of good faith, and because he who has the affirmative of the issue must maintain it. When it is shown that the purchase was made for a valuable consideration, the burden of proving notice devolves on the complainant, and rebutting or explanatory evidence may then be adduced by the defendant; *Carter v. Allan*, 21 Grattan, 241; *Carr v. Callaghan*, 3 Littell, 365.

In general the allegations of the plea or answer are not evidence that value was paid or that the defendant did not receive notice. It was well settled before the statutes which render parties competent, that the defendant's oath was not admissible in support of new matter not responsive to the bill. And the principle is still applicable to the pleadings, although both parties may now be called as witnesses before the master or examiner appointed to take testimony.

One who alleges that he is a purchaser for value must present his case with certainty, in order that it may not be a cover for fraud; *Leftwich v. Orne*, 1 Freeman's Ch. 207; *Jenkins v. Bodley*, 1 Smedes & Marshall's Ch. 338. The conveyance by which he acquired title must be set forth briefly, showing the date, parties and contents. He must not only aver that he gave a valuable consideration, but what it was, and when paid or transferred; *High v. Batte*, 10 Yerger, 385; *Donnell v. King*, 7 Leigh, 393; *The Bank v.*

Godfrey, 23 Illinois, 579, 606; *Moore v. Clay*, 7 Alabama, 742, 751.

It must appear that the purchase-money was *bona fide* and actually paid; *Snelgrove v. Snelgrove*, ante, 82; *Lloyd v. Lynch*, 4 Casey, 419, 425. And the allegation must be substantiated by evidence independently of the recital in the deed; *Lloyd v. Lynch*; *Henry v. Rainman*, 1 Casey, 360. And as good faith is not less important than the payment of value, the plea or answer must be sufficiently precise to show that from the inception of the transaction to its close, the defendant had no notice or knowledge that could affect his conscience or render it inequitable for him to make the purchase. "The plea or answer must state the deed of purchase, the date, parties, and contents briefly; that the vendor was seised in fee, and in possession; the consideration must be stated, with a distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed. Notice must be denied previous to and down to the time of paying the money, and the delivery of the deed; and if notice is specially charged, the denial must be of all circumstances referred to from which notice can be inferred; and the answer or plea show how the grantor acquired title; *Sugden*, 766, 70; 1 Ath. 384; 3 P. W. 2801, 243, 307; Amb. 421; 2 Atk. 230; 8 Wh. 449; 12 Wh. 502; 5 Pet. 718; 7 J. C. 67. The title purchased must be apparently perfect, good at law, a vested estate

in fee simple; 1 Cr. 100; 3 Cr. 133, 5; 1 Wash. C. C. 75. It must be by a regular conveyance; for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor, and has no better standing in a court of equity; 7 Cr. 48; 7 Pet. 271; *Sugden*, 722. Such is the case which must be stated to give a defendant the benefit of an answer or plea of an innocent purchase without notice, and the case stated must be made out. Evidence will not be permitted to be given of any other matter not set out; 7 Pet. 271; " *Boone v. Chilles*, 10 Peters, 177, 211.

Notice must be denied explicitly, whether it is or is not averred in the bill, in order to put the fact at issue, and enable the opposite party to establish the existence of notice by proof; *Harris v. Fly*, 7 Paige, 422, 424; *Harper v. Reno*, Freeman's Ch. 323; *Gallatin v. Cunningham*, Hopkins, 48; 8 Cowen, 361; *Manhattan Co. v. Evertson*, 6 Id. 457, 466; *Moore v. Clay*, 7 Alabama, 742, 751; *De Vendal v. Malone*, 25 Id. 272; *Downing v. Smith*, 3 Johnson's Ch. 345. The denial should, moreover, extend to every fact or circumstance set forth in the bill from which notice can be inferred; *Harper v. Reno*; *Gallatin v. Cunningham*; *Downing v. Smith*. It must show not only that the purchaser made the contract in good faith, but that he did not receive notice before the purchase money was paid or the deed executed; *Jewett v. Palmer*, 7 Johnson's Ch. 65. A want of fulness or precision

on these points is a good cause of demurrer, or may be a ground for an adverse decree at a hearing on bill, answer and proofs; *Leftwitch v. Orne*, 1 Freeman's Ch. 207; *Harper v. Freno*, Ib. 323; *Jenkins v. Bodley*, 1 Smedes & Marshall, 338. See *Cutler v. The Bank*, 22 Alabama, 743, 750; *Parkinson v. Welch*, 19 Pick. 231, 234; *Bailey v. Wilson*, 1 Dev. & Bat. Eq. 182.

In *Cason v. Round*, Prec. in Ch. 226, notice was denied evasively, and not positively, and the chancellor held that the mortgagee was not a *bona fide* purchaser, although the plaintiff was unable to prove notice until after the money was lent. So in *Parkinson v. Welch*, the want of particularity in an answer to a bill charging fraud and propounding specific interrogatories, was held to be a ground from which the court might infer the truth of the charge. In like manner it is not enough to aver that the defendant had no actual knowledge, nor any detailed information of a prior equity or unrecorded deed, because such information as will lead to knowledge if followed up, is notice; *Harper v. Reno*.

In *Wallwyn v. Lee*, 9 Ves. 24, 32, Lord Eldon observed, that where a purchase for valuable consideration without notice is pleaded to shut out a discovery, it is necessary to aver not only that the vendor or mortgagor was the owner or pretended owner, but that he was in possession, although it need not be averred that the purchaser was put in possession; and the same proposition may be

found in *Daniells v. Davidson*, 16 Ves. 252; *Tompkins v. Anthon*, 4 Sandford's Ch. 97, 122; *Jackson v. Row*, 4 Russell, 523. The possession of a tenant is the possession of his landlord, within this rule. See *Daniells v. Davidson*, 16 Vesey, 252. And it does not apply where the conveyance is of a reversion, or does not purport to be an immediate transfer of the possession. See *Flagg v. Mann*, 2 Sumner, 489, 558. It is no doubt true that where the holder of the equity is in possession personally, or through an agent, it will operate as notice, and one who buys under these circumstances to his prejudice, is chargeable with actual or constructive fraud; but the better opinion seems to be that if an averment that the vendor was possessed is essential when the defence is made by plea, it is not where the answer discloses all the circumstances, and relies on good faith and the payment of value, as shown by them; *Wright v. Hood*, 11 Harris, 120; *Rupert v. Mark*, 15 Illinois, 530.

An allegation that the defendant is a *bona fide* purchaser is in confession and avoidance. It admits the plaintiff's case, and sets up new matter as a defence. It is, therefore, pleading, and not evidence, and cannot ordinarily be read at the hearing as proof of the payment of value, or to disprove notice; *Boone v. Chilles*, 10 Peters, 179, 211; *Brown v. Welsh*, 18 Illinois, 423. In the language of Mr. Justice Baldwin, in *Boone v. Chilles*, 10 Peters, such a defence "sets up matter not in the bill; a new case presented, not

responsive to the bill; but one founded on a right and title operating to bar and avoid the plaintiff's equity, which must otherwise prevail; 9 V. 33, 34. The answer setting it up is no evidence against the plaintiff, who is not bound to contradict or rebut it; 14 J. R. 63, 74; 1 Mumf. 396-7; 10 J. R. 544-8; 2 Wh. 383; 3 Wh. 527; 6 Wh. 468; 1 J. C. 461. It must be established affirmatively by the defendant independently of his oath; 6 J. R. 559; 1 J. R. 590; 17 J. R. 367; 18 J. R. 532; 2 J. C. 87, 90; 4 B. C. 75; Amb. 589; 4 V. 404, 587; 3 J. C. 583."

The appropriate mode of making the defence, considered in this note, is by plea, when it is not only a bar to the complainant's case, but a justification for not making a discovery whereby his case might be helped; although it may still be requisite to sustain the plea by an answer denying any fact or circumstance set forth in the bill tending to prove notice; *Snelgrove v. Snelgrove*, 4 Dessausure, 274. But the defendant may, if he thinks fit, answer instead of pleading, and if he does, and it finally appears from the pleadings and proofs that he is a *bona fide* purchaser, the bill will be dismissed; *High v. Batte*, 10 Yerger, 385; *Donnell v. King*, 17 Leigh, 393; *Hagthorp v. Hook*, 1 Gill. & Johnson, 270; *Jerrard v. Saunders*, 2 Vesey, Jr. 254. The language of Sugden, that "if he neglect to plead it, he cannot avail himself of it as a defence," (4 Sugden on Vendors, Ch. 25, sect. 3), should be understood as referring to the

discovery sought by the bill and not to the relief. It was long held that one who submits to answer, must answer fully at the risk that the disclosure may invalidate his defence; *Orrery v. Leighton*, 2 Simons & Stuart, 234; *The Earl of Portarlington v. Soulby*, 7 Simons, 28; *Salmon v. Cleggett*, 3 Bland, 125; *The Bank of Utica v. Mersereau*, 7 Paige, 517. Whether an answer alleging a purchase for value is an exception to this rule was a doubtful question, which was answered in the affirmative by some of the authorities, and negatively in others; *High v. Batte*; *Donnell v. King*; *Jerrard v. Saunders*; *The Bank v. Mersereau*; *Salmon v. Claggett*; *The Earl of Portarlington v. Soulby*. The question is now set at rest in the Supreme Court of the United States by the new rules in equity, which were taken from the English courts, and have been adopted in Pennsylvania and some of the other States. These provide that a defendant may by answer insist on all substantial matters of which he could avail himself by a demurrer, or plea in bar, without answering further than he would be compellable to answer if he had demurred or pleaded, and filed an answer in support of the plea.

In *The Bank v. Mersereau*, the question grew out of the negotiation of a bill of exchange, and it was held that an answer averring that the defendant gave value in good faith, did not excuse the non-production of documents which, as the bill averred, were in his

possession, and would show notice if disclosed.

The weight of authority is that one who sets up a purchase for value and without notice, cannot rely on the answer as proof of good faith or of the payment of the consideration; *Boone v. Chilles*, 10 Peters, 177; *Kyles v. Tait*, 6 Grattan, 44; *Hagthorp v. Hook*, 1 Gill & Johnson, 270; *Halstead v. The Bank of Kentucky*, 4 J. J. Marsh. 554. But it has been held in some instances that where the denial of notice is sufficiently full and precise, it not only shifts the burden of proof, but cannot be overthrown by the uncorroborated testimony of one witness; *Kingdom v. Boakes*, Prec. Ch. 19; *Hine v. Dodd*, 2 Atkyns, 275; *Roberts v. Salisbury*, 3 Gill & Johnson, 425; *Kingdom v. Boakes*, Prec. Ch. 16; *Hughson v. Mandeville*, 4 Dessausure, 87; *Maywood v. Lubcock*, 1 Bailey's Eq. 382; *Conner v. Tuck*, 11 Alabama, 794. Such is the undoubted and well-settled rule, where the answer is in the proper sense of the term responsive to the bill; *Flagg v. Mann*, 2 Summer, 487, 551. "It is an established rule in equity," said Story, J., in *Flagg v. Mann*, "that to overcome the positive denials of an answer responsive to the charges in a bill, there should be the testimony of two witness of equal credibility on the other side, or of one witness with strong and stringent circumstances." The point actually decided was, that the testimony of several witnesses, that the defendant had confessed or admitted notice, in the course of a loose and gene-

ral conversation, was insufficient to overbalance his solemn denial of notice under oath. The same conclusion was reached in *Hine v. Dodd*; *Jolland v. Stanbridge*, 3 Vesey, 478; *Conner v. Tuck*, 11 Alabama, 794, and *Roberts v. Saulsbury*, 3 Gill & Johnson, 425; although the decision turned, in nearly all these instances, on the vagueness and generality of the admissions, which the defendant was alleged to have made, rather than on his right to be believed.

There can be no doubt in general, that where the allegations going to make up the complainant's case are explicitly contradicted in the answer, the denial should be taken as verity until it is disproved; *Alam v. Jourdan*, 1 Vernon, 161; *Mortimer v. Orchard*, 2 Vesey, jun., 243; *Evans v. Bicknell*, 6 Id. 174; *East India Co. v. Donald*, 9 Id. 275; *Cooke v. Clayworth*, 18 Id. 12; *Smith v. Brush*, 1 Johnson, Ch. 459; *Clason v. Morris*, 10 Johnson, 524; *Clark's Ex'ors v. Van Reimsdyk*, 9 Cranch, 153; *Lenox v. Prout*, 3 Wheaton, 520; *Hughes v. Blakes*, 6 Id. 453; *Daniel v. Mitchell*, 1 Story, 172; *Dunham v. Gates*, 1 Hoff. Ch. R. 185; *Martin v. Browning*, 2 Hawks, 644; *Hart v. Ten Eyck*, 2 John. Ch. 92; *Watkins v. Stockett*, 6 Harr. & John. 435; *Hughes v. Blake*, 6 Wheaton, 468; *Peirson v. Claves*, 15 Vermont, 93; *Gould v. Williamson*, 21 Maine, 273; *Hollister v. Barkley*, 11 New Hamp. 501; *Beatty v. Smith*, 2 Hen. & Munf. 395; *Langdon v. Goddard*, 2 Story, 267; *Sullivan v. Bates*, 1 Littell, 42; *Roberts v. Salisbury*,

3 Gill & John, 425; *Hawkins v. Embry*, 3 Monroe, 225; *Gaither v. Caldwell*, 1 Dev. & Bat. Eq. 504, 509; *Speight v. Speight*, 2 Dev. & Bat. Eq. 280; *Petty v. Taylor*, 5 Dana, 598; *Gray v. Faris*, 7 Yerger, 155; *Hudson v. Cheatham*, 5 J. J. Marsh. 50; *Patrick v. Langston*, 1b. 654; *Mason v. Peck*, 7 Id. 300; *Stafford v. Bryan*, 1 Paige, 239; *Clarke v. Oakley*, 4 Ark. 236. For as the defendant is compelled to say whether the charges in the bill are true or false, he has a right to require that his response shall be read as a whole, and that the complainant shall not accept what makes in his favor and reject the rest. "The reason upon which the rule stands is this, that where the plaintiff calls on the defendant to answer an allegation, he makes, and thereby admits the answer to be evidence;" Per Marshall, C. J., *Clark's Executor v. Reimsdyk*, 9 Cranch, 153. But it is no less true that the answer cannot be read as evidence of new matter, not responsive to the bill, and operating by way of confession and avoidance; *The New England Bank v. Lewis*, 8 Pick. 113; 1b. 63; *James v. M'Kernon*, 6 Johnson, 543, 559; *Skinner v. White*, 17 Id. 357, 367; *Neale v. Hagthorp*, 3 Bland, 551; *Salmon v. Claygett*, 3 Bland, 125; *Wakeman v. Grover*, 4 Paige, 23; *Hart v. Ten Eyck*, 2 John. Ch. 62; *O'Brien v. Elliott*, 15 Maine, 125; *Lucas v. Bank of Darien*, 2 Stewart, 280; *Peirson v. Claves*, 15 Verm. 93; *M'Daniels v. Barnum*, 5 Vermont, 279; *Mott v. Harrington*, 12 Id. 199; *Cannon v. Norton*,

14 Id. 178; *Lane v. Marshall*, 15 Id. 85; *M'Donald v. M'Donald*, 16 Id. 630; *Randall v. Phillips*, 3 Mason, 378; *Chinowith v. Williamson*, 2 Bibb. 36; *Clarke v. White*, 12 Peters, 178; *Lampton v. Lampton*, 6 Monroe, 620; *Paynes v. Coles*, 1 Munf. 373; *Hagthorp v. Hook*, 1 Gill & John 272; *Alexander v. Wallace*, 10 Yerger, 105; *Carter v. Leeper*, 5 Dana, 263; *Gould v. Williamson*, 21 Maine, 273; *Jones*, 1 Ired. Eq. 332; *Johnson v. Person*, 1 Dev. Eq. 364; *Peckworth v. Butler*, 1 Wash. 224; *Miller v. Wack*, 1 Saxton, 204; *Norwood v. Norwood*, 2 Harr. & John. 238; *M'Gowen v. Young*, 2 Stew. & Port. 161; *Eberley v. Groff*, 9 Harris, 251. It is not always easy to apply this rule. But the better opinion would seem to be that a denial of notice is not "responsive" in the proper sense of the term, merely because notice is alleged generally in the bill. For, as the defendant must deny notice, whether it is or is not alleged, so the mere circumstance that the complainant charges notice should not vary the case, or give a greater weight to the defendant's oath than it would otherwise possess.

Such at least seems to be the reasonable inference where the allegation of notice is not essential, and might be omitted without rendering the bill demurrable. A bill alleging a trust for the complainant, and that the premises were wrongfully conveyed to the defendant, presents a *prima facie* case for relief (see *Brown v. Welsh*, 18 Illinois, 343); and an

answer averring that the defendant is a *bona fide* purchaser, being in confession and avoidance, is not evidence, and must be substantiated by proof. There is a material difference where, from the nature of the case, a chancellor cannot have jurisdiction, unless notice is charged. If, for instance, a complainant who sets up an unrecorded grant against one that has been duly placed on record, were simply to aver the execution of the deed under which he claims, and that the grantor subsequently conveyed the premises to the defendant, the suit would fail, because, on his showing, there would be an adequate remedy at law. The bill should, therefore, disclose the defect in the complainant's title, and then go on to aver that the defendant had notice, or is not a purchaser for value, when an answer contradicting either statement will be responsive to the bill. See *Hine v. Dodd*, 2 Atkyns, 273; *Kingdom v. Boakes*, Prec. Ch. 19; *Center v. The Bank*, 25 Alabama, 743; *Sullivan v. Bates*, 1 Littell, 42; *Mason v. Pick*, 7 J. J. Marshall, 301; *Roberts v. Salisbury*, 3 Gill & J. 425; *Hagthorp v. Hook*, 1 Id. 270, 282; *Neale v. Hagthorp*, 1 Bland, 551; *Maywood v. Lubcock*, 1 Bailey, Eq. 382.

The question does not arise where the defence is made by plea, because a plea is not evidence of what it contains. The plea must be sworn to as a means of testing the defendant's conscience, but it cannot be used as proof of the payment of value, or to contradict the evidence of notice adduced on the

other side. The right to make such a defence by answer instead of pleading, is an indulgence which should not be allowed to prejudice the complainant. A general denial of notice by answer is, therefore, entitled to no greater weight than if it were made by plea. The case is obviously different where facts or circumstances are alleged in the bill as constituting or proving notice, and the defendant's answer that they do not exist, may then have a greater claim to credence than the testimony of a single witness.

The course of proof is, therefore, as follows: The burden is on the complainant to establish some fact or circumstance which operates as actual or constructive notice. A general denial of notice in the answer will not weigh against such evidence. If, however, the bill alleges specific instances of notice which are explicitly denied, the answer will stand against the uncorroborated testimony of a single witness. It is, nevertheless, well settled, that an express denial of notice in response to the bill, or an allegation that the defendant was ignorant of the complainant's equity, and believed the vendor's title to be good, will not avail, if any fact or circumstance is admitted by the defendant, or not denied by him and testified to by a witness, which operates as constructive notice, or justifies the inference that it was his duty to inquire; *Hudson v. Warner*, 2 Harris & Gill, 415; *Price v. M'Donald*, 1 Maryland, 403, 420. See *Tillinghast v. Champlin*, 4 Rhode

Island; *Hoxie v. Carr*, 1 Sumner; *Flagg v. Mann*, 2 Id.; *Parkman v. Welsh*, 19 Pick. 251, 234.

It is proper to add, that under a general replication to a plea, nothing is at issue but what the pleaver, and if that is established at the hearing, the plea is a bar not merely to that part of the claim to which it is strictly pertinent, but to so much of the bill as it professes to cover. It follows that where the defendant pleads that he gave value without denying notice, and the allegation is substantiated by proof, the bill must be dismissed, notwithstanding the clearest proof of notice on the part of the complainant. See *Fish v. Miller*, 5 Paige, 29; *Daws v. M'Michael*, 6 Id. 144; *Hughes v. Blake*, 6 Wheaton, 453; *Harris v. Ingledew*, 3 P. F. Williams, 91; *Thompkins v. Anthon*, 4 Sandford, Ch. 97.

In general, one who claims as a purchaser, must show that the consideration was valuable, and actually paid, by calling witnesses who were present at the transaction, or some other legal means of proof, and cannot rely on the recitals in the deed, or the vendor's receipt, as evidence of the payment of value or any other fact material to his case; *Nolen v. Gwyn*, 16 Alabama, 725; *De Vendal v. Malone*, 25 Id. 272; *Kimball v. Fenner*, 12 New Hampshire, 248; *Rogers v. Hall*, 4 Watts, 359; *Clark v. Depew*, 1 Casey, 509; *Henry v. Raiman*, Ib. 354, 360; *Bolton v. Johns*, 5 Barr, 151; *Lloyd v. Lynch*, 4 Casey, 419; *Snelygrove v. Snelgrove*, 4 Dessausure, 287;

Hawley v. Bullock, 29 Texas, 216; *Bolton v. Johns*, 5 Barr, 145; *The Union Canal Co. v. Young*, 1 Wharton, 410, 432.

In *Lloyd v. Lynch*, where the defendant claimed to be a purchaser for a valuable consideration as against the plaintiff, who sought to enforce an antecedent equity, Lewis, Chief Justice, said "that the defendant had given no evidence of the payment of the purchase money except the receipt in the deed from his immediate grantor. That receipt was undoubted evidence of payment against the grantor, and all who claimed under him subsequently. It was also evidence to pass the grantor's right, whatever it was at the time. But it was no evidence whatever of the fact of payment against a stranger, or even against one who derived title from the grantor previously to the conveyance to the plaintiff. As it regarded such a one, the receipt was a mere *ex parte* declaration, not under oath, and made without any opportunity at cross-examination." For a like reason, when a mortgage is impeached as a fraud, or as having been executed in fraud of the mortgagor's creditors, the production of the note or bond which it was professedly intended to secure, is not evidence of the realty or value of the consideration.

It has been held in New York, that where an ejectment is brought on an unregistered deed or mortgage, against one claiming under a subsequent grant, the defendant may rely on the recital in his deed, as evidence which shifts the

burden of proof, and renders it incumbent on the plaintiff to show that the amount set forth was not actually paid; *Jackson v. M^cChesney*, 7 Cowen, 360. Sutherland, J., said, that "the acknowledgment in a deed of the receipt of the consideration money, was *prima facie* evidence of its payment. Like a receipt for money, it might be explained or contradicted, but until impeached, it was legal and competent evidence of payment, which, though not operating by way of estoppel, sustained the deed by establishing the consideration not only as between the immediate parties, but against any one who sought to impeach it collaterally. One who claimed as a purchaser in equity must aver and prove that the purchase money was actually paid, but there was no analogy between such a case and an action of ejectment, where the strict legal title must prevail." It was said, in like manner, in *Wood v. Chapin*, 3 Kernan, 509, that where the case arises under the recording acts, the receipt for the consideration in the grantor's deed is *prima facie* evidence of payment.

It is not easy to perceive the force of this reasoning. No one doubts that in a court of law the legal title must prevail. So far as the decision in *Jackson v. M^cChesney* rests on this ground, it is not in point when the question arises in an equitable tribunal. But the court seems to have overlooked that the actual payment of value is essential to take advantage of the failure to record the prior

deed. Unless evidence is adduced on this head by the subsequent grantee, his case will fail. The grantor's receipt or acknowledgment is not admissible for such a purpose; *ante*. It is no doubt true that a conveyance by way of bargain and sale cannot be defeated by disproving the consideration contrary to the allegation of the deed. The reason is that a bargain for value and under seal, raises a use which the statute executes, although nothing be paid. But the case is obviously different where the consideration must not only be agreed upon, but delivered and received, to perfect the title of one party, or preclude the other from asserting an equitable right; and it then falls within the general rule, that an admission is not evidence except as against the person who makes it, or one in privity with him by virtue of a subsequent conveyance.

It results from this principle, that a grantee may rely on a recital in his deed as evidence of the payment of the purchase-money as against any one to whom the premises are subsequently conveyed by the grantor; *The Penna. Salt Mine Co. v. Neil*, 4 P. F. Smith, 9. Thompson, J., said, "that it had been ruled in *Lloyd v. Lynch*, 4 Casey, 419, that the receipt in a deed was good against the grantor and all who derived title from him subsequently, but no evidence against a stranger, or one claiming under a previous conveyance. If this doctrine was questionable as it regarded strangers, it was entirely accurate as to parties

and privies." It may be observed of the distinction taken in these instances between parties and strangers, that a deed of bargain and sale is conclusive on all the world that the land was sold for a consideration which may be nominal, but is yet valuable in the technical sense requisite to pass the title; *Wood v. Chapin*, 3 Kernan, 509, 517; and that it is not evidence as against strangers or persons claiming by an anterior or paramount right, of the amount or value of the consideration, or that any consideration was actually paid.

There is more room for doubt where the deed is impeached as a fraud on creditors. The grantor's receipt, or a recital that the consideration has been paid, is obviously a part of the *res gestæ*, which should be taken into view as showing that the transfer purported to be for value, and not voluntary. It does not follow that an inference of actual payment can be drawn from such an acknowledgment. Whether it can or not, depends upon who are the parties to the controversy. We have seen that an admission by a grantor is evidence against a subsequent grantee, but not against one whose claim originated previously. A creditor who seeks to set aside a deed as fraudulent, has been held to be within the former category; *Lutton v. Hesson*, 6 Harris, 109; *Clark v. Depew*, 1 Casey, 509; *Lloyd v. Lynch*, 4 Casey; *Clapp v. Tyrrell*, 20 Pick. 247. In *Lutton v. Hesson*, Rogers, J., said, "that title would be insecure if a

deed must be set aside as voluntary and fraudulent, unless the grantee could prove that the consideration money had been paid. The court below were consequently right in refusing to instruct the jury that the acknowledgment in the body of the deed, and the receipt at the foot of it, were no evidence of payment." Such evidence is, nevertheless, of a low order, from the facility with which it may be fabricated; *Clapp v. Tirrell*. If it appears that the grantor was largely indebted, and that the conveyance left him without the means of payment, his receipt will not be sufficient proof of consideration, unless the failure to adduce direct evidence is excused by the lapse of time or other circumstances; *Clark v. Depew*; *Rogers v. Hall*, 4 Watts, 359; *Zerbe v. Miller*, 4 Harris, 597; and Ch. J. Gibson seems to have been of opinion in *Rogers v. Hall*, that where the vendor's circumstances are such that he is not entitled to make a gift, and the conveyance must be set aside as fraudulent, if not made for a valuable consideration, his receipt in the instrument or dehors, is not evidence against his creditors, who, having a paramount and anterior right, cannot be affected by his declarations in the course of a transaction with a third person. And a similar view was taken in *Kimball v. Fenner*, 12 New Hampshire, 248, and *Faulkner v. Leith*, 15 Alabama.

There can be no doubt that where a conveyance is shown to have been fraudulent as against creditors, one who claims as a *bona fide*

purchaser from the grantee, has the burden of proof, and cannot rely on a recital in the deed by which he acquires title, or the receipt of his immediate vendor, as evidence of payment; *Rogers v. Hall*, 4 Watts, 359; *Lutton v. Hesson*, 6 Harris, 109, 111.

*LE NEVE v. LE NEVE.¹

[*35]

DEC. 9, 1747.

REPORTED AMB. 436.

NOTICE.]—*Lands in register county, settled by a deed which is not registered, are settled upon a second marriage, with notice of the former settlement, and the second settlement is registered pursuant to the statute 7th Anne. The former settlement shall be preferred in equity. Notice to an agent or trustee is notice to the principal.*

LORD CHANCELLOR HARDWICKE.—The bill was brought by the plaintiffs Peter Le Neve and Hugh Pigot and Elizabeth his wife, late Elizabeth Le Neve, as the only surviving children of the defendant Edward Le Neve, by Henrietta, his late wife.

The end of the bill, in general, is, to have the execution of trust of leasehold estates settled upon the late wife of Edward Le Neve and the issue of that marriage, by articles previous to the marriage, dated 1st July, 1718; and that the conveyances made by the defendant Edward Le Neve and the defendant Mary, his now wife, to trustees, may be set aside and delivered up, being made after notice of the articles of the 1st of July, 1718, or of the other conveyances made in pursuance thereof; and to have the leasehold exonerated and disencumbered.

The facts are that, in 1718, the defendant Edward Le Neve intermarried with his first wife, Henrietta Le Neve, who had a considerable fortune; and articles were executed previous to the marriage, dated the 1st July, 1718, whereby the father of Edward, in consideration of Henrietta's fortune, &c., covenanted with trustees to convey to them several estates, and some leasehold, amongst the rest, near Soho Square, in the county of Middlesex; [*36] to permit Edward Le Neve the younger to receive the rents and profits during his own life, and after his death to pay to Henrietta 250*l.* a year, in case she survived Edward; and, after the decease of Edward and Henrietta, then the said estates should remain to their issue in such manner as Edward the younger should by will or otherwise appoint; and, for want of such issue, to the use of Edward Le Neve the father, and his heirs.

The 16th June, 1719, a settlement was made in pursuance of the articles.

¹ *S. C.*, 3 Atk. 646; 1 Ves. 64.

The marriage took effect; and Edward and Henrietta had issue, plaintiffs Peter and Elizabeth. Henrietta died July, 1740, leaving no other children.

Twenty-five years after the first marriage, Edward Le Neve entered into a treaty of marriage with the defendant Mary, and by articles dated the 16th of November, 1743. previous to the marriage, Edward, in consideration of such marriage, covenanted with the trustees, the defendants Dandridge and Norton, to convey these very leasehold estates near Soho Square to them, their executors, &c., within three months after the marriage, in trust to pay to the defendant Mary, out of the rents of these messuages, in case she survived him, a clear annuity of 150*l.* for her life, for her jointure, &c.

The marriage took effect, and three months after, on the 20th of January, 1744, a settlement was made pursuant to the articles.

The settled estate, being houses in Middlesex, was subject to the register Act, the 7th Anne, cap. 20.

The second articles and settlement were registered, but not the first.

Edward has mortgaged the house likewise.

The bill is brought in order to set the second articles and settlement out of the way, and that they may be postponed to the first articles and settlement; upon this equity, that the defendant Mary Le Neve had notice of them.

[*37] *The counsel for the plaintiffs admit that the registering of the second articles and settlement has, in point of law, affected the leasehold estates, as the 7th Anne gives the legal estate where the effect of the registering has placed it.

The question is, Whether equity will enable the children of the first marriage to get the better of the defendant's legal right? And this will depend upon the question of notice:—

1st, Whether it appears sufficiently, that Joseph Norton was attorney for the defendant Mary in the transaction of her marriage?

2ndly, Whether Norton himself had sufficient notice of the first articles and settlement?

3rdly, Whether that will affect Mary as a purchaser, and postpone her articles and settlement, notwithstanding the Register Act?

First, it will depend on the answer of the defendant Mary.

She has in general denied any notice of the first articles and settlement till six months after the marriage, and says, “that the defendant Joseph Norton was so far from being employed as solicitor for her, in transacting the business of the marriage articles and settlement, that he had been for a considerable time before employed as attorney for the defendant Edward Le Neve, her husband; that, being at the time of the marriage concerned for her husband, she was thereupon induced to place confidence in him, and her husband assured her he would take care there should be a handsome provision made for her, and recommended

Norton as a proper person to prepare the deeds whereby such settlement was to be made upon her, to which she consented: and that Norton assured her that he had taken care to secure for her 150*l.* a year by way of jointure, and did not then, or at any time before her intended marriage, give her any notice of any former settlement."

It is insisted by the defendant Mary's counsel, that Joseph Norton was not her attorney or agent, but her *husband's, and that the attorney for one party having notice will not [*38] affect her with notice.

I am of opinion she has admitted enough on her side to make him attorney or agent for her. If she placed confidence in Joseph Norton, no matter on whose recommendation,—if she relied enough on her husband to take his recommendation, it is sufficient; or otherwise it would be mischievous and inconvenient if this Court was to take into their consideration from whom the recommendation comes; for in purchases, and more especially in mortgages, very frequently the same counsel and agents are employed on both sides, and therefore each side is affected with notice as much as if different counsel and agents had been employed.

It is material to see how far the cases have gone on this point. Two have been cited: *Brotherton v. Hatt*, 2 Vern. 574, and *Jennings v. Moore, Blincorne*,¹ and *Others*, 2 Vern. 609. [*S. C.*, 2 Bro. P. C. 278, Toml. ed.] The first was shortly this:—A. makes three several mortgages to B., C., and D., and in the last mortgage B. is a party, and agrees, after he is paid he will stand a trustee for D. Decreed, that C. shall be paid before D., for, all the securities being transacted by the same scrivener, notice to him was notice to D.

See how far this goes:—the same scriveners were witnesses, and engrossed all the securities, and were in the nature of agents for all the lenders, and very likely for the borrower himself; and notwithstanding it does not appear Mrs. Hatt had personal notice, "yet notice to the agent is notice to the party, and, consequently, they that lend last must come last, having notice of what was before lent; and if any one after notice lend more money although he should obtain the legal estate, yet he would in equity stand affected with the notice, and be bound thereby."

The second case was no more than this:—Blincorne having notice of an incumbrance, purchases in the name of Moore, and then agrees that Moore shall be the purchaser, and he accordingly pays the purchase-money *without notice of the incumbrance. Though Moore did not employ Blincorne, nor [*39] know anything of the purchase till after it was made, yet Moore approving of it afterwards made Blincorne his agent ab initio, and therefore shall be affected with the notice to Blincorne.

The last goes a great way: for Moore knew nothing of the

¹ Nom. *Blenkarne v. Jennings*.

transaction, and yet the Court held, that his approving it afterwards made Blincorne his agent ab initio. This carries it further than the present case; but the first is a clear authority.

These cases, therefore, sufficiently prove, that it is not at all material to the plaintiffs on whose advice or recommendation the defendant Mary intrusted Norton; nor does it make any difference that it is the recommendation of the husband any more than of any other person.

The second consideration is (as it appears clearly that Norton was employed for defendant Mary), whether there is sufficient evidence of notice to him?

An objection has been taken by defendant Mary's counsel, that, as notice hath been denied by her answer, if it be sworn to by one witness only, that being but oath against oath, cannot prevail to establish the fact.

The general rule, to be sure, is so, but it admits of this distinction:—where the denial of a defendant is clear, it has been adhered to; but where the answer is not a positive denial of the same fact, but only as to part, as in the present case, as to the notice to herself only, it makes a difference.

And there are many cases where the Court, upon the testimony of one witness, whose credit is unimpeached, and what he swears is uncontradicted by the answer, have decreed upon this single evidence.

The defendant Mary denies notice to herself; but whether there was notice to another person, her agent, she passes by without giving any answer.

This is a denial, indeed, as to herself, but it is at the same time what is called at law a negative pregnant, that there was notice to her agent.

As to the evidence of notice to Norton, it is extremely [*40] strong; for he swears that he had notice of the first articles some time before the second marriage, and *that he had then a copy thereof from the defendant Edward Le Neve, in order to take counsel's opinion thereon, how to secure against the effect of them, and to contrive in what manner they might get the better of these articles*: and, therefore, as to Norton, there cannot be a stronger notice.

The third and last general question is, whether the notice to Norton will affect the defendant Mary, as a purchaser, and postpone her articles and settlement, notwithstanding the Register Act?

This depends on two things:—

1st, Whether any notice whatsoever would be sufficient to take from the defendant the benefit of the Register Act?

2nd, Whether personal notice to the defendant Mary is requisite to postpone her?—or whether notice to her agent is sufficient to do it likewise?

As to the 1st, it is a question of great extent and consequence.

The preamble of the statute of the 7th Anne, c. 20, is in sub-

stance:—"Whereas, by the different and secret ways of conveying lands, &c., such as are ill-disposed have it in their power to commit frauds, and frequently do so, by means whereof several persons have been undone in their purchases and mortgages, *by prior and secret conveyances*, and fraudulent incumbrances." Then comes the enacting clause:—"That a memorial of all deeds and conveyances which, after the 27th of September, 1709, shall be made and executed, and of all wills and devises in writing, whereby any honours, manors, lands, &c., in the county of Middlesex, may be any way affected in law or equity, may be registered in such manner as is after directed; and that every such deed or conveyance that shall, at any time after, &c., be made and executed, shall be *adjudged fraudulent and void against any subsequent purchaser or mortgagee* for valuable consideration, unless such memorial be registered as by this Act is directed, *before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim," &c.

What appears, by the preamble, to be the intention of the Act?

Plainly, to secure subsequent purchasers and mortgagees against *prior secret conveyances* and fraudulent incumbrances.

Where a person had no notice of a prior conveyance, there the registering his subsequent conveyance shall prevail against the prior; but if he had notice of a prior conveyance, then that was not a secret conveyance by which he could be prejudiced.

The enacting clause says *that every such deed shall be void against any subsequent purchaser or mortgagee*, unless the memorial thereof be registered, &c.; that is, it gives him the legal estate, but it does not say that such subsequent purchaser is not left open to any equity which a prior purchaser or incumbrancer may have, for he can be in no danger when he knows of another incumbrance, because he might then have stopped his hand from proceeding.

This case has been very properly compared to cases on the 27 Hen. 8, for inrolment of bargains and sales.

That Act is formed pretty much in the same manner with this.

The words of the enacting clause:—"That from, &c., no manors, lands, tenements, &c., shall pass, alter, or change from one to another, whereby any estate of inheritance or freehold shall be made, or take effect in any person or persons, *or any use thereof* to be made thereof, by reason only of any bargain and sale thereof, except the same bargain and sale be by writing, indented, sealed, and inrolled in one of the King's Courts of Record at Westminster, or else within the same county, &c., where the same manors, &c., so bargained and sold do lie, &c.; and the same inrolment to be had and made within six months next after the date of the same writings, indented, &c., *nor any use shall pass thereof from one to another.*"

*What is the meaning of this?

[*42]

Before the making of the Act, any paper writing passed the

use from the bargainor to the bargainee, whereby great mischief arose; for it entangled the purchasers, affected and injured the Crown, and was contrary to the rule of law, which required notoriety in purchases by feoffment and livery, &c.

But what has been the construction of this statute ever since? Why, if a subsequent bargainee has notice of a prior, he is equally affected with that notice as if the prior purchase had been a conveyance by feoffment and livery, &c.

The operation of both Acts of Parliament and the construction of them is the same; and it would be a most mischievous thing if a person, taking that advantage of the legal form appointed by an Act of Parliament, might under that protect himself against a person who had a prior equity, of which he had notice.

The cases put by the Attorney-General are very material:—

“Suppose,” said he, “the defendant Mary had, by letter of attorney, empowered Norton to transact the affair with her husband, and he by means of this agency comes to the knowledge of the prior articles and settlement, would not this affect the principal? Or suppose a purchaser of lands in a register county orders his attorney to register it, and he neglects to do it, and then buys the estate himself, and registers his own conveyance, shall this be allowed to prevail?”

It certainly shall not; for such a purchaser is out of the consequences which the Register Act guards against, of imposition from a prior secret conveyance, as he had personal knowledge of the first.

There have been three cases on the Register Act:—

1st, *Lord Forbes v. Nelson*, 4 Bro. P. C. 189, Toml. ed.

2nd, *Blades v. Blades*, 1 Eq. Ca. Abr. 358, pl. 12.

3rd, *Cheval v. Nichols*, 10th December, 1725, in the Exchequer, 1 Stra. 664.

[*43] The first¹ arose originally in Ireland, where there is ^aa general Register Act, and heard on appeal to the House of Lords, in England, 22nd and 23rd February, 1722.

The Earl of Granard, father of Lord Forbes, was seised of a large estate of which he was tenant for life, with remainder to his first and every other son in tail, and had a power of leasing for lives at the best rent.

The Register Act in Ireland passed the 6th Anne; Lord Granard granted a lease for three lives at the rent of 30*l.* a year, which was not registered.

His Lordship, being greatly in debt, came to an agreement with Lord Forbes, his eldest son, by the agency of Mr. Steward, to take upon him the payment of certain debts of his father, and so secure a jointure to his mother-in-law, and an annuity to his father.

The estate was conveyed to Mr. Justice Doyne and Mr. Justice Nutt, as trustees, during the life of the father.

¹ *Lord Forbes v. Nelson*.

Mr. Steward had notice of this lease during the treaty between Lord Granard and Lord Forbes.

The conveyance to the trustees being registered, they brought an ejectment against the lessee of the leasehold estate: and it was heard before Lord Middleton, Lord Chancellor of Ireland, in February, 1721, who then made a declaration rather than a decree, that the conveyance was void as against the lessee. It came on again before him the 17th of February, 1721, and he then determined, there was full notice of the lease to Lord Forbes, and awarded a perpetual injunction from time to time.

The judgment of the House of Lords was, That the said decree be reversed, and that all proceedings at law of the appellants against the respondent should, during the life of Lord Granard, be stayed, on lessee's paying the rents, performing the covenants, &c.; but that after the death of Lord Granard, Lord Forbes might be at liberty to try the tenant's right to the lease.

The decree was reversed, not because Lord Middleton had proceeded on a wrong principle, but had drawn a wrong inference from it; for Lord Forbes did not insist merely on the register, but that the lease was made contrary *to the power: and [*44] therefore the Lord Chancellor of Ireland was mistaken, and wrong in decreeing the lease to be good in every respect; and the House of Lords set the decree right only as to this particular part, that, after the death of Lord Granard, the estate determined; and therefore left it open to Lord Forbes to dispute whether it was a lease pursuant to the power, but gave no relief as to the Register Act.

The case of *Blades v. Blades*¹ came before Lord Chancellor King, 2nd May, 1727.

William Blades, in 1716, devised certain lands to his wife for her life, and after her death to his nine children. The wife enters, but does not register the will. The heir-at-law mortgages the estate, and has it registered, and, upon a bill brought against him, denies notice of the will. But it was proved in evidence that he had notice: and the Court said, that, having notice of the first purchase (though it was not registered), bound him; and that getting his own purchase first registered was a fraud; the design of those Acts being only to give parties notice who might otherwise without such registry be in danger of being imposed on by a prior purchase or mortgage, which they are in no danger of when they have any notice thereof in any manner, though not by the registry; and that they would never suffer any Act of Parliament made to prevent fraud to be a protection to fraud; and therefore decreed for plaintiff, *looking upon the transaction between the heir-at-law and mortgagee to be collusive.*

I mention this, not only as a material authority, but as determined by Lord King, who, we all know, was as willing to adhere to the common law as any judge that ever sat here.

¹ 1 Eq. Ca. Ab. 358, pl. 12.

The other case, of *Cheval v. Nichols*,¹ was in the Court of Exchequer, the 10th of December, 1725, before Lord Chief Baron Gilbert, and is a clear authority for giving relief against the Register Act upon an equity of notice. But then there were charges of fraudulent circumstances besides, and therefore not so similar to the present.

[*45] *Consider, therefore, what is the ground of all this, and particularly of those cases which went on the foundation of notice to the agent. The ground of it is plainly this: That the *taking of a legal estate after notice of a prior right, makes a person a mala fide purchaser*; and not, that he is not a purchaser for a valuable consideration in every other respect. This is a species of fraud and *dolus malus* itself: for he knew the first purchaser had the clear right of the estate, and after knowing that, he takes away the right of another person by getting the legal estate.

And this exactly agrees with the definition of the civil law of *dolus malus*, Dig. Lib. 4, tit. 3: "*Dolum malum Servius quidem ita definit, machinationem quandam alterius decipiendi causâ, cum aliud simulatur, et aliud agitur. Labeo autem, posse et sine simulatione id agi ut quis circumveniat: posse et sine dolo malo aliud agi, aliud simulari: sicuti faciunt, qui per ejusmodi dissimulationem deserviant, et tuenter vel sua vel aliena. Itaque ipse sic definiit dolum malum esse omnem calliditatem fallaciam machinationem ad circumveniendum, fallendum, decipiendum alterum adhibitam. Labeonis definitio vera est.*"

Now, if a person does not stop his hand, but gets the legal estate when he knew the right was in another, *machinatur ad circumveniendum*. It is a maxim, too, in our law, that *fraus et dolus nemini patrocinarî debent*. Vide Co., 3 Rep. 78, 7 Rep. 38.

Fraud, or *mala fides*, therefore, is the true ground on which the Court is governed in the cases of notice; and it is a consequence of the decision of the former question that notice to the agent is sufficient; for if the ground is the fraud, or *mala fides*, of the party, then it is all one whether by the party himself or his agent: still it is a *machinatio ad circumveniendum*, and the putting a copy of the first articles and settlement into Norton's hands, to take the opinion of counsel in what manner they could be set aside, is a contrivance to circumvent.

It has been said, if this woman has been imposed on by her husband, she, instead of cheating, has been cheated.

[*46] *But, then, who ought to suffer?—the person intrusting an agent, or a stranger who did not employ him? He, certainly, who trusts most ought to suffer most.

Mrs. Hatt, the third mortgagee in the case in 2 Vern. 574, mentioned before, was imposed upon; and so was Moore, in the other case reported there,² clearly imposed on: and yet, if this was to be any excuse, it would make all the cases of notice very precarious; for it seldom happens but the agent has imposed on his

¹ 1 Stra. 664.

² Jennings v. Moore, 2 Vern. 609.

principal; and, notwithstanding that, the person trusting ought to suffer for his ill-placed confidence.

Therefore, in both respects, as agent and trustee, notice to Joseph Norton is notice to defendant Mary likewise. And as to the Registry Act, here is sufficient equity in the plaintiff to postpone the second articles and settlement, notwithstanding those only have been registered. And decreed accordingly.

No equitable doctrine is better established than that so clearly and forcibly laid down by Lord Hardwicke in the principal case, viz.: *that the person who purchases an estate (although for valuable consideration) after notice of a prior equitable right, makes himself malâ fide purchaser, and will not be enabled, by getting in the legal estate, to defeat such prior equitable interest, but will be held a trustee for the benefit of the person whose right he sought to defeat.* "If," says his Lordship, "a person does not stop his hand, but gets the legal estate, when he knew the right in equity was in another, machinatur ad sub-veniendum; and it is a maxim in our law, that *fraus et dolus nemini patrocinarî debent*. Fraud, or mala fides, therefore, is the true ground on which the Court is governed in cases of notice."

It may be laid down as a general rule, that a purchaser, with notice of a right in another, is in equity liable, to the same extent, and in the same manner, as the person from whom he made the purchase. For instance, if a person contracts to sell an estate, or to grant leases thereof, a purchaser, with notice of such contracts, is liable to the same equity, stands in the same place, and is bound to do that which the vendor, whom he represents, would be bound to do by decree. Thus, in an early case, A. contracted with B. to purchase lands of him; and afterwards C., on *behalf of his son, purchased the same lands, and [*47] took a conveyance from B. to his (C.'s) son in fee. On a bill by A. to be relieved against this conveyance, the son pleaded himself to be a purchaser bonâ fide, without any notice of B.'s contract with the plaintiff, and without any trust for his father. But, it appearing that C., the father, had notice of the plaintiff's contract before he purchased for his son, the Court decreed in favour of the plaintiff: *Merry v. Abney*, 1 Ch. Ca. 38. See also *Ferrars v. Cherry*, 2 Vern. 384; *Jackson's case*, Lane 60; *Earl Brooke Bulkeley*, 2 Ves. 498; *Daniels v. Davidson*, 16 Ves. 249; *Crofton v. Ormsby*, 2 S. & L. 583; *Kennedy v. Daly*, 1 S. & L. 355; *Field v. Boland*, 1 D. & Walsh, 37; *Potter v. Sanders*, 6 Hare, 1.

Upon the same principle, an estate in the hands of a subsequent purchaser, or mortgagee, with notice of a prior defective mortgage, will be bound by it. Thus, in a case where a person lent money on a surrender of copyholds, which became void for want of presentment, and after-

wards another person purchased the same lands from the mortgagor, with notice of the prior surrender, and took a surrender and was admitted, the Court decreed the subsequent purchaser either to pay the mortgagee his money, or to surrender to him the legal estate: *Jennings v. Moore*, 2 Vern. 609; *S. C.*, 2 Bro. P. C. 278, Toml. ed.

So also, a purchaser or mortgagee of the legal estate, with notice of an equitable mortgage by deposit of title deeds, will be held a trustee for the equitable mortgagee to the amount of his charge: *Birch v. Ellames*, 2 Anst. 427.

So, a purchaser having notice of an equitable lien for unpaid purchase-money will be bound by it: *Mackreth v. Symmons*, 15 Ves. 349; ante, Vol. 1, p. 289; *Grant v. Mills*, 2 V. & B. 306.

So also, a purchaser with notice of a trust will be bound in the same manner as the person from whom he purchased; *Dunbar v. Tredennick*, 2 Ball & B. 319; *Pawlett v. Attorney-General*, Hard. 465; *Burgess v. Wheate*, 1 Eden, 195; *Bovey v. Smith*, 1 Vern. 149; *Mansell v. Mansell*, 2 P. Wms. 681; *Phayre v. Peree*, 3 Dow. 129; *Adair v. Shaw*, 1 S. & L. 262; *Wigg v. Wigg*, 1 Atk. 382; *Mead v. Lord Orrery*, 3 Atk. 238; *Mackreth v. Symmons*, 15 Ves. 350; *Saunders v. Dehew*, 2 Vern. 271; and see ante, p. 11.

In the principal case, the postponement in a Register County—Middlesex—of a registered, to an unregistered conveyance, of which the purchaser had notice, seems to have carried the doctrine of equity upon this subject to a great length, and even to have infringed upon the policy of the Registration Acts. "It has," says Sir William Grant, M. R., "[*48] "been much doubted *whether Courts ought ever to have suffered the question of notice to be agitated as against a party who has duly registered his conveyance; but they have said, 'We cannot permit fraud to prevail; and it shall only be in cases where the notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title of another, that we will suffer the registered deed to be effected;'" *Wyatt v. Barwell*, 19 Ves. 439; and see *Chadwick v. Turner*, 34 Beav. 634; *W. R. (M. R.)* 447; 1 L. R. Ch. App. 310; *Neve v. Pennell*, 2 Hem. & Mill. 170. However, *Le Neve v. Le Neve* has been always considered a binding authority, although it may, perhaps, be regretted that notice of unregistered deeds should, under any circumstances, be binding as against a person claiming under a deed properly registered. See *Co. Litt.* 290 b., n. 13; *Ford v. White*, 16 Beav. 120, 123, 124; *Benham v. Keane*, 1 J. & H. 685, 701; 3 De G. F. & Jo. 318. Constructive notice, moreover, has the same effect as actual notice as against a registered deed. Thus, in a recent case, a registered marriage settlement was postponed to an equitable mortgage of the same property prior in point of date, but registered subsequently, in consequence of the trustees of the settlement being held to be affected with notice of the equitable mortgage,

by reason of their not having inquired for the title deeds, when the abstract was delivered to them: *Wormald v. Maitland*, 35 L. J. (N. S.) Ch. 69; 13 W. R. (V. C. S.) 832; *Re Allen*, 1 I. R. Eq. 455. But see *Chadwick v. Turner*, 1 L. R. Ch. App. 310; *Agra Bank v. Barry*, 6 I. R. Eq. 128.

Where a person has taken a conveyance for valuable considerations without notice of a prior unregistered deed, he may, upon acquiring subsequent notice, gain priority by registering his conveyance. See *Elsey v. Lutyens*, 8 Hare, 159; where it was held that a conveyance of lands in Middlesex, by settlement upon the marriage of the settlor, registered under the statute 7th Anne, c. 20, was effectual against a prior unregistered conveyance, notwithstanding the party claiming under the settlement had notice of the unregistered conveyance after the marriage, but before the registry of the settlement.

So likewise, a subsequent incumbrancer who, at the time of taking his security, had no notice of the prior incumbrance, may by properly registering his security, though after notice, obtain priority over the prior incumbrancer, if the security of the latter be defectively registered: *Essex v. Baugh*, 1 Y. & C. C. C. 620.

Registration is not of itself notice, so that a prior equitable incumbrance will not, although registered, affect a subsequent purchaser *without notice who has obtained the legal estate: *Morecock v. [49]* *Dickins*, Amb. 678; *Bushell v. Bushell*, 1 S. & L. 103.

There is, however, a material difference between the Register Act of Ireland and the Register Acts of England. By the Irish Act, 6 Anne, c. 2, an absolute priority is expressly given to the instruments first registered, so that a subsequent purchaser for value having the legal estate, although he has not notice of an equitable estate previously registered, will be bound by, and compelled to give effect to it. See *Bushell v. Bushell*, 1 S. & L. 98; *Latouche v. Lord Dunsany*, Id. 159, 160; *Drew v. Lord Norbury*, 9 Ir. Eq. Rep. 171; 3 J. & L. 267; *Thompson v. Simpson*, 1 Dru. & War. 459; *Mill v. Hill*, 12 Ir. Eq. Rep. 107; 3 H. L. Cas. 828; *Hunter v. Kennedy*, 1 Ir. Ch. Rep. 148; *Corbett v. De Cantillon*, 5 Ir. Ch. Rep. 126; *Re Driscoll*, 1 I. R. Eq. 285.

The doctrine of notice has no operation with reference to British ships duly registered. See *Hughes v. Morris*, 2 De G. Mac. & G. 349; *M'Calmont v. Rankin*, 2 De G. Mac. & G. 403; *Liverpool Bank v. Turner*, 1 J. & H. 159; 2 De G. F. & Jo. 502; *Coombes v. Mansfield*, 3 Drew. 193; *Orr v. Dickson*, 1 Johns. 1; but see *Stapleton v. Haymen*, 12 W. R. (Ex.) 317, ante, vol. i. p. 803, 804.

It may here be observed, that it has been long since settled, that if a person purchases for valuable consideration with notice, from a person who bought without notice, he may shelter himself under the first purchaser, for otherwise, a bona fide purchaser would be unable to deal with his property, and the sale of estates would be very much clogged:

(*Lowther v. Carlton*, 2 Atk. 242;) and, without exception, even in the case of a charity (*Attorney-General v. Wilkins*, 17 Beav. 293; but see *East Grinstead's case*, Duke, 64), if a person who has notice sells to a bonâ fide purchaser for a valuable consideration, without notice, the latter may protect his title. See *Harrison v. Forth*, Prec. Ch. 51, the leading case upon both branches of this doctrine. There A. purchased an estate, with notice of an incumbrance, or that it was redeemable, and then sold to B., who had no notice; who afterwards sold it to C., who had notice; the Master of the Rolls held, that the first notice to A., the first purchaser, was thereby revived, and that C., the last purchaser, should be liable to the incumbrance or redemption as if it had never been in the hands of one who had no notice; but afterwards, on appeal to Lord Keeper Somers, it being urged, that, in such case, an innocent purchaser without notice might be forced to keep his estate and could not sell it, and should be accountable for all the profits received ab initio, his Lordship *held, that though A. and C. had notice, yet if [*50] B. had no notice, the plaintiff could not be relieved against the defendant C. The doctrine laid down in this case has ever since been adhered to; see *Brandlyn v. Ord*, 1 West. Rep. 512; *S. C.*, 1 Atk. 571; *Lowther v. Carlton*, 2 Atk. 242; *Ferrars v. Cherry*, 2 Vern. 383; *Mertins v. Jolliffe*, Amb. 313; *Sweet v. Southcote*, 2 Bro. C. C. 66; *M'Queen v. Farquhar*, 11 Ves. 467, 478.

Since, however, as a general rule persons taking equitable interests take subject to all the equities affecting them, an equitable incumbrancer on property, who has distinct notice of a prior incumbrance, cannot by concealing his knowledge from a party claiming under him, make his security more extensive, or give a better right to his assignee than that which he himself possesses. Thus, in *Ford v. White*, 16 Beav. 120, property in Middlesex was mortgaged to A., and afterwards to B., and subsequently to C., with notice of B.'s incumbrance. C. registered his mortgage before B., and afterwards assigned to D., who had no notice of B.'s mortgage. It was held by Sir John Romilly, M. R., that as C.'s interest was equitable, he could not, by assigning it to D. without notice, put him in a better situation than himself, and consequently that D. was not entitled to priority over B.

If a trustee conveys to a person who has no notice of the trust, and then takes a reconveyance, he having notice of the trust, it attaches on him; *Kennedy v. Daly*, 1 S. & L. 379.

A purchaser for valuable consideration of an estate, even with notice of a voluntary settlement, will not be affected by it; *Buckle v. Mitchell*, 18 Ves. 100; ante, vol. i. p. 283.

The vendor of land who has contracted to sell it, may convey to the purchaser, and receive the balance of the purchase-money, without regard to the receipt of a notice that the purchaser had agreed to assign the contract to secure sums of money advanced to him. See *M'Creight*

v. *Foster*, 5 L. R. Ch. App. 604, where Lord Hatherley, L. C., observed, "I should embarrass all future vendors, and should interfere far more with the freedom of the sale of land, if I held that a party to a contract could be arrested in the course of his proceeding to enforce or complete that contract, by a notice that the other party had engaged to give some one else the benefit of the contract by way of security for money lent; and that the person who gives the notice of this security, as to which nothing is known except that the assertion is made, has a right to assist at the completion, and to insist that the completion of the contract shall be arrested until the rights are determined *between the [*51] party to the contract and this third party."

The same principle applies when the purchaser has before completion agreed to sell the estate, and has received part of the purchase-money. See *Crabtree v. Poole*, 12 L. R. Eq. 13. There the defendant Poole agreed to sell land to the defendant Mortimer, with immediate possession, the purchase to be completed in five years. Before completion Mortimer agreed to sell the land to the plaintiff, and the agreement was registered in the district registry, with a receipt for part of the consideration-money, which the plaintiff had laid out for Mortimer in buildings on the land. The plaintiff offered to pay the vendor the amount agreed upon between him and Mortimer, and applied for the delivery of the abstract, but Poole refused to convey to him the land in question, unless he would purchase other land also agreed to be sold to Mortimer; and shortly afterwards Poole and Mortimer conveyed the land to Holdsworth. On a bill filed by the plaintiff against Poole and Holdsworth, alleging that the latter had constructive notice of his title, and praying a conveyance of the estate, it was held by Lord Romilly, M. R., that whether Holdsworth had such notice or not, the conveyance to him could not be set aside. "I think," said his Lordship, "this is a weaker case than *M'Creight v. Foster*. Here the plaintiff was told, and knew perfectly well, that Poole would not sell one of the plots without the other."

Next, as to what constitutes notice.—Notice is either actual or constructive.

1st. *As to actual notice*, it will be unnecessary to say anything except this: that mere vague reports from strangers, or mere general assertions that some other persons claim a title, is not sufficient to affect a person with actual notice (*Wildgoose v. Wayland*, Gouldsb. 147, pl. 67; *Jolland v. Stainbridge*, 3 Ves. 478; *Fry v. Porter*, 1 Mod. 300; *Butcher v. Stapely*, 1 Vern. 363). Such notice, in order to be binding, must proceed from some person interested in the property: *Barnhart v. Greenshields*, 9 Moore's P. C. C. 36; *The Natal Land, &c., Company v. Good*, 2 L. R. P. C. 121, 129.

2nd. *As to constructive notice*.—Constructive notice is defined to be in its nature no more than evidence of notice, the presumption of which

is so violent, that the Court will not even allow of its being controverted: per *Eyre*, C. B., in *Plumb v. Fluitt*, 2 Anst. 438; and see *Kennedy v. Green*, 3 My. & K. 719. It is by no means an easy matter to say what amounts to constructive notice; for much depends upon the circumstances of each particular case, and the position of the persons [*52] *concerned in it. However, the able exposition of the law in a well-known case, by the Vice-Chancellor Wigram, although showing an anxiety, as far as possible, to avoid the appearance of defining what in the abstract is to be deemed constructive notice in equity, has cleared the subject of much difficulty. "It is scarcely possible," observes his Honor, "to declare à priori what shall be deemed constructive notice, because, unquestionably, that which would not affect one man may be abundantly sufficient to affect another. But I believe I may, with sufficient accuracy for my present purpose, and without danger, assert, that cases in which constructive notice has been established resolve themselves into two classes: *first*, cases in which the party charged has had actual notice that the property in dispute was, in fact, charged, incumbered, or in some way affected; and the Court has thereupon bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by an inquiry after the charge, incumbrance, or other circumstance affecting the property of which he had actual notice; and, *secondly*, cases in which the Court has been satisfied, from the evidence before it, that the party charged had designedly abstained from inquiry for the very purpose of avoiding notice.

"The proposition of law, upon which the former class of cases proceeds, is not that the party charged had notice of a fact, or instrument, which, in truth, related to the subject in dispute without his knowing that such was the case; but that he had actual notice that it did so relate. The proposition of law, upon which the second class of cases proceeds, is, not that the party charged had incautiously neglected to make inquiries, but that *he had designedly abstained from such inquiries, for the purpose of avoiding knowledge—a purpose which, if proved, would clearly show that he had a suspicion of the truth, and a fraudulent determination not to learn it.* If, in short, there is not actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of facts which the *res gestæ* would suggest to a prudent mind,—*if mere want of caution, as distinguished from fraudulent and wilful blindness, is all that can be imputed to the purchaser,*—there the doctrine of constructive notice will not apply; there the purchaser will, in equity, be considered, as in fact he is, a *bonâ fide* purchaser without notice:" *Jones v. Smith*, 1 Hare, 55. See also *Ware v. Lord Egmont*, 4 De G. Mac. & G. 473; *Attorney-General v. Stephens*, 6 De G. Mac. & G. 111; *Greenfield v. Edwards*, 2 De G. Jo. & Sm. 582. It

will be found, on examining *the cases, that they fall within one [*53] or other, or both of these propositions.

Constructive notice by negligence or fraud.—Whatever is sufficient to put a person upon inquiry is good notice; that is, where a man has sufficient information to lead him to a fact, he shall be deemed conusant of it. Thus, if a man knows that the legal estate is in a third person at the time he purchases, he is bound to take notice of what the trust is: *Anon.* Freem. Ch. Ca. 137, c. 171. So the purchaser of a house has been held to have notice of an agreement to grant an easement for the passage of smoke to an adjoining owner, from the mere fact of there being fourteen chimney-pots on the top of the house, whereas there were only twelve flues in the house; *Hervey v. Smith*, 22 Beav. 299; and see *Davies v. Sear*, 7 L. R. Eq. 427, where it was held that the state of the property at the time of the purchase was such as to be sufficient to put the purchaser upon inquiry, which would have led him to a knowledge of an easement of necessity, and he was therefore held to be fixed with constructive notice thereof.

Upon the same principle notice that the title deeds are in another man's possession may be held to be notice of any claim which he has upon the estate, especially if the person having such notice appears studiously to have avoided inquiry for what purposes they were deposited, or the conveyance to him is to secure an antecedent debt: (*Birch v. Ellames*, 2 Anst. 427; *Hiern v. Mill*, 13 Ves. 114; *Dryden v. Frost*, 3 My. & Cr. 670, 673); but the mere absence of the title deeds has never been held sufficient per se to affect a party with notice, if he has bonâ fide inquired for the deeds, and a reasonable excuse has been given for the non-delivery of them; for in that case the Court cannot impute fraud, or gross or wilful negligence to him (*Plumb v. Fluitt*, 2 Anst. 432; *Evans v. Bicknell*, 6 Ves. 174; *Farrow v. Rees*, 4 Beav. 18; *Hewitt v. Loosemore*, 9 Hare, 449, 458; *Finch v. Shaw*, 19 Beav. 500; *S. C.*, nom. *Colyer v. Finch*, 5 H. L. Cas. 905; *Roberts v. Croft*, 24 Beav. 223; 2 De G. & Jo. 1; *Perry Herrick v. Attwood*, 2 De G. & Jo. 37; *Carter v. Carter*, 3 K. & J. 646; *Hunt v. Elmes*, 28 Beav. 631; 2 De G. F. & Jo. 578; *Espin v. Pemberton*, 4 Drew. 333; 3 De G. & Jo. 547; *Atterbury v. Wallis*, 8 De G. Mac. & G. 454; *Wormald v. Maitland*, 35 L. J. Ch. 69; 13 W. R. (V. C. S.) 832; *Hopgood v. Ernest*, 3 De G. Jo. & Sm. 116; 13 W. R. (L. J.) 1004; *Hipkins v. Amery*, 2 Giff. 292; *Dowle v. Saunders*, 2 Hem. & Mill. 242.

But the Court will impute fraud, or gross and wilful negligence to a person dealing respecting an estate, if he omits all inquiries *as [*54] to the deeds, and will hold him to have notice of those circumstances which, had he not neglected his duty, would have come to his knowledge; *Worthington v. Morgan*, 16 Sim. 547; *Hewitt v. Loosemore*, 9 Hare, 458; *Finch v. Shaw*, 19 Beav. 511; *Allen v. Knight*, 5 Hare, 272; 11 Jur 527, and see note to *Russell v. Russell*, vol. i. p.

687; *Whitbread v. Jordan*, 1 Y. & C., Exch. Ca. 303; *Jones v. Williams*, 24 Beav. 47; *Peto v. Hammond*, 30 Beav. 495; and see *Jones v. Smith*, 1 Hare, 64; 1 Ph. 255.

Special conditions of sale, limiting the extent of title, will be no excuse for a purchaser not insisting on the production of a deed beyond those limits of which he has notice; *Peto v. Hammond*, 30 Beav. 495.

But although a purchaser who omits to call for the title deeds will be affected with the knowledge which he might have obtained by inquiry, that they were in the possession of some holder for value, he will not be affected with the knowledge of a fraud committed by the person of whom he was bound to make the inquiry: *Hipkins v. Amery*, 2 Giff. 292, 301.

Constructive notice by recital or reference.—Where the purchaser cannot make out a title but by a deed, which leads him to another fact, the purchaser shall not be a purchaser without notice of that fact, but shall be presumed cognisant thereof; for it is crassa negligentia that he sought not after it; *Moore v. Bennet*, 2 Ch. Ca. 246; *Bacon v. Bacon*, Tothill, 133; and it is immaterial whether the deed leads him to the knowledge of that fact by description of the parties, in recital, or otherwise. Thus, in *Bisco v. Earl of Banbury*, 1 Ch. Ca. 287, a party purchased with actual notice of a specific mortgage. The deed creating this mortgage referred to other incumbrances. The question was, whether the purchaser was to be affected with notice of the incumbrances which the deed creating the mortgage disclosed. The language of the Lord Chancellor, in that case, lays down an important and well-established rule, namely, “that the purchaser could not be ignorant of the mortgage, and ought to have seen that, and that would have led him to the other deeds, in which, pursued from one to another, the whole case must have been discovered to him.” So, in *Coppin v. Fernyhough*, 2 Bro. C. C. 291, the mortgagee of a lease which recited the surrender of a former lease, which was in consideration of the surrender of the former lease in which the plaintiff’s title appeared, was held to have notice of that title. This case decides, in effect, that a purchaser who has actual notice of one instrument affecting an estate, has constructive notice of all other instruments to which an examination [*55] *of the first could have led him. And see *Nixon v. Robinson*, 2 J. & L. 14; *Roddy v. Williams*, 3 J. & L. 1; *Hope v. Liddell*, 21 Beav. 183; *Barber v. Brown*, 3 Jur. N. S. 18.

So, in *Davies v. Thomas*, 2 Y. & C. Exch. Ca. 234, the purchaser had actual notice that the property in question was affected by a marriage settlement, and this settlement, when referred to, gave notice of a will. The Court decided that the purchaser had notice of the will. This case, however, has been questioned, ante, vol. i., p. 326. In *Eyre v. Dolphin*, 2 Ball & B. 290, the tenant for life under a settlement renewed a lease of the settled property in his own name, and for his own benefit.

The Court held, that he was a trustee of the renewed lease for the parties interested under the settlement. The Court also held (a point upon which there could be no doubt), that a purchaser from the tenant for life, with actual notice of the above facts, could be in no better position than the tenant for life himself. In *Malpas v. Ackland*, 3 Russ. 273, the lessee accepted a lease of the premises, and the lease contained a recital, that Hannam, one of the parties to the lease, was seised to him and his heirs of the leasehold premises, "upon trust for the use and behoof of W. Malpas and Susannah his wife, and George Colman (three other parties to the lease), for such estates in possession, reversion, or remainder, as they become entitled to after the decease of Mary Colman, and that the trust had devolved on Hannam." The Court held, that the lessee was affected with notice of the trust, whatever that trust might be.

In *Ferrars v. Cherry*, 2 Vern. 383, the defendant purchased an estate, with notice of a post-nuptial settlement, which comprised the estate in dispute; it was argued in his behalf, that there was no recital of the articles for a settlement entered into before the marriage; and that, for aught appeared to the defendant, the deed was fraudulent as against a purchaser; but the Court held, that he ought to have inquired of the wife's relations, who were parties to the deed, whether it was voluntary or made pursuant to an agreement before marriage, and, having notice of the deed, must purchase at his peril, and be bound by the effect and consequence of the deed.

A purchaser will have notice of a title, by the concurrence in his conveyance of persons interested under that title as devisees (*Burgoyne v. Hatton*, Barn. Ch. Rep. 237); and the circumstance that, upon a renewal of a lease, the lessors are not the same persons who were lessors in the original lease, is one which ought to lead the lessee to inquire into their title, and is sufficient to fix him *with notice of a trust: [*56] *Attorney-General v. Hall*, 16 Beav. 388. So, the fact of a married woman being party to an under-lease has been held notice of her title: *Steedman v. Poole*, 6 Hare, 193; 16 L. J. N. S. Ch. 348.

A purchaser with notice of a deed, is bound by all its contents. Thus, notice of a lease necessarily imparts notice of the covenants contained in it; *Taylor v. Stibbert*, 2 Ves. jun. 437; see also *Hall v. Smith*, 14 Ves. 426; *Pope v. Garland*, 4 Y. & C. 394; *Walter v. Maunde*, 1 J. & W. 181; *Spinner v. Walsh*, 10 Ir. Eq. Rep. 386, 400; *Tanner v. Florence*, 1 Ch. Ca. 259; *Lewis v. Bond*, 18 Beav. 85; *Wilbraham v. Livesey*, Ib. 206; *Cosser v. Collinge*, 3 M. & K. 282; *Martin v. Cotter*, 3 J. & L. 506; *Grosvenor v. Green*, 5 Jur. N. S. 117; *Vignolles v. Bowen*, 12 Ir. Eq. Rep. 194; *Vaughan v. Magill*, Ib. 200; *Stewart v. Marquis of Conyngham*, 1 Ir. Ch. Rep. 207, 534; *Smith v. Capron*, 7 Hare, 191; *Drysdale v. Mace*, 2 Sm. & G. 225; *Cox v. Coventon*, 31 Beav. 379; *Clements v. Welles*, 1 L. R. Eq. 200; 35 Beav. 513.

In cases, however, where specific performance of a contract is sought to be enforced, the rule that notice of a lease will affect the purchaser with notice of the covenants contained in it, is not of universal application, for there may have been such a degree of misrepresentation in the particulars of sale, as for instance when a lease contains unusual covenants, as may induce the Court to refuse its assistance. "I can imagine," said Lord Chancellor Sugden, "a covenant in a lease, which would so deteriorate the property as to destroy the interest of the seller in it; and the particulars might state some of the covenants, and omit that. Such a description might amount to fraud in the sale. I agree that if a purchaser had notice that the property was held under a lease, he cannot object that he had no notice of any particular covenant therein contained. He must look closely, and be active, in order to ascertain whether there is any such as would materially prejudice him. The rule perhaps has been carried a little too far. It is a question of bona fides. *Where the purchaser has completed his purchase the rule is right*; but *where the purchaser is only bidding for something*, and has not been informed of the obligations to which he will be liable in becoming the purchaser, it is always a question of bona fides: *Martin v. Cotter*, 3 J. & L. 506. And see *Bessonnet v. Robins*, Sausse & Sc. 142; *Van v. Carpe*, 3 My. & K. 269, 277; *Pope v. Garland*, 4 Y. & C. 401; *Flight v. Barton*, 3 My. & K. 282; *Darlington v. Hamilton*, Kay, 550.

Upon the same principle it has been held by Sir John Romily, M. R., in *Wilbraham v. Livesey*, 18 Beav. 206, that although a person who [*57] contracts for a lease from another, with the knowledge *that he holds under a leasehold title, has notice of the ordinary covenants in the original lease, he will not be held to have notice of peculiar and unusual covenants. "In this case," said his Honor, "though there is distinct notice that the plaintiff was lessee, there was no notice except of ordinary and usual covenants, and covenants in restraint of trade are not usual covenants, although in some localities they are common. The case might be varied by the particular situation of the property, as if a house were situated in Grosvenor Square, I do not say that a covenant against converting the house into a shop would be unusual; but it cannot be said that a covenant in restraint of trade, in a situation where trade is usually carried on, is a usual and ordinary covenant."

A purchaser is not imperatively bound to inquire whether he has notice of an instrument, only because by *possibility* it may affect the subject of his purchase. Thus in *Cothay v. Sydenham*, 2 Bro. C. C. 391, a purchaser had notice that a *draft* of a deed was prepared, but not that a deed was executed; and it was held that he was not bound by notice of the deed, although in fact it was executed. "If," said Lord Thurlow, "the notice had been of a deed actually executed, it certainly

would do, but where the notice is not of a deed, but only of an intention to execute a deed, it is otherwise; there is no case or reasoning which goes so far as to say that a purchaser shall be affected by notice of a deed in contemplation."

Moreover, notice of a deed, accompanied by a statement of its contents, which is erroneous, does not necessarily give a person notice of its real contents. Thus in *Jones v. Smith*, 1 Hare, 43, Smith, before advancing money on a mortgage, inquired of Jones the mortgagor and his wife, whether any settlement had been made upon their marriage; and was informed that a settlement had been made, *but of the wife's fortune only, and that it did not include the husband's estate*, which was proposed as the security; and he afterwards advanced the mortgage money without having seen the settlement or known its contents, upon the security of a term prior in date to the settlement. It was held, by Sir J. Wigram, V. C., that the mortgagee was not, under the circumstances, affected with constructive notice of the contents of the settlement, or of the fact that the settlement comprised the husband's estate. "This case," said his Honor, "cannot be brought within the scope of the authorities which at once establish and limit the cases to which the doctrine of constructive notice is applied. For, first, it is incontrovertibly clear, that Smith had not actual notice of the mortgaged property being in any way affected *with the plaintiff's interest. The [*58] contrary of this has not been suggested, and the point, therefore, requires no observation. Therefore, secondly, if Smith's estate is to be affected by the plaintiff's claim, it must be upon the ground of his having purposely avoided inquiry, in order to avoid discovery. But is such a supposition consistent with a single fact in this case? His debt was not like that of Boulnois, in *Whitbread v. Jordan* (1 Y. & C. Exch. Ca. 303), an antecedent debt, for which he might be glad to get any security. The advance of his money was contemporaneous with the mortgage which secures it. His mortgagor was a needy man, and the evidence proves that Smith, at the time for treating for the first mortgage, so considered him. The letter of October, 1826, which the plaintiff has put in evidence, suggests the fraud which was practised upon Smith; and the evidence of Sarah Jones proves the suggestions in that letter to be true. Where is the ground for questioning the honesty and bona fides of Smith, even if his caution could be successfully impeached? How can anything, exceeding want of caution, be imputed to the man who parts with his money upon the bare faith of a security, without any assignable motive? The only knowledge Smith had was, that there was a settlement. But the contemporaneous assertion respecting that settlement was, that it related to other property than the husband's. A simple denial by Jones and his wife, that there was any settlement affecting Jones's property, would clearly have made Smith safe. How can it be argued, that such denial is qualified by the statement that

there is a settlement relating to other property? Nay, more, is not the apparent candour of that statement calculated rather to inspire confidence than to excite suspicion and lay a foundation for inquiry? If Smith was bound to inquire after one deed of which he was told nothing, except that it did not relate to Jones's estate, why, upon the same principle, should he not be bound to examine any other deed, of the mere existence of which he had notice? If notice of the existence of a settlement, declared not to affect the husband's estate, is to put a purchaser upon inquiry, only because it may by possibility affect it, how can the plaintiff stop short of the conclusion, that marriage alone should be constructive notice of any settlement that may have been executed? And why, upon the same principle, should not every man who deals with his neighbour, without knowing he is married, be affected with notice of his marriage (if any), and thence with notice of the contents of the settlement? The basis of the plaintiff's argument is this: that a purchaser is imperatively bound to inquire, wherever he has notice of a [*59] fact which by *bare possibility may affect the subject of his purchase. . . . The affairs of mankind cannot be carried on with ordinary security, if a doctrine like that of constructive notice is to be refined upon until it is extended to cases like the present. I should myself incline to limit the cases to which the doctrine is applied, rather than to extend them, were it not that the principle upon which these cases are decided, is sound in itself, and that it is better to carry out a sound principle to its just limits, even at the occasional expense of individual hardship, than render the law uncertain and fluctuating, by arbitrarily refusing to apply an acknowledged principle to cases within its range." This case, on appeal, was affirmed by Lord Lyndhurst, 1 Ph. 244. See, also, *Allen v. Knight*, 5 Hare, 272, 11 Jur. 527; *Bird v. Fox*, 11 Hare, 40; *Ware v. Lord Egmont*, 4 De G. Mac. & G. 460, 473, 474; *Harryman v. Collins*, 18 Beav. 11; *Re Bright's Trusts*, 21 Beav. 430.

The same principle is applicable as between vendor and purchaser in cases of sales of property: thus, although where a deed is simply referred to in particulars of sale, without mentioning its contents, and the deed can be examined by the purchaser, he will be bound by everything contained in the deed; but if the vendor, instead of referring the purchaser to the deed to ascertain its contents, himself states what the contents are, the purchaser is not bound to examine the deed, but may reasonably trust to the representation of it contained in the particulars of sale, as being the correct statement of its contents: *Cox v. Coventon*, 31 Beav. 378, and see *Grosvenor v. Green*, 28 L. J. Ch. (N. S.) 173.

It was argued in *Jones v. Smith*, 1 Hare, 60, that a purchaser from an heir-at-law, with notice of a will by the ancestor, under whom the heir claimed, would be affected with notice of the contents of that will, although he was ignorant of such contents, and even misled by the heir

at the time of his purchase. But Sir J. Wigram, V. C., in his judgment said, that the question must depend upon circumstances. If the testator had been long dead, and the heir long in possession, and the other circumstances of the case such as to leave the purchaser in credit for perfect good faith, he thought a Court of equity would not interfere against the legal title, only because the purchaser had notice of a will respecting which he was misled. If the death of the testator were recent, other considerations might arise affecting the purchaser with the imputation of a fraudulent blindness. And see *Burgoyne v. Hatton*, Barn. Ch. Rep. 237; *West v. Reid*, 2 Hare, 257.

The purchaser of the estate of an insolvent debtor from his assignees, *at a sale by auction, will not be affected by constructive notice [*60] of circumstances of negligence on the part of the assignees in conducting the sale, such circumstances being entirely collateral to any question of title: *Borell v. Dann*, 2 Hare, 440.

The purchaser of a charity lease takes, with notice of the facts thereon, showing its equitable invalidity (*Attorney-General v. Pargeter*, 6 Beav. 150; *Attorney-General v. Pilgrim*, 12 Beav. 57). Secus, where the facts depend on circumstances dehors the lease; *Attorney-General v. Backhouse*, 17 Ves. 293; 3 Ridg. P. C. 512.

It seems that a purchaser is bound by notice of articles, the construction of which is dubious, see vol. i. p. 42, 43; *Lloyd v. Banks*, 4 L. R. Eq. 222; *Re Brown's Trusts*, 5 L. R. Eq. 88.

A general recital in a deed, that there were mortgages on the estate, was held to affect parties claiming under the deed with notice; *Farrow v. Rees*, 4 Beav. 18; and see *Eland v. Eland*, 1 Beav. 18.

In *Taylor v. Baker*, 5 Price, 306, a person had made an equitable mortgage to A., and afterwards giving a security to another person, stated that he had given a judgment or warrant of attorney to A. for money borrowed of him; and this was held to be sufficient notice of the mortgage. This case has been recognised and approved of by Lord Cottenham, in *Penny v. Watts*, 1 Hall & T. 266; 1 Mac. & G. 150. In that case, on the marriage of the defendant with A., who, under the will of her former husband, was entitled to certain real estates, charged with a legacy of 2000*l.*, payable to B., a feme sole, the defendant had notice that B., while sole, had released this legacy to A., and that A. had in consequence devised to B. a certain part of the real estates; it was held, by Lord Cottenham, reversing the decision of Sir J. L. Knight Bruce, V. C. (reported 2 De G. & Sm. 501), that the knowledge of these facts rendered it incumbent on the defendant to have made further inquiries, and affected him with constructive notice of an equitable title acquired by the husband of B., under a subsequent agreement with A. to have the devised estate conveyed to him. And see *Tildesley v. Lodge*, 3 Sm. & Giff. 543.

Upon the same principle it was held that notice of a charge to an in-

definite amount, although the notice was inaccurate as to the particulars or extent of the charge, was sufficient to put upon inquiry a party dealing for the property subject to the charge; and though the actual charge afterwards appeared to be incorrectly described in the notice, it was nevertheless sufficient, as a ground for giving priority for the true amount of the charge, as against the party who received the incorrect [*61] notice, *but made no inquiry; *Gibson v. Ingo*, 6 Hare, 112, 124. And see *Gurney v. Lord Oranmore*, 5 Ir. Ch. Rep. 436; *Jones v. Williams*, 24 Beav. 47.

With reference to the case of *Penny v. Watts*, it must be remarked, that it has been considered as having carried the doctrine of notice too far (Sugd. V. & P. 766, 14th ed.). And in a recent case in Ireland, Lord Chancellor Brady said, that it seemed to require much examination before it could be received as established law; *Abbott v. Geraghty*, 4 Ir. Ch. Rep. 23. And in another case, a purchaser was held not to be fixed with notice of a deed by evidence that he had notice of an annuity created by that deed, which, from the notice given of its existence, appeared to have expired many years before the purchase; *Stephenson v. Royce*, 5 Ir. Ch. Rep. 401.

And it has been recently held, that if a man is purchasing or taking a mortgage over a large estate as to which the title is furnished to him, chooses, as to a small portion, to be content with a short title, he will not as to all the rest of the estate be affected with notice of something which he might have found out if he had investigated the earlier title to the small portion. Per Lord Hatherley, L. C., in *Hunter v. Walters*, 7 L. R. Ch. App. 83.

Constructive notice by tenancy.—If a person purchases an estate which he knows to be in the occupation of another than the vendor, he is bound by all the equities which the party in such occupation may have in the land; for possession is *prima facie* seisin, and the purchaser has, therefore, actual notice of the fact by which the property is affected, and he is bound to ascertain the truth. Thus, if a person purchases property in the occupation of one whom he supposes to be only a tenant from year to year, he will be held to have notice of a lease under which he holds, and of the contents of it; *Taylor v. Stibbert*, 2 Ves. jun. 437, 440; where Lord Rosslyn says, “I have no difficulty to lay down, and am well warranted by authority, and strongly founded in reason, that whoever purchases an estate from the owner, knowing it to be in the possession of tenants, is bound to inquire into the estates these tenants have. It has been determined, that a purchaser being told particular parts of the estate were in possession of a tenant, without any information as to his interest, and taking it for granted it was only from year to year, was bound by a lease that tenant had, which was a surprise upon him. That was rightly determined; for it was sufficient to put the purchaser upon inquiry, that he was informed the es-

tate was not in the actual possession of the person with whom he contracted; *that he could not transfer the ownership and possession at the same time; that there were interests as to the extent and terms of which it was his duty to inquire." And see *Jones v. Smith*, 1 Hare, 60; *James v. Lichfeld*, 9 L. R. Eq. 51. [*62]

And the equity of the tenant extends not only to interests connected with his tenancy, but also to interests under collateral agreements. Thus, if the tenant in possession has entered into a contract for the purchase of the estate, a subsequent purchaser will be held to have had constructive notice of the contract, as he was bound to make inquiry from the tenant which would have led him to a knowledge of it (*Daniels v. Davison*, 16 Ves. 249; *S. C.*, 17 Ves. 433; *Douglas v. Witterwonge*, 16 Ves. 254, cited; *Lewis v. Bond*, 18 Beav. 85; *Wilbraham v. Livesey*, Ib. 206; and see *Crofton v. Ormsby*, 2 S. & L. 583; *Meux v. Maltby*, 2 Swanst. 281; *Powell v. Dillon*, 2 Ball & B. 416; *Bailey v. Richardson*, 9 Hare, 734, and the comments thereon in *Barnhart v. Greenshields*, 9 Moore, P. C. C. 33, 34; *Thomas v. Davies*, 9 W. R. (V. C. S.) 831); even although the interest which the tenant may have were posterior to the lease under which he held; *Allen v. Anthony*, 1 Mer. 282. But *Daniels v. Davison* has always been considered an extreme case, beyond which the doctrine ought not to be extended. Accordingly it was said by Lord Cottenham, then Master of the Rolls, that "although it is true that where a tenant is in possession of the premises, a purchaser has implied notice of the nature of his title; yet if, at the time of the purchase, the tenant in possession was not the original lessee, but merely held under a derivative lease, and had no knowledge of the covenant contained in the original lease, it had never been considered want of due diligence in the purchaser, which was to fix him with implied notice, if he did not pursue his inquiries through every derivative lessee, until he arrived at the person entitled to the original lease, which could alone convey to him information of the covenant;" *Hanbury v. Litchfield*, 2 My. & K. 633; *Jones v. Smith*, 1 Hare, 62. And, in *Penny v. Watts*, it seems to have been considered doubtful whether the mere occupation by a person of property would be notice of an agreement not connected with his occupation. See 2 De G. & Sm. 150; 1 Mac. & G. 150; 1 Hall & T. 266. And see *Nelthorpe v. Holgate*, 1 Coll. 203.

It has been recently laid down that "the question of notice concerning the right to an easement is like those cases in which notice of possession by a tenant of land is notice of the terms of his holding;" per Sir W. Page Wood, *V. C., in *Hervey v. Smith*, 1 K. & J. 394; [*63] see *S. C.*, 22 Beav. 299; *Kyle v. O'Connor*, 16 Ir. Ch. Rep. 46; *Davies v. Sear*, 7 L. R. Eq. 427.

So where the mortgagee of a burial ground had notice of the purposes to which it was devoted, he was held to be bound by rights of

burial temporary or in perpetuity granted by his mortgagor while left in possession ; *Moreland v. Richardson*, 24 Beav. 33.

If the possession is vacant, the purchaser is not bound to inquire as to the title of the last occupier, and will, therefore, not have constructive notice of the information he might have obtained by such inquiry. Thus in *Miles v. Langley*, 1 Russ. & My. 39, where a person purchased an estate described as "lâte the residence of Thomas Hellicar," and it appeared that Thomas Hellicar had, theretofore, held and occupied the land in question under an agreement ; it was argued upon the authority of *Daniels v. Davison*, that the purchaser was bound to have inquired what the interest of Hellicar was under his late "late occupation ;" but Sir J. Leach, V. C., held, that the obligation to inquire did not arise in the case of vacant possession. His Honor said, that Lord Eldon's principle, in *Daniels v. Davison*, could not, where the possession was vacant, be extended to the last occupier. This decision was confirmed by Lord Brougham (2 Russ. & My. 626), upon the express ground that a contrary decision would have extended the doctrine laid down in *Daniels v. Davison* ; for, in that case, the purchaser had, whereas, in *Miles v. Langley*, he had not, actual notice of a fact affecting the subject-matter of the contract. See *Jones v. Smith*, 8 Hare, 62.

The rule that a purchaser has notice of the rights of the tenant is not limited to the terre tenant, who is in the actual occupation, but it extends to the person who is known to receive the rents from the occupier of the land. Thus, in *Knight v. Bowyer* (2 De G. & Jo. 421), where the purchaser of a charge upon an estate had notice that the rents were received by a person who was not the owner of the estate, it was held by the Court of Appeal in Chancery affirming the decision of Sir John Romilly, M. R. (23 Beav. 609), that the notice that the tenants paid their rents to such person, was notice of the instrument under which they were compelled to pay them, and of the rights of all parties thereunder.

Where a man is of right in possession of a corporeal hereditament, he is entitled to impute knowledge of that possession to all who deal for any interest in the property, and persons so dealing cannot be heard to deny notice of the title under which the possession is held, nor is it [*64] *necessary that such possession should be continually visible or actively asserted. See *Holmes v. Powell*, 8 De G. Mac. & G. 572. There the purchasers of mines took possession under the agreement for purchase without any conveyance. Afterwards a person purchased the land without any exception of the mines. It was held by the Lords Justices of the Court of Appeal, affirming the decision of Sir John Stuart, V. C., that the purchaser of the land took with notice of the agreement, and was bound specifically to perform it.

Moreover, a lessee (*Fielden v. Slater*, 7 L. R. Eq. 523), sub-lessee (*Parker v. Whyte*, 1 H. & M. 167), or tenant from year to year (*Wilson*

v. *Hart*, 1 L. R. Ch. App. 463; *Ib.* 2 H. & M. 551, who enters without inquiries will be taken to have notice of that which he would have found out, if he had made such inquiries; and see *Clements v. Welles*, 1 L. R. Eq. 200; 35 Beav. 513.

The following summary of the law, of Lord Justice Turner, is both clear and accurate: "It cannot, I think, be denied that, generally speaking, a purchaser or mortgagee is bound to inquire into the title of his vendor, or mortgagor, and will be affected with notice of what appears upon the title if he does not so inquire; nor can it, I think, be disputed that this rule applies to a purchaser or mortgagee of leasehold estates, as much as it applies to a purchaser or mortgagee of freehold estates, or that it applies equally to a tenant for a term of years; and I cannot see my way to hold that a rule which applies in all these cases, ought not to be held to apply in the case of a tenant from year to year. The difference in the cases seems to me to be only in the quantum of injury which falls upon the party to whom the rule is applied;" *Wilson v. Hart*, 1 L. R. Ch. App. 467.

The possession, however, of a vendor of an estate which he has sold will not be constructive notice of any lien he may have for unpaid purchase-money, if he has signed the usual receipt on the conveyance for the whole purchase-money; for, after that, no man could be expected to inquire whether the purchase-money had been paid: *White v. Wakefield*, 7 Sim. 401. And see *Rice v. Rice*, 2 Drew. 1; *Muir v. Jolly*, 26 Beav. 143; *Wilson v. Keating*, 4 De G. & Jo. 588; and the note to *Mackreth v. Symmons*, ante, vol. i. p. 326, 327.

Notice of a tenancy will not, it seems, affect a purchaser with constructive notice of the lessor's title (per Wigram, V. C., in *Jones v. Smith*, 1 Hare, 63); nor will a purchaser *bonâ fide* and without notice be affected by the mere circumstance of the vendor having been out of possession many years: *Oxwith v. Plumer*, Bac. Abr., tit. "Mortgage" (E.), sect. *8; *S. C.*, 2 Vern. 636; *S. C.*, Gilb. Eq. Rep 13; and [*65] see the remarks on this case in *Barnhart v. Greenshields*, 9 Moore's P. C. C. 34, 35; and in the *Attorney-General v. Backhouse*, 17 Ves. 293, where the question arose upon the validity of a lease of charity-lands. Lord Eldon, speaking of the position of the assignee of the lease, said, "Though the purchaser of a lease has never been considered as a purchaser for valuable consideration without notice, to the extent of not being bound to know from whom the lessor derived his title, I am not aware of any case that has gone the length that he is to take notice of all those circumstances under which the lessor derived that title."

Constructive notice between principal and agent.—It is clear, as is laid down in the principal case, that notice to an agent, attorney, or counsel of a purchaser, is constructive notice to their principal; for, if it were otherwise, it would cause great inconvenience, and notice would

be avoided in every case by employing agents; *Sheldon v. Cox*, 2 Eden, 228; *Newstead v. Searles*, 1 Atk. 265; *Tunstall v. Trappes*, 3 Sim. 301; *Dryden v. Frost*, 3 M. & C. 670; *Lenehan v. M' Cabe*, 2 Ir. Eq. Rep. 342; *Richards v. Gledstones*, 3 Giff. 298; *Atterbury v. Wallis*, 8 De G. Mac. & G. 454.

The same rule applies if, as in the principal case, they are concerned for both vendor and purchaser in the same transaction (*Sheldon v. Cox*, 2 Eden, 224; *Fuller v. Bennett*, 2 Hare, 402; *M' Mahon v. M' Elroy*, 5 I. R. Eq. 1); even if they be themselves the vendors (*Majoribanks v. Hovenden*, 6 Ir. Eq. Rep. 238; *Dru*, 11; *Atkyns v. Delmege*, 12 Ir. Eq. Rep. 1; *Twycross v. Moore*, 13 Ir. Eq. Rep. 250; *Robinson v. Briggs*, 1 Sm. & Giff. 188; *Tucker v. Henzill*, 4 Ir. Ch. Rep. 513; *Spencer v. Topham*, 2 Jur. N. S. 865; *In re Rorke*, 13 Ir. Ch. R. 273; 14 Ir. Ch. Rep. 442) or when the same solicitor acts both for the mortgagor and mortgagee (*Tweedale v. Tweedale*, 23 Beav. 341); and notice to a solicitor in the country is notice to a person acting in a cause by a town agent (*Norris v. Le Neve*, 3 Atk. 26); and notice is binding even upon infants, where a sale is made under a decree of the Court (*Toulmin v. Steere*, 3 Mer. 210; or although the conveyance is made to a third person (*Coote v. Mammon*, 5 Bro. P. C. 355, Toml. ed.).

And where moneys which formed part of a larger sum placed by a client in the hands of his solicitor for the purposes of investment, were lent by him on the security of a mortgage in which he had affected to act as principal, the client was held to be bound by the notice of all the [*66] circumstances which came within the solicitor's *knowledge; *Spaight v. Cowne*, 1 Hem. & Mill. 359.

However, notice to counsel, agents, or solicitors must, in order to affect their employer, have been given or imparted to them in the same transaction; for, if the law were otherwise, "it would," as observed by Lord Hardwicke, "make purchasers' and mortgagees' titles depend altogether on the memory of their counsellors and agents, and oblige them to apply to persons of less eminence as counsel, as not being so likely to have notice of former transactions;" *Warrick v. Warrick*, 3 Atk. 294; *Fitzgerald v. Falconberge*, Fizzgibb. 207; *Worsley v. Earl of Scarborough*, 3 Atk. 392; *Steed v. Whitaker*, Barnard, Ch. Rep. 220; *Hine v. Dodd*, 2 Atk. 275; *Ashley v. Bailey*, 2 Ves. 368; *Lowther v. Carlton*, 2 Atk. 242; *Fuller v. Bennett*, 2 Hare, 394; *Tylee v. Webb*, 6 Beav. 552; *S. C.*, 14 Beav. 14; *Finch v. Shaw*, 19 Beav. 500; 5 H. L. Cas. 905; *In re Smallman's Estate*, 2 I. R. Eq. 34.

The same exception seems to apply, even if the notice is personal: as, "if a man purchase an estate under a deed, which happens to relate also to other lands not comprised in that purchase, and afterwards purchases the other lands to which an apparent title is made, independent of that deed, the former notice of the deed will not of itself affect him in the second transaction; for he was not bound to carry in his recol-

lection those parts of a deed which had no relation to the particular purchase he was then about, nor to take notice of more of the deed than affected his then purchase." Per Lord Redesdale in *Hamilton v. Royse*, 2 S. & L. 327.

Where, however, one transaction is closely followed by, and connected with another; or where it is clear that a previous transaction is present to the mind of the solicitor when engaged in another transaction, there is no ground for the distinction by which the rule that notice to the solicitor is notice to the client, had been restricted to the same transaction. Per Lord Langdale, M. R., in *Hargreaves v. Rothwell*, 1 Kee. 159; and see *Winter v. Lord Anson*, 3 Russ. 488, 493; *Lenehan v. M'Cabe*, 2 Ir. Eq. Rep. 342; *Nixon v. Hamilton*, 2 D. & Walsh, 364; *Perkins v. Bradley*, 1 Hare, 219; *Majoribanks v. Hovenden*, 6 Ir. Eq. Rep. 238; *M'Mahon v. M'Elroy*, 5 I. R. Eq. 1. This subject was fully considered by Sir J. Wigram, V. C., in the important case of *Fuller v. Bennett*, 2 Hare, 394. There, after the commencement of a treaty for the sale of an estate by A., and the purchase of it by B., A. agreed to give C. a mortgage on the estate as a security for an antecedent debt, and notice of the agreement was given to the solicitors of B. The treaty for the sale afterwards *ceased to be prosecuted for [*67] upwards of five years, during part of which time the suit of an adverse claimant of the estate was pending. A. then died, and B. purchased the estate at a low price, from the heir and devisee of A. B. conveyed the estate in mortgage to D. The same solicitors were concerned for B. from the commencement of the treaty with A. until the final purchase of the estate, and for D. in the business of the mortgage. It was held, under the circumstances of the case, that B. and D. had, through their solicitors, constructive notice of the agreement with C., and that the estate in their hands was subject to the lien of C. for the amount agreed to be secured by the proposed mortgage. "The general propositions," said his Honor,—“first, that notice to the solicitor is notice to the client; secondly, that, where a purchaser employs the same solicitor as the vendor, he is affected with notice of whatever that solicitor had notice in his capacity of solicitor for either vendor or purchaser in the transaction in which he is so employed; and, thirdly, that the notice to the solicitor, which alone will bind the client, must be notice in that transaction in which the client employs him—have not as general propositions, been disputed at the bar; but with respect to the last proposition, it was argued for the plaintiffs, that, where one out of two matters transacted by the same solicitor follows so close upon the other, that the earlier transaction cannot have been out of the mind of the solicitor when engaged in the latter, there is no ground for restricting the notice to the client to the second transaction only, and that he will be affected with notice of both; and for this, reference was made to *Winter v. Lord Anson* (3 Russ. 488); *Mountford v. Scott* (T. & R. 274);

and *Hargreaves v. Rothwell* (1 Kee. 154); to which I may add the case of *Brotherton v. Hatt* (2 Vern. 574).

“According to the plaintiff’s argument upon this part of the case, carried to its full extent, the question is one of memory only on the part of the solicitor, irrespective of the circumstance which has entered into all the cases cited for the plaintiffs, that the same solicitor was employed by both parties, the vendor and the purchaser. According to the defendant’s argument, the knowledge which the solicitor has must be acquired after and during the retainer, or it will not affect the client. I am certainly not prepared to accede to either proposition to the full extent. Cases may easily be suggested, in which it would be impossible that a solicitor should have forgotten a fact recently under his view, with notice of which, however, it would be impossible to affect his client, unless the circumstance of his being solicitor for two parties be introduced into *the case. And it is equally clear, where that circumstance forms part of the case, that a purchaser may be affected with notice of what the solicitor knew, as solicitor for the vendor, although, as solicitor for the vendor, he may have acquired his knowledge before he was retained by the purchaser. Whatever the solicitor during the time of his retainer, knows as solicitor for either party may possibly, in some cases, affect both, without reference to the time when his knowledge was first acquired. If, therefore, in order to decide the cause now before me, it were strictly necessary that I should decide, as an abstract question, that a purchaser, who for the first time employs a solicitor (not being also the solicitor of the vendor), can be affected with constructive notice of anything known to the solicitor, save that of which the solicitor acquires notice after his retainer, and during his employment by the purchaser, I should certainly feel great difficulty in coming to the conclusion. The rule, that notice to the solicitor will not bind the client, unless it be in the same transaction, or at least during the time of the solicitor’s employment in that transaction, I have always understood to be a rule *positivi juris*, adopted by courts of justice in favour of innocent purchasers; and the reason and policy of the rule appear to me to show that such is the case. ‘It is settled,’ says Lord Hardwicke, ‘that notice to the agent or counsel, who was employed in the thing by another person, or in another business, and at another time, is no notice to his client who employs him afterwards. It would be very mischievous if it were so: for the man of most practice and greatest eminence would then be the most dangerous to employ’ (3 Atk. 392). The expression commonly used in explaining the rule, namely, that the agent may have forgotten the former transaction, points at the same conclusion; and I cannot think that Lord Eldon, in the language he used extra-judicially, in *Mountford v. Scott*, intended to shake the general doctrine which himself, as well as Lord Hardwicke and other judges, had so often insisted upon (*Warrick v. Warrick*, 3 Atk. 294;

Steed v. Whitaker, Barnard, Ch. Rep. 220; *Hiern v. Mill*, 13 Ves. 120; *Mountford v. Scott*, 3 Madd. 34; *Kennedy v. Green*, 3 My. & K. 699). It is not necessary so to understand Lord Eldon's language, when construed with reference to the circumstances of the case before him. The rule, limited as above, is, I presume to say, best adapted to, and fully sufficient for, the purposes of justice.

"It appears to me, however, that it may not be necessary that I should give an opinion upon the abstract question. The cases of **Brotherton v. Hatt*, *Winter v. Lord Anson*, *Mountford v. Scott*, [*69] and *Hargreaves v. Rothwell*, do not appear to me necessarily to impeach the rule. The circumstances of those cases were, for the present purpose, in substance the same. The mortgagors had at different times, employed the *same* solicitor in effecting different incumbrances upon the same estate; and the incumbrancers with whom the contest arose had employed the mortgagor's solicitor in the several transactions in which they were respectively concerned. The Court held the puisne incumbrancer affected with constructive notice of the prior incumbrances; for, having in that case employed the mortgagor's solicitor, he would necessarily be affected with notice of the prior transaction, unless it should be held that the common solicitor (in his character of solicitor to the mortgagor) was not to be considered as recollecting the old transactions when engaged in new. If that were admitted,—if the notice which the solicitor of the mortgagor had in the old transaction were not continued in the new transaction,—I do not know what should prevent the solicitor of the mortgagor from himself becoming an incumbrancer upon the estate, and insisting upon his incumbrance against the mortgagees whose mortgages he had himself on former occasions prepared. This was, in fact, unsuccessfully attempted in the late case of *Perkins v. Bradley* (1 Hare, 219). In the absence of special circumstances to affect the conclusion, and in the absence, certainly, of any rule of law affecting the case, it might be right to hold that the solicitor for the mortgagor had (like the mortgagor himself) notice of the prior transaction, in that very transaction in which he was employed by the mortgagee. It was one continuous dealing with the same title. If, as solicitor for the mortgagor, he had such notice in the new transaction, he had it in that new transaction as solicitor for both. The reasoning is technical; and in a case like that I am supposing, the technicality as well as the common sense of the case appears to me to be in favour of the decisions I am now considering. But, however that may be, the decisions must govern the present case, whether my attempt to reconcile them with the positive rule I have referred to be right or not." And see *Wilde v. Gibson*, 1 H. L. Ca. 605; *Gerrard v. O'Reilly*, 3 D. & War. 414.

In order to affect a person with constructive notice of facts within the knowledge of his solicitor, it is necessary not only that the knowledge

should be derived from the same transaction, but it must be material to that transaction, and which it was the duty of the agent to communicate. [*70] See **Wyllie v. Pollen*, 32 L. J. Ch. (N. S.) 782, where it was held by Lord Westbury, C., that the transferee of a mortgage would not be affected by the knowledge of the solicitor acting for him in the transfer of an incumbrance subsequent to the original mortgage, so as to prevent him from making further advances, such knowledge not being material to the business of the transfer.

The circumstance of only one solicitor acting in a transaction does not necessarily constitute him the solicitor of both parties, so as to affect one with notice of facts known to the others (*Perry v. Holl*, 2 De G. F. & Jo. 33); and the employment of a solicitor to do a merely ministerial act, such as the procuring the execution of a deed, does not constitute him solicitor to the party executing the deed so as to affect him with constructive knowledge of matters within the knowledge of the solicitor: *Wyllie v. Pollen*, 32 L. J. Ch. (N. S.) 782.

Where a solicitor acting for both parties, has notice of a document, and with the consent of one of such parties conceals his knowledge from the other party, the latter party will not be affected with constructive notice of such document; *Sharpe v. Foy*, 4 L. R. Ch. App. 35.

Where a solicitor, employed both by the mortgagor and mortgagee, was himself the author of a fraud, Lord Brougham, differing in this respect from the opinion of Sir J. Leach, M. R., held, that although the solicitor had actual and full notice of his own fraud, the mortgagee was not cognisant in law, and, constructively, merely because his solicitor, himself the contriver, the actor, and gainer of the transaction, knew it well; but his Lordship affirmed the judgment of the Master of the Rolls on another ground, viz., that it was apparent on the face of the deed that a fraud had been committed, which ought to have led to further inquiries, and the mortgagee was, therefore, constructively affected in the same manner as if he had employed another solicitor; *Kennedy v. Green*, 3 My. & K. 699. And see *Jones v. Smith*, 1 Ph. 256; *Neesom v. Clarkson*, 2 Hare, 163; *Frail v. Ellis*, 16 Beav. 350; *Hiorns v. Holom*, 16 Beav. 259; *Greenslade v. Dare*, 20 Beav. 284, 291; *Spencer v. Topham*, 2 Jur. N. S. 865; *Robinson v. Briggs*, 1 Sm. & Giff. 188; *Hewitt v. Loosemore*, 9 Hare, 449, 455; *Thompson v. Cartwright*, 33 Beav. 178; 2 De G. Jo. & Sm. 10; *Ogilvie v. Jeaffreson*, 2 Giff. 353; *In re European Bank*, 5 L. R. Ch. App. 358.

Where, however, the question of fraud wholly depends upon the fact whether the act which has been made known or not, the decision in *Kennedy v. Green* has been held not to be applicable. To make it applicable, [*71] it must be made out that *distinct fraud was intended in the very transaction, so as to make it necessary for the solicitor to conceal the facts from his client in order to defraud him. See *Atterbury v. Wallis*, 8 De G. Mac. & G. 454: there a solicitor took a mortgage of

an equity of redemption and sub-mortgaged it. Soon afterwards he and the first mortgagee and the mortgagor joined in a new mortgage of part of the property, he acting as the solicitor for all the parties to the transaction, and suppressing all mention of the sub-mortgage. It was held by the Lords Justices of the Court of Appeal, that the new mortgagee was affected by the solicitor's knowledge of the sub-mortgage (his fraud not excluding the effect of such notice), and took subject to it, except to the extent of the money paid by him in satisfaction of the first mortgage. See also *Rolland v. Hart*, 6 L. R. Ch. App. 678. But see *Thompson v. Cartwright*, 33 Beav. 178; 2 De G. Jo. & Sm. 10.

And in a recent case it has been decided, that a client will be affected with constructive notice of a trust, the existence of which is known to his solicitor, even although the solicitor may have committed a fraud in relation to that trust. Thus, in *Boursot v. Savage*, 2 L. R. Eq. 134, Holmer, one of three trustees, executed an assignment of leasehold property held jointly by them, to Savage, a purchaser, and forged the signatures of his two co-trustees, and also the requisite assent of the cestui que trust, to the sale. Holmer was a solicitor, and acted as such on behalf of the purchaser. It was held by Sir R. T. Kindersley, V. C., that the purchaser had constructive notice of the trust through the knowledge of his solicitor, and ordered a re-conveyance of the legal interest in one-third of the property which passed to the purchaser. "Supposing," said his Honor, "that actual knowledge of the existence of a trust cannot be imputed to the defendant Savage, still I think he is affected by constructive notice. He employed Holmer as his solicitor in the transaction of the purchase; and according to the doctrine of equity, a purchaser has constructive notice of that which his solicitor, in the transaction of the purchase, knows, with respect to the existence of the rights which other persons have in the property. Take the simplest case: Suppose the purchaser's solicitor happens, by reason of his connection with the property, to be aware that the vendor has created an equitable mortgage. Is it possible to contend that the purchaser would not be held to be affected with constructive notice of the existence of such mortgage? It is a moot question upon what principle *this [*72] doctrine rests. It has been held by some that it rests on this:—that the probability is so strong, that the solicitor would tell his client what he knows himself, that it amounts to an irresistible presumption that he did tell him; and so you must presume actual knowledge on the part of the client. I confess my own impression is, that the principle on which the doctrine rests is this:—that my solicitor is *alter ego*; he is myself, I stand in precisely the same position as he does in the transaction, and therefore his knowledge is my knowledge; and it would be a monstrous injustice that I should have the advantage of what he knows without the disadvantage. But whatever be the principle upon which the doctrine rests, the doctrine itself is unquestionable.

"It is insisted, however, that because Holmer was committing a fraud, the client is not to be affected with constructive notice of a fraud committed by his solicitor. But if the client would be affected with constructive notice of a trust, the existence of which is known to his solicitor, in the case where there is no fraud, the fact that the solicitor is committing a fraud, in relation to that trust, cannot afford any reason why the client should not be affected with constructive notice of the existence of the trust. It is the existence of the trust, and not the fraud, of which he is held to have constructive notice; and the constructive notice of the existence of the trust must be imputed to him, whether there is a fraud relating to it or not."

The mere fact of two companies having the same solicitor, or same directors, in common, does not affect each company with notice of everything that is done by the other: *In re Marseilles Extension Railway Company*, 7 L. R. Ch. App. 161; and see *In re European Bank*, 5 L. R. Ch. App. 358.

As to constructive notice in dealings with executors, administrators, and trustees, see note to *Elliott v. Merryman*, ante, p. 64.

As to constructive notice by record.—A public Act of Parliament is of itself full notice, but not a private Act (*Earl of Pomfret v. Lord Windsor*, 2 Ves. 480); nor, it seems, is a private Act made a public one (*Hesse v. Stevenson*, 3 Bos. & Pull. 565, 578; *Attorney-General v. Murrett*, 10 Ir. Eq. Rep. 167.)

Nor will an act (*Wilkes v. Bodington*, 2 Vern. 599; *Collett v. De Gols*, Ca. t. Talb. 65; *Ex parte Knott*, 11 Ves. 609; but see 1 S. & L. 152; *Ex parte Herbert*, 13 Ves. 183) or commission (*Hitchcock v. Sedgwick*, 2 Vern. 156, reversed Dom. Proc., House of Lords Journ., vol. 14, p. 601; 3 My. & K. 591; *Sowerby v. Brooks*, 4 B. & Ald. 523; *In re Barr's Trusts*, 4 K. & J. 219) of *bankruptcy of itself amount to notice.

With regard to the protection given by recent Bankruptcy Acts to parties dealing with bankrupts, see 12 & 13 Vict. c. 106, s. 133 (repealed by 32 and 33 Vict. c. 83), and 32 & 33 Vict. c. 71, ss. 94, 95.

Nor will a judgment be notice (*Churchil v. Grove*, 1 Ch. Ca. 35; *Freem. Ch. Ca.* 176; *Lane v. Jackson*, 26 Beav. 535; 1 & 2 Vict. c. 110, s. 13), unless a search have been made for judgments, in which case notice may be presumed (*Procter v. Cooper*, 2 Drew. 1; 18 Jur. 444; 1 Jur. N. S. 149); but it seems that a title depending on the fact of the vendor having been a purchaser without notice of a registered judgment, cannot be forced upon a purchaser (*Freer v. Hesse*, 4 De G. Mac. & G. 495; and see *The Governors of the Grey Coat Hospital v. The Westminster Improvement Commissioners*, 1 De G. & Jo. 531; *Knight v. Pocock*, 24 Beav. 436); and although, under the old law, a purchaser would be bound by a judgment, even though not docketed, if he had notice of it (*Davis v. Strathmore*, 16 Ves. 419), he will not under 3 &

4 Vict. c. 82, s. 2, *even with notice*, be affected by a judgment, unless duly registered. And see 18 & 19 Vict. c. 15, s. 4, and *Lee v. Green*, 6 De G. Mac. & G. 155, 168.

By 3 & 4 Vict. c. 82, notice of an unregistered decree, as well as of an unregistered judgment, will not, as against purchasers, mortgagees, or creditors, give such decree or judgment any effect under 1 & 2 Vict. c. 110.

And judgments and decrees not duly re-registered within five years will be void as against subsequent purchasers, mortgagees, and creditors, though they will not lose their priority over previous purchasers, mortgagees, and creditors (2 & 3 Vict. c. 11, s. 4; *Beaven v. The Earl of Oxford*, 6 De G. Mac. & G. 492; *Hickson v. Collis*, 1 J. & L. 94, 113; Sugd. V. & P. 426, 13th ed.; sed vide *Shaw v. Neale*, 20 Beav. 157; *S. C.*, 6 Ho. Lo. Ca. 581). And registration is equally necessary as to judgments removed from the inferior courts (18 & 19 Vict. c. 15, s. 7), and as to judgments in the counties palatine (*Ib.* s. 3).

However, by 23 & 24 Vict. c. 38, no judgment, statute, or recognisance is to affect any land of whatever tenure as to a bonâ fide purchaser for valuable consideration, or a mortgagee, although with notice, unless a writ of execution thereof be registered and issued within three calendar months from the time of the registering, and before the execution of the conveyance or mortgage, and payment of the purchase or mortgage money (sect. 1). And by 27 & 28 Vict. c. 112, it is enacted that no judgment, statute, or recognisance to be entered up after the passing *of that act (29th July, 1864) shall affect any land (of whatever tenure) until such land shall have [*74] been actually delivered in execution by virtue of a writ of elegit or other lawful authority, in pursuance of such judgment, statute, or recognisance (sect. 1). Writs of execution, or other process of execution of any such judgment, statute, or recognisance must be registered in manner prescribed by 23 & 24 Vict. c. 38 (sect. 3); and the creditor to whom land is delivered in execution is entitled to obtain a summary order from the Court of Chancery for sale (sect. 4); other creditors on judgment, statute, or recognisance, having a charge on the land, must be served with notice of the sale, and the persons entitled to the proceeds of the sale are to be paid according to their priorities (sect. 5); and every person claiming any interest in the land through or under the debtor, by any means subsequent to the delivery of such land in execution as aforesaid, will be bound by the order for sale, and by all proceedings consequent thereon (sect. 6).

As to the re-registration of Crown debts, see 22 & 23 Vict. c. 35, s. 22; and 34 & 35 Vict. c. 72, (An Act for the further protection of purchasers against Crown debts, Ireland), partially repealing 7 & 8 Vict. c. 90 (Ireland).

And for further information on the subject, see *Prideaux on Judg-*

ments and Crown debts, 6th ed.; 1 Prideaux's Precedents on Conveyancing, 4th ed., p. 130.

As to the effect of judgments registered under the provisions of the Irish Acts, 3 & 4 Vict. c. 105, and 13 and 14 Vict. c. 29, see *Eyre v. M'Dowell*, 9 Ho. Lo. Ca. 619, and the cases there cited. See also 11 & 12 Vict. c. 120; 34 & 35 Vict. c. 72.

Although a decree *after* the determination of the suit is not constructive notice to persons not parties to it (*Worsley v. Earl of Scarborough*, 3 Atk. 392), in the case of a *lis pendens*, if there has been a close and uninterrupted prosecution of the suit, a purchaser *pendente lite*, for valuable consideration even without notice, was, prior to 2 Vict. c. 11, bound by the decree, although the *lis pendens* had not been registered (*Preston v. Tubbin*, 1 Vern. 286; *Culpepper v. Aston*, 2 Ch. Ca. 115, 221; *Sorrell v. Carpenter*, 2 P. Wms. 482; *Walker v. Smallwood*, Amb. 676; *Garth v. Ward*, 2 Atk. 175); and also by interlocutory decree, or a decree to account (*Worsley v. Earl of Scarborough*, 3 Atk. 392; *Higgins v. Shaw*, 2 D. & War. 356); but some specific claim must have been made in the suit to the particular subject sought to be affected by *lis pendens* (*Reed v. Freer*, 13 L. J. (Chanc.) 417; *Holt v. Dewell*, 4 Hare, 446; and see and consider *Shallcross v. Dixon*, 7 L.

J. N. S. (Ch.) 180; **Jennings v. Bond*, 2 J. & L. 720; *Tenison* [*75] *v. Sweeny*, 1 J. & L. 710; 7 Ir. Eq. Rep. 511). By 2 & 3 Vict. c. 11, s. 7, *lis pendens* will not affect a purchaser without express notice, unless properly registered.

Pending litigation not only cannot the defendant affect the rights of the plaintiff to the property in dispute, but the same principle is applicable against a plaintiff, so as to prevent him from alienating to the prejudice of the defendant, where, from the nature of the suit, he may have in the result a right against the plaintiff, as on a bill by a devisee to establish a will against an heir, if in the result the devise is declared void, the heir is not to be prejudiced by the alienation of the devisee (plaintiff) *pendente lite*: *Bellamy v. Sabine*, 1 De G. & Jo. 580; and see *Garth v. Ward*, 2 Atk. 174.

The question has been raised how far a purchaser from a defendant *pendente lite* is affected by the right of another defendant in the same suit. It seems where a person without notice of a suit, purchases from one of the defendants property which is the subject of it, he is not, in consequence of the pendency of the suit, affected by an equitable title of another defendant which appears on the face of the proceedings, but of which he has no notice, and to which it is not necessary for any of the purposes of the suit to give effect; *Bellamy v. Sabine*, 1 De G. & Jo. 566.

Where however the suit is such that an adjudication will take place between defendants with regard to the subject-matter of the suit, an alienee from one of the defendants will be affected by the *lis pendens* if

duly registered. Thus, in *Tyler v. Thomas*, (25 Beav. 47), it appeared a suit had been instituted by creditors for the administration of the testator's estate, and that the deficiency of the personal estate for payment of the debts was payable out of two real estates devised separately to the defendants A. and B. In 1846 the debts were ordered to be paid out of A.'s estate alone, without prejudice to his right of contribution against B.'s estate. In 1852 the suit was registered as a *lis pendens*, and two months afterwards B. mortgaged his estate to C., who had no notice of A.'s rights. It was held by Sir John Romilly, M. R., that there was a *lis pendens* as regarded A.'s rights, and that C.'s mortgage must be postponed to A.'s claims. His Honor said, "He did not think the Court, in *Bellamy v. Sabine*, meant to lay down, as a principle, that where a distinct decree is made in favour of one defendant against another defendant the doctrine of *lis pendens* does not apply. He said that the point was very important, for there were many cases in which the plaintiff had no interest *at all, as in cases of interpleader, [*76] and suits instituted by executors or trustees, to have the rights of all parties determined; that if, in the course of proceedings in a suit, a decree was made for a conveyance from one defendant to another, to be settled in chambers, which was not very unusual, it would be very extraordinary if, after the suit has been registered as a *lis pendens*, the person ordered to convey might sell it to a third person, who might set up for a defence that he was a purchaser for valuable consideration without notice. If creditors, who are plaintiffs, were ordered to be paid their debts out of two estates, could a defendant, the owner of one of them, after the suit had been registered, sell his estate, which was liable to contribute? "This," his Honor said, "appeared to him to be a startling proposition, and unless he could understand that the contrary had been laid down by the Court of Appeal, he should hold that a purchaser having notice of the suit, not actual, but constructive, by its being registered as a *lis pendens*, must be taken to have notice that the Court had made a decree that one defendant had a right to stand in the shoes of the other."

It should always be borne in mind in considering this subject, that the doctrine as to the effect of *lis pendens* on the title of an alienee is founded not on any principles of Courts of equity with regard to notice, but on the ground that it is necessary to the administration of justice that the decision of the Court in a suit should be binding not only on the litigant parties, but on those who derive title from them *pendente lite*, whether with notice of the suit or not. If this were not so, there could be no certainty that the litigation would ever come to an end. A mortgage or sale made before a final decree to a person who had no notice of the pending proceedings would always render a new suit necessary, and so interminable litigation might be the consequence; *Bellamy v. Sabine*, 1 De G. & Jo. 578.

The filing of a special case, and the entering of appearances thereto by persons named as defendants, is to be taken as a *lis pendens*, and in order to be binding on purchasers or mortgagees without notice, must be registered under 2 & 3 Vict. c. 11. See 13 & 14 Vict. c. 35, s. 17.

The Court has power now, under 30 & 31 Vict. c. 47, to order the cancelling of the registration of *lis pendens*.

As to the liability of a solicitor for neglecting to register a *lis pendens*, see *Plant v. Pearman*, 41 L. J. Q. B. (N. S.) 200; 20 W. R. Q. B.) 314.

Although the contrary has been held (*Pearce v. Newlyn*, 3 Madd. 89), it appears to be now settled that court rolls of a manor do not give constructive notice of their contents; *Bugden v. Bignold*, *77] 2 Y. & C. C. C. 377.

The registration of deeds, as before observed, will not of itself be notice so as to affect a purchaser taking the legal estate; *Bushell v. Bushell*, 1 S. & L. 103; *Ford v. White*, 16 Beav. 120; but if a purchaser search the register he will be presumed to have notice unless the presumption be rebutted by his showing that the search was made for a period only in which the registered deeds are not included; *Hodgson v. Dean*, 2 S. & S. 221; and see *Lane v. Jackson*, 20 Beav. 535.

As to the time of notice being had.—Notice before actual payment of the purchase-money, even although it may have been secured and a conveyance actually executed, will be binding in the same manner as notice had before the contract; for, although the purchaser has no remedy at law against the payment of the money for which he gave his security, yet he would be entitled to relief in equity, on bringing his bill and showing that though he has given a security for his purchase-money, yet he had since had notice of an incumbrance; under which circumstances the Court would stop payment of the money due on the security; *Tourville v. Naish*, 3 P. Wms. 307; *Story v. Lord Windsor*, 2 Atk. 630; *More v. Mayhow*, 1 Ch. Ca. 34; *Jones v. Stanley*, 2 Eq. Ca. Ab. 685, pl. 9; so, where notice is had before the execution of the conveyance, or its due acknowledgment by a married woman (*Sharpe v. Fox*, 4 L. R. Ch. App. 35, 37), it is equally binding, although the purchase-money may have been paid before notice; *Wigg v. Wigg*, 1 Atk. 382, 384; and see *Rayne v. Baker*, 1 Giff. 241; *Illdesley v. Lodge*, 3 Sm. & G. 543.

As to what is sufficient proof of notice, see Sugd. V. & P. 784, 14th edit.

<p>In legal parlance notice is information given by one duly authorized, or derived from some authentic source. Notice may be</p>	<p>either actual or constructive. It is actual when the purchaser is aware of the adverse claim or title, or has such information as would</p>
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lead to knowledge; *The Mayor v. Williams*, 6 Maryland, 235; *Tufts v. King*, 6 Harris, 157; *Rogers v. Jones*, 8 New Hampshire, 264; *Williamson v. Brown*, 15 New York, 354. Constructive notice is a legal inference of notice of so high a nature as to be conclusive unless disproved, and is in most cases insusceptible of explanation or rebuttal by evidence that the purchaser had no actual notice and believed the vendor's title to be good; *Plumb v. Fluitt*, 2 Anstruther, 432; *Griffith v. Griffith*, 1 Hoffman, 153. Proof that a deed from the vendor to a third person was in the hands of the purchaser prior to the sale, would authorize an inference that he knew what it contained, and thus raise a presumption of actual notice, which might be rebutted by showing that the instrument was in a foreign language, or that the purchaser was unable to read, or by any other evidence that he was ignorant of the nature of the instrument, and not in default for not consulting some one who was better informed; *Farnsworth v. Childs*, 4 Mass. 637, 640. But where a deed is an essential link in the chain of the title, the law takes it for granted that the purchaser had notice of its contents, and will not suffer the presumption to be overthrown by the clearest evidence that he never saw the instrument or heard of its existence. In like manner there is a presumption that one knows what a conveyance or release which he executes, sets forth, and the contents of any instrument to which it

refers; *The Howard Ins. Co. v. Halsey*, 4 Sandford, 564; 4 Selden, 271; which if capable of being rebutted, can only be so on the ground that the deed was obtained from him by fraud. So notice to an agent in the course of the transaction, is constructive notice to the principal, and it will not avail the latter to show that the agent fraudulently or negligently omitted to communicate what he was told. See *Williamson v. Brown*, 15 New York, 359. It follows that constructive notice is not necessarily evidence of knowledge, or to sustain a charge of actual fraud; *Weilder v. The Farmers' Bank*, 11 Serg. & Rawle, 134. Gibson, J., said, "Constructive notice is not *prima facie* evidence of actual knowledge of the fact; the presumption of notice, if it arises at all, being conclusive even against the truth of fact; and, therefore, constructive notice is insufficient to fix on a party actual knowledge as the ground work of express fraud, which, and not fraud by implication of law, is the foundation of this action."

In like manner, a vendee will not be charged with knowledge of a defect in the vendor's title, on evidence which would affect him with constructive notice in a controversy with a third person, whose right was prejudiced by the sale; *Champlin v. Laytin*, 6 Paige, 189, 203. The chancellor said "that for certain purposes, and where the equitable rights of third persons are concerned, it has been found necessary by this court to hold a purchaser to be chargeable with

constructive notice of all the facts communicated to his attorney or agent for the purchase, or in the examination of the title; and that notice of the existence of a deed was good constructive notice of the contents of the deed itself, especially if it was one of the deeds under which the purchaser derived his title to the premises. But this equitable rule as to constructive notices has no reference to controversies between the vendor and vendee in relation to their own rights," *ante*, 128.

A statement by an adverse claimant that he has a right or equity which he proposes to assert, manifestly operates as notice, if sufficiently clear and full, to put the purchaser on his guard; *Nelson v. Sims*, 1 Cushman, 383; *Barnes v. M'Clintock*, 3 Penna. 67; *Bartlett v. Glasscock*, 4 Missouri, 62, 66; *Blakely v. Osborn*, 33 Conn. 226. Such a notice need not give particulars, although they should be ready if required; *Epley v. Witherow*, 7 Watts, 167. In *Epley v. Witherow*, Kennedy, J., said: "This court, ruled in the case of *Barnes v. Mylington*, 3 Penna. R. 67, that actual notice given by the party, or his agent, of his claim generally to the land at the time of sale, without specifying the nature of his title, or in what way he claimed it, or an interest in it, was sufficient to put the purchaser upon inquiry, and to have enabled him, if he desired it, to have ascertained the nature of the claim, and how it was derived from the party making it, who would have been bound to have answered

fully at his peril." It has, nevertheless, been made a question whether a general claim is sufficient to affect a purchaser with notice; *Tolland v. Stainbridge*, 3 Vesey, 486. See *Jaques v. Weeks*, 7 Watts, 274, 282. A purchaser will also be affected with notice who has just cause to believe from what he hears from the vendor, that he is not the equitable owner of the premises, or that they are subject to an unrecorded trust or encumbrance; *Durham v. Dey*, 2 Johnson's Ch.; 15 Johnson, 555; *Russell v. Patrie*, 10 B. Monroe, 184, 186; *Price v. M'Donald*, 1 Maryland, 403; *Hudson v. Warner*, 2 Harris & Gill, 413; and the same effect may ensue from an authentic statement by a third person, who speaks from his own knowledge; *Benton v. Burgott*, 10 Johnson, 457, 459; *Jackson v. Caldwell*, 1 Cowden, 622; *Pearson v. Daniel*, 2 Dev. & Bat. Eq. 366; *Doyle v. Teas*, 4 Scammon, 202, 265.

It has, nevertheless, been held, that notice must come from a party in interest, and will be inoperative when given by a stranger to the right involved; *Rogers v. Haskings*, 14 Georgia, 166; *Lamont v. Stinson*, 5 Wisconsin, 443; *Miller v. Cresson*, 5 W. & S. 284; *Woods v. Farmere*, 7 Watts, 382, 387; *Churcher v. Guernsey*, 3 Wright, 86. "To constitute a binding notice, it must proceed from a person interested in the property, and in the course of a treaty for its purchase." Sugden on Vendors, 755, c. 24, sect. 1, *ante*; see *Van Dusen v. Vreeland*, 1 Beasley, 142, 155; and this is no doubt

true of notice in the technical sense as distinguished from knowledge, or such information as is substantially equivalent to knowledge. Notice, said Duncan, J., in *Peebles v. Reading*, 8 S. & R. 496, should be actual, circumstantial, in the transaction, and by the party in interest; and it is generally conceded that notice cannot be established by showing that it was generally believed in the neighborhood that the vendor had sold or encumbered the premises, and that the report was communicated to the defendant; *Jacques v. Weeks*, 7 Watts, 267; *Epley v. Witherow*, Id. 167; *Hood v. Fahnestock*, 1 Barr, 470; *Wilson v. M'Cullough*, 11 Harris.

There is no doubt that a purchaser may disregard a hearsay statement by one who is not acquainted with the facts. For as there are no means for verifying the truth of such an allegation, it may be treated as if it were false; *Doyle v. Teas*, 4 Scammon, 202, 250; *Butler v. Steevens*, 26 Maine, 484; *The City Council v. Page*, 1 Spear Eq. 159; *Wilson v. M'Cullough*, 11 Harris, 440. The case is obviously different where a purchaser receives full and authentic information from a person who speaks from his own knowledge, and it may then be as much his duty to refrain from buying as if he had been notified by the party whose interest will be affected by the sale. Knowledge by whatever means acquired is equivalent to notice, and a purchaser who is definitely informed that the sale is an actual or constructive fraud,

cannot claim the protection due to good faith, whether the communication comes from the complainant, or from a stranger to the right involved; *Mullikin v. Graham*, 22 P. F. Smith, 484; *Rupert v. Mack*, 15 Illinois, 542; *Cox v. Milner*, 23 Id. 473. "If" said, Putnam, J., in *Curtis v. Munday*, 3 Metcalf, 407, "the information were given by those persons who know the party and much of his transactions, and who spake not vaguely, especially if the party himself who was to be affected by the notice, was so well satisfied of its truth as again and again to state or acknowledge the fact, it must be sufficient. No honest man, after such notice, could undertake, or if he did should be permitted to acquire title to the land which from information given on certain knowledge he believed had been conveyed." It was held in like manner in *Mullikin v. Graham*, 22 P. F. Smith, 484, 490, that it is not indispensable to the validity of notice of an equitable interest, that it should come from the party or his agent. It is sufficient, though derived *aliunde*, provided it be of a character to gain credit.

The question is, nevertheless, one of circumstances. In considering whether the defendant bought in good faith, it should be remembered that one who intervenes officiously in a matter which does not concern him, will naturally be regarded with distrust. A purchaser should not, therefore, be charged with notice for not attending to the statements of a stranger to the title, who gives un-

asked advice, unless the informant's character was above suspicion, and he spoke from knowledge. See *Wilcox v. Hill*.

Whatever the rule may be under other circumstances, it is clear that a friend or relative may come forward on behalf of one who cannot act for himself, in consequence of disease, absence, or non-age; and a notice given under such circumstances, will be as effectual as if it came from the party; *Ripple v. Ripple*, 1 Rawle, 390; *Butcher v. Yocum*, 11 P. F. Smith, 168; *Millikin v. Graham*, 22 Id. 484. In *Butcher v. Yocum*, notice by a grandfather that his grandchildren were equitably entitled to the land, was held sufficient to put a purchaser from the mother on his guard, and this case must be regarded as overruling the dicta of Chief Justice Gibson, in *Woods v. Farmere*, 7 Watts, 382, 387, "That neither consanguinity nor community of interest gives a right to interfere," and that one brother cannot give a valid notice for another, of an equity in which both are interested. See *Millikin v. Graham*. Yet in *Jolland v. Stainbridge*, 3 Vesey, 478, a request from a mother, "not to buy the estate, for that it belonged to her daughter, and the person who was about to dispose of it had no right to sell," was held not to be notice of an unregistered will; and Lord Loughborough said "she should have registered the will; then the purchaser would have had notice not only of the claim, but of what sort of claim it was. I very much doubt whether that general

claim is sufficient to affect a purchaser with notice of a deed of which he appears to have had no knowledge."

Where notice is requisite to perfect a right or put the person to whom it is given in default, knowledge is not equivalent to notice. This rule does not apply where the question is one of good faith. One who knows that the vendor is fraudulently disposing of that which is not equitably his own, cannot claim to be a *bona fide* purchaser; *Leinman's Estate*, 32 Maryland, 125; *Blatchley v. Osborn*, 33 Conn. 226. If it appears from the defendant's admissions, or by any other means of proof, that he had such knowledge, it is superfluous to prove notice; or to speak more accurately, notice is a legal inference; *M'Kinney v. Brightly*, 4 Harris, 399; *Phillips v. The Bank*, 6 Id. 394, 404; *Curtis v. Mundy*, 3 Metcalf, 405, 407; *Stevens v. Goodenough*, 26 Vermont, 676; *Henry v. Rainman*, 1 Casey, 354; *Meux v. Bell*, 1 Hare, 73; *Tillinghast v. Champlin*, 4 Rhode Island, 173, 212; *Hankerson v. Barbour*, 29 Illinois, 80; *Mullekin v. Graham*, 22 P. F. Smith, 484; *Vanduyne v. Vreeland*, 1 Beasley, 142, 155; *Curtis v. Mundy*, 3 Metcalf, 405; *Currens v. Hurt*, Hardin, 37; *Rowan v. Adams*, 1 S. & M. Ch. 45; *Roberts v. Stanton*, 2 Munford, 129; *Lewis v. Bradford*, 10 Watts, 67; *Phillips v. The Bank of Lewistown*, 6 Harris, 394; *Trefts v. King*, Ib. 157.

Accordingly, where the purchaser was told by a third person

that he believed that the vendor had conveyed the premises to the complainant, and on being asked subsequently how he ascertained that the deed had not been recorded, replied that he had found it out, but would not say by what means; it was held that he had not acquired a valid title under the revised statutes of Massachusetts, which provide that no unrecorded deed shall be valid, save as against the grantors, and persons having actual notice; *Curtis v. Mundy*. So the clerk of a court cannot allege that he is a purchaser without notice of an equitable right, which was known to him through his acquaintance with the record. *Dickson v. Campbell*, 32 Missouri, 544.

In Maryland and Missouri knowledge of a prior deed will supply the want of registration; *Leinman's Estate*, 32 Maryland, 325; *Maupron v. Emmons*, 47 Missouri, 304; and the same rule prevails in Massachusetts, although the statutes of that State require actual notice; *White v. Foster*, 102 Massachusetts, 375; *George v. Kent*, 7 Allen, 16. And where knowledge is shown either by direct proof or as a necessary inference, it will not avail the purchaser to deny notice, or allege that having searched the record without discovering any such incumbrance, he believed that it did not exist, and that he might buy with safety; *Blatchley v. Osborn*, 33 Conn. 226.

An inference of knowledge, and consequently of notice, may consequently be drawn from the presence of the party at a

conversation, in the course of which the existence of an incumbrance on the title is stated as an undoubted fact; *Westervelt v. Hoff*, 2 Sandford, Ch. 98; or from his having witnessed a deed under circumstances which leave no doubt that he was acquainted with its contents, though not from the mere circumstance of attestation. See *Curtis v. Mundy*; *Boling v. Ewing*, 9 Dana, 76; *Mocatta v. Murgatroyd*, 1 Peere Wms. 393; *Hill on Trustees*, 512; *Sugden on Vendors*, 296.

So notice, may be inferred from facts and circumstances in the absence of direct proof; and close friendship or relationship may be taken into view in determining whether the purchaser knew that which is not shown to have been communicated to him; *Tillinghast v. Champlin*, 4 Rhode Island, 173, 204; *Phillips v. The Bank of Lewistown*, 6 Harris, 394, 404; *Hoxie v. Carr*, 1 Sumner, 173, 192; *Trefts v. King*, 6 Harris, 157, 160.

In *Tillinghast v. Champlin*, the question was whether the defendant had notice that land which had been conveyed to Benjamin Gardner and William Gardner, as tenants in common, was partnership property, and that the assets of the firm were insufficient to pay their debts. Such knowledge was denied in the answer, but held to be a reasonable and natural presumption of fact on the evidence. "For us to doubt," said Ames, C. J., "that the respondent, Champlin, knew these facts, which appear from the proofs to have been notorious in the village of East

Greenwich, and where the partners themselves, by their daily acts and repeated declarations, took pains for the sake of obtaining credit for their firm to make them so, would suppose on our part a degree of skepticism quite unfitting us for an office which requires us in matters of proof to weigh and decide upon probabilities. Although during a portion of the time, at least, of the continuance of this copartnership, the respondent owned and occupied a farm a few miles off in West Greenwich, yet the occasions of his business and pleasure, as proved, brought him frequently to the village of East Greenwich, where the firm did business, and where the works in question were situated; and, where also, the respondent's mother and family resided. His personal and business relations with both the members of this firm were intimate. His sister was the wife of William A. Gardner, and Benjamin W. Gardner boarded with his mother, and was thought to be attentive to an unmarried sister, and he was frequently with both the copartners, and was advised with about their business. He bid off for William A. Gardner, at auction, the very lot upon which these works were situated, when sold by the town of East Greenwich, and must have known the openly declared purpose for which it was bought. From the proof, no one could have been more cognizant of the credit and capital upon which the firm did business, and out of which they built up the property in question. This intimacy continued

with Benjamin W. Gardner after the decease of William A., his brother. Robert H. Champlin was the original administrator, appointed on the estate of William A. Gardner, and he himself took apparently a great interest in the affairs of the estate, frequently attending the courts of probate when questions concerning it were agitated, and seeming to be a prominent actor in its affairs. He knew, or affected to know, the precise condition of the estate of his deceased brother-in-law, and informed the witness, David W. Hunt, a creditor of the firm to the amount of \$400 only, some six weeks after the death of William A. Gardner, that he would get his whole debt; that the debts of the estate were about \$3,000, and that there would be property to pay them all; though he declined the offer of the witness to guarantee the payment of his debt for a commission of five per cent. In his answer, he admits that both at the decease of William A. Gardner, and at the time of the taking of his deed, he knew that the firm owed debts, though not the amount; and although he denies that he knew that the firm was insolvent, yet, it is evident from the fact, and his means of knowledge concerning it, that he must have known that it was grossly so, and that nothing was done by the surviving partner, who still continued to use the property of the firm to pay any of its debts." It would, nevertheless, be erroneous to infer notice from intimacy or nearness of blood, without other circumstances, especially

in opposition to a denial of notice in the answer ; *Flagg v. Mann*, 2 Sumner, 486.

Gross inadequacy of price may operate as notice, by putting the purchaser on inquiry as to the cause or motive for the sacrifice ; or it may raise to an inference that both parties colluded to place the property beyond the reach of creditors or of the equitable owner ; *Hop-
pin v. Doty*, 25 Wisconsin, 573 ; *Peabody v. Fenton*, 3 Barb. Ch. 451.

It was held in *Kerns v. Swope*, 2 Watts, 75, that where one buys land lying in two counties, there is a presumption of fact that he examined the registry in both, and is consequently affected with actual notice of a prior deed, which being only recorded in one of them, does not operate as constructive notice, as it regards that portion of the land which is situated in the other county ; but that no such inference can be drawn from evidence, that a purchaser inspected a registered copy of a deed which was not duly acknowledged under the recording acts, because such a copy lacks the authentication prescribed by law, and has no more weight than if it were made by a private individual.

"It has been argued," said Gibson, C. J., who delivered the opinion of the court, "that a presumption may arise of actual inspection of the defective registry, which is said to amount to actual notice of the contents of the original paper. The ground of the supposed presumption is the fact that the plaintiff purchased,

along with the tracts in dispute, certain other tracts included in the conveyance to the bank, which are situate in Huntingdon county, where the conveyance, and what purports to be the memorandum containing a recital of the material facts, were registered together ; and as the original was lost, it is supposed to be a reasonable presumption that the plaintiff purchased on the faith of the registry in that county, and actually inspected it. Nothing is more reasonable. But not to insist on the obvious answer to this, that the jury were not left to draw the conclusion of fact, we will consider the case as if the registry had been actually examined. That it was defective, is not open to a doubt. The memorandum of the recital, thought to be material, purports, according to the registry, to have been endorsed on the conveyance, but underneath the certificate of the acknowledgment, which contains neither reference nor allusion to it ; and the original was therefore destitute of the evidence of authentication required by the law to entitle it to be registered. The registration, therefore, being without the authority of the law, was the unofficial act of the officer, which could give the copy no greater validity than the original deprived of legal evidence of execution ; nor even so much, for an original deed exhibited to a purchaser would affect him though it were unaccompanied with the evidence of its execution. But here the registry was no better than a copy made by a private person in

a memorandum book; from which a purchaser would be unable to determine whether there were, in fact, an indorsement on the deed, or whether it had been truly copied—especially when neither the copy, nor an exemplification of it, would be legal evidence of the fact in a court of justice. Unquestionably a purchaser would not be affected by having seen the copy of a conveyance among the papers of another, or an abstract of it in a private book. The whole effect of a registry, whether as evidence of the original, or as raising a legal presumption that the copy thus made equivalent to the original, has been actually inspected by the party to be affected, is derived from the positive provisions of the law; and when unsustained by these, a registry can have no operation whatever. Stripped of artificial effect, it is but the written declaration of the person who was the officer at the time, that he had seen a paper in the words of the copy which purported to be an original. But to say nothing in this place of the incompetency of such a declaration as evidence of the fact, on what principle would a purchaser be bound to attend to the hearsay information of one who is not qualified to give it? Since the decision in *Cornwallis's Case*, Toth. 254, and *Wildgoose v. Wayland*, Gouldsb. 147, pl. 67, it has been considered a settled principle, that the vague reports of strangers, or information given by a person not interested in the property, are insufficient. It has been held even

that a general claim may be disregarded. There certainly are cases which seem to cast a doubt on the principle. But as is properly remarked by Mr. Sugden in his *Treatise on Vendors*, the point of notice to which the remark of Chief Baron Hale was directed, in *Fry v. Porter*, 1 Mod. 300, did not relate to a purchaser. In *Butcher v. Stapely*, 2 Vern. 364, the purchaser was affected with notice, of which, it is said, there was no other direct evidence than what might have been gleaned from the conversation of some neighbors, who said they had heard that the vendor had sold the estate to the plaintiff. It is obvious that to decree on parol evidence of loose conversations in the presence of the party, which may not have been heard or understood by him, would be attended with extreme danger of injustice; and notwithstanding this decision, the rule seems to be established as I have stated it, having been recognized by this court in *Peebles v. Reading*, 8 Serg. & Rawle, 480, and *Ripple v. Ripple*, 1 Rawle, 386."

There can be no doubt as to the point determined in this instance. If the jury could have inferred that the purchaser consulted the registry in the absence of proof, the question should at all events have been left them as one of fact. But the court would seem to have gone too far in saying that if such evidence had been adduced, it would not have sustained an inference of notice. In *Hastings v. Cutler*, 4 Foster, 481, it was held, that one

who sees and examines what purports to be a registered copy of a conveyance of the land he is about to buy, is put on inquiry, although the original is defectively acknowledged, and will be affected with notice if he does not ascertain the truth.

From whatever source notice may come, it must be sufficiently clear and full to put the purchaser on his guard, and enable him to ascertain the truth. This applies not only to actual notice, but to the constructive notice arising from a recital in a deed, or the pendency of a bill in equity. If a purchaser could be affected by a loose report or allegation resting on no sure foundation, and incapable of being traced to any definite source, the best title might be impaired by rumors which their very falsity would render it impossible to disprove. Notice must consequently be certain within the rule, *id certum est, quod certum reddi potest*; and the criterion seems to be,—were the facts disclosed or known, such as render it incumbent on the purchaser to inquire, and to enable him to prosecute the inquiry to a successful termination? *Massey v. Grenhow*, 2 Patton & Heath, 255, 256; *Parker v. Kane*, 4 Wisconsin, 1; *Kerns v. Swope*, 2 Watts, 78; *Jacks v. Weeks*, 7 Id. 266; *Epley v. Withe-
row*, Ib. 163, 167; *Bellas v. Mc-
Carthy*, 10 Watts; *Spafford v. Weston*, 29 Maine, 140. A vague allegation that the vendor's title is subject to a latent equity without saying what; *Lamont v. Stimpson*, 5 Wis. 443; *Wadsworth v. Paige*,

15 Ohio, N. S. 70; or that the premises in question have been conveyed to a third person, whose name is not given, will not bind the conscience of the purchaser, because it does not indicate where he is to look for information, and merely raises a doubt which he has no means of satisfying. This is equally true, whether the notice comes from the complainant or from a third person. One who seeks to arrest a sale by an allegation that he has obtained a deed, or that the equitable estate is in him, should consequently be prepared to give such definite information as will enable the purchaser to test what he says, and if he declines, or is unable to do so when requested, and the purchaser has no means of ascertaining the truth, he cannot justly be charged with bad faith in accepting the title; *Massie v. Greenhow*, 2 Patton & Heath, 255.

It should, nevertheless, be remembered, that where a purchase is set up against a right which would otherwise be valid, the question is essentially one of good faith, and whatever affects the buyer's conscience will operate as notice. A purchaser is consequently chargeable with notice, not only where the evidence raises a presumption that he knew, but where there is just ground for inferring that reasonable diligence would have led him to a discovery of the truth; *Nute v. Nute*, 41 New Hampshire, 60; *Warren v. Scott*, 31 Id. 332. One who wilfully remains ignorant, where the rights of a third person are concerned, is as much in de-

fault as if he had the knowledge which he avoids. The question, therefore, is not merely did the defendant know, but had he sufficient information to render it his duty to inquire, and would an investigation, in the ordinary course of business, have led to a discovery of the equity which the complainant is endeavoring to assert; or, as the rule is sometimes stated, a purchaser has notice not only of what is definitely communicated to him, but of all that a proper use of that information would have enabled him to ascertain, *ante*, 123; *Danforth v. Dart*, 4 Duer, 106; *Williamson v. Brown*, 15 New York 354, 362; *Sigourney v. Mann*, 7 Conn. 324; *Peters v. Goodrich*, 3 Id. 146; *Pendleton v. Fay*, 2 Paige, 202; *Hoxie v. Carr*, 1 Sumner, 193; *Hawly v. Cramer*, 4 Cowen, 717; *Jackson v. Caldwell*, 1 Id. 622; *Doyle v. Teas*, 4 Scammon, 202; *Blaisdell v. Stevens*, 16 Vermont, 179; *Stafford v. Ballou*, 17 Id. 320; *M'Daniels v. The Flower Brook Man. Co.*, 22 Id. 274; *Stevens v. Goodenough*, 26 Id. 676; *Hinde v. Vattier*, 1 M'Lean, 110; 7 Peters; *Bunting v. Ricks*, 2 Dev. & Bat. Ch. 130; *Bartlett v. Glasscock*, 4 Missouri, 62; *Gibbes v. Cobb*, 7 Richardson's Eq. 54; *Ringgold v. Bryan*, 3 Maryland Ch. Decisions, 488; *Stockett v. Taylor*, Ib. 537; *Ringgold v. Waggoner*, 14 Arkansas, 69; *Swarthout v. Curtis*, 1 Selden, 301; *Maybin v. Kerby*, 4 Richardson's Eq. 105; *Center v. The Bank*, 22 Alabama, 743; *M'Geher v. Gendrat*, 20 Id. 95.

"Much less," said Ruffin, C. J., in

Bunting v. Ricks, "than actual or particular knowledge, in detail, is sufficient to convert a person into a trustee, who co-operates with a dishonest trustee in an act amounting to a breach of trust. Constructive notice, from the possession of the means of knowledge, will have that effect, although the party were actually ignorant, but ignorant merely because he would not investigate. If anything appears in the course of the negotiation calculated to attract attention or stimulate inquiry, the purchaser is affected with knowledge of all that the inquiry would have disclosed."

In like manner, "if one have knowledge of distinct facts, affecting the title of land which he is about to purchase, he is not at liberty to close his eyes and then screen himself under a plea of ignorance of other facts connected with the facts already known to him; but he is bound in good faith to make reasonable inquiry, and will be presumed to have done so, and will be affected with notice of all that he might have learned by such inquiry; *Blaisdell v. Stevens*, 16 Vermont, 186."

Accordingly notice of a mortgage is notice of another incumbrance, which is recited in the mortgage deed, *ante*, 124. So one who has notice through a *lis pendens* of certain facts, is chargeable with notice of other facts to which these lead by a natural sequence; *Slayer v. Green*, 4 Johnson's Ch. 38.

It results from these decisions that whatever is sufficient to direct the attention of a purchaser

to the existing right or equity of a third person, and enable him to ascertain that it will be prejudiced by the sale, operates as notice; *The Raritan Water Power Co. v. Veghte*, 6 C. E. Green, 463, 478; *Hoy v. Bramhall*, 4 Id. 563. In *The Power Co. v. Veghte*, a purchaser was accordingly held to have notice of an easement resulting from the execution of a parol license, and so distinctly marked on the land, that it could not escape the observation of any one who visited the premises with a view to buying. The same point was determined in *Randall v. Silverthorn*, 4 Barr, 173; and *Blatchly v. Osborn*, 33 Conn. 226.

It has been repeatedly held that notice in one transaction is not notice in another, *post*, 172. See *Mehan v. Williams*, 12 Wright, 238; *The Bank of Louisville v. Curren*, 36 Iowa, 555; *Fallon v. Burnet*, 2 Hare, 394, 404; *Lowther v. Carlton*, 2 Atkins, 242; *Wyllie v. Pollen*, 32 Law Journal, Ch. N. S. 782. This is sometimes treated as peculiar to the relation of agency, but is a general rule, applying whether the person to whom the information is communicated is a principal or agent; *Boggs v. Varner*, 6 W. & S. 469, 473. It would obviously be unreasonable to infer as a conclusion of law, and without regard to circumstances, that what is once known will always be present to the memory. The doctrine of constructive notice has its root in a principle which is more fixed than memory. That which a man ought to know, as it regards the

matter in hand, he will be presumed to know. But it is not incumbent on him to carry the information which he acquires while engaged in the transaction of one piece of business, through the subsequent affairs of life. This is the more true, because the mind attends to so much of what is before it as the exigency of the case requires, and dismisses even that, when the occasion for it ceases. It may be just to fix a purchaser with notice of that which appears in his title-papers, so far as it is relevant to the right acquired, but it would be of injurious consequence to hold that a recital in a conveyance of one tract of land, is notice of a fact, which though immaterial at the time, becomes important subsequently on the acquisition of a different tract. A purchaser need only give heed to so much of a deed as relates to his then purchase, and affects the title which he is about to acquire; *Boggs v. Varner*; *Hamilton v. Rogers*, 2 Schoales & Lefroy, 315, 327, *ante*, 134.

It results from these considerations, that as constructive notice is not proof of knowledge, so notice should not be constructively inferred from evidence that the purchaser had information at an antecedent period, or in the course of a different transaction, which would have been notice if it had been received at the time. In *Boggs v. Varner*, 6 W. & S. 469, a conveyance was made to the defendant in 1821, in which the premises were described as bounded by "land demised to John Boggs." Boggs

was then in actual possession of the land thus referred to, and so continued for several years; and evidence was adduced that this was known to the defendant, who visited at the house. In 1825, the house was consumed by fire; the family removed to another State; and the land remained vacant until 1828, when it was purchased by the defendant. It was held that these circumstances were not notice to the defendant of Boggs' title, nor evidence whence a jury could infer such notice.

This doctrine is qualified by the not less well established principle that knowledge is equivalent to notice, *ante*, 148. If the principal, or an agent whom he employs to effect the purchase, knows that which renders the transaction fraudulent, it may be set aside by the injured party without regard to when the information was acquired. It is an invariable rule that one cannot acquire title through his own wrong, nor through the wrong of another, because the adoption of the act makes him *particeps criminis*, however innocent he may have been in the first instance.

It should, nevertheless, be remembered in the application of this rule, that constructive notice is not always, or even generally, evidence of knowledge, where the question is one of guilty intent, or actual fraud. See *Wilde v. Gibson*, House of Lords Cases, 605, 623, *ante*, 145.

It results from what has been said, that a purchaser will have notice where he knows that the vendor has no equitable right to

the property which he is about to sell; where he has authentic information to that effect; or, finally, where his information, though not full or accurate, is yet such as no prudent or conscientious man would disregard without inquiry. Notice of the kind last mentioned is sometimes styled constructive notice, *ante*, 122; but is properly classed under the head of actual notice; *Williamson v. Brown*, 15 New York, 354, 359. Actual notice passes into that which is merely constructive by such nice gradations, that it is not easy to draw the line; see *Doyle v. Teas*, 4 Scammon, 202, 244; but it would seem that one who is informed of that which renders it his duty to inquire, has actual notice, whether he does or does not follow out the clue.

The line of demarcation between actual and constructive notice was carefully drawn in *Williamson v. Brown*, 15 New York, 354. Selden, J., said: "The plaintiff's counsel contends that knowledge sufficient to put the purchaser upon inquiry, is only presumptive evidence of actual notice, and may be repelled by showing that the party did inquire with reasonable diligence, but failed to ascertain the existence of the unregistered conveyance, while, on the other hand, it is insisted that notice, which makes it the duty of the party to inquire, amounts to constructive notice of the prior conveyance, the law presuming that due inquiry will necessarily lead to its discovery.

The counsel for the defendant cites several authorities in support of his position, and among others,

the cases of *Tuttle v. Jackson*, and *Grimstone v. Carter*, *supra*. In the first of these cases, Walworth, Chancellor, says: "If the subsequent purchaser knows of the unregistered conveyance at the time of his purchase, he cannot protect himself against that conveyance; and whatever is sufficient to make it his duty to inquire as to the rights of others, is considered legal notice to him of those rights; and in *Grimstone v. Carter*, the same judge says: "And if the person claiming the prior equity is in the actual possession of the estate, and the purchaser has notice of that fact, it is sufficient to put him on inquiry as to the actual rights of such possessor, and is good constructive notice of those rights."

It must be conceded, that the language used by the learned chancellor in these cases, if strictly accurate, would go to sustain the doctrine contended for by the defendant's counsel.

Notice is of two kinds, actual and constructive. Actual notice embraces all degrees and grades of evidence, from the most direct and positive proof, to the slightest circumstances from which a jury would be warranted in inferring notice. It is a mere question of fact, and is open to every species of legitimate evidence which may tend to strengthen or impair the conclusion. Constructive notice, on the other hand, is a legal inference from established facts, and like other legal presumptions, does not admit of dispute. "Constructive notice," says Judge Story,

"is in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted." (Story's Eq. Juris. § 399.)

A recorded deed is an instance of constructive notice. It is of no consequence whether the second purchaser has actual notice of the prior deed or not. He is bound to take, and is presumed to have, the requisite notice. So, too, notice to an agent is constructive notice to the principal, and it would not in the least avail the latter to show that the agent had neglected to communicate the fact. In such cases, the law imputes notice to the party, whether he has it or not. Legal or implied notice, therefore, is the same as constructive notice, and cannot be controverted by proof.

But it will be found, on looking into the cases, that there is much want of precision in the use of these terms. They have been not unfrequently applied to degrees of evidence barely sufficient to warrant a jury in inferring actual notice, and which the slightest opposing proof would repel, instead of being confined to those legal presumptions of notice which no proof can overthrow. The use of these terms by the chancellor, therefore, in *Tuttle v. Jackson*, and *Grimstone v. Carter*, is by no means conclusive.

The phraseology uniformly used, as descriptive of the kind of notice in question, "sufficient to put the party upon inquiry," would seem to imply that if the party is faith-

ful in making inquiries, but fails to discover the conveyance, he will be protected. The import of the terms is, that it becomes the duty of the party to inquire. If, then, he performs that duty, is he still to be bound, without any actual notice? The presumption of notice which arises from proof of that degree of knowledge which will put a party upon inquiry is, I apprehend, not a presumption of law, but of fact, and may, therefore, be controverted by evidence."

To an allegation that the defendant had sufficient information to have enabled him to ascertain the truth, it may be replied that if some of the facts communicated to the defendant were suspicious, and if standing alone would have rendered it incumbent on him to inquire, they were yet explained or qualified by other facts, and taking the whole, there was no reasonable cause for doubt; *Curtis v. Blair*, 4 Cushman, 310; or that although it would have been the defendant's duty to inquire, in view of all the circumstances, if there had been any means of ascertaining the truth, still there was no such clue, and the law does not exact an investigation that can lead to no good result; or that the defendant being informed of circumstances tending to show that the vendor's title was subject to a latent equity or unrecorded deed, proceeded in the usual course of business to investigate the title, and was unable to discover anything that would confirm the truth of the report.

It is well settled under the first head, that one who is informed by

a friend or neighbor that the land which he is about to purchase was sold to a third person, but is also told by the same informant that the contract has been rescinded, may buy with a safe conscience, unless there is some sufficient reason for crediting the first part of the statement and rejecting the last. *Prima facie*, both are equally false or equally trustworthy, and in either aspect there is nothing to put the purchaser on inquiry; *Williamson v. Brown*, 15 New York, 354, 360; *Buttrick v. Hildon*, 3 Met. 335; *Rogers v. Wiley*, 14 Illinois, 65. So, in *Bright's Trusts*, 21 Beavan, 43, notice of a deed accompanied by an erroneous statement of its contents, was held insufficient to charge the conscience of the purchaser.

It has been said to result from the same principle, that where the vendor couples an admission that would be notice if it stood alone, with an explanation which is satisfactory if true, the purchaser may accept the whole as veritable, and will not be responsible if the event shows that he was deceived; *Curtis v. Blair*, 4 Cushman, 309, 328.

Such an application of the rule is questionable. Where a vendor admits that he has sold the premises to a third person, but that the contract is at an end, the former allegation is against his interest, the latter for it, and it can hardly be said that both have an equal claim to credence. It may be contended that the statement taken as a whole does not vary the case, and that there is consequently no motive for falsification; but the ven-

dor may still intend to mislead the buyer by an affected candor, and induce him to disregard what he hears from others. A prudent man should consequently, under these circumstances, consult the former purchaser, or require the production of such evidence under his hand, as will remove all doubt; and one who does not observe this precaution cannot well be viewed as a *bona fide* purchaser.

The weight of authority accordingly is, that a purchaser who is put on inquiry, cannot safely rely on an explanation given by one, who like the vendor, may have a motive for misleading him, and should have recourse to some disinterested source of information; *Bunting v. Ricks*, 2 Dev. & Bat. Ch. 130; *Russel v. Petrie*, 10 B. Monroe, 186.

In *Russell v. Petree*, Simpson, J., said: "It is admitted by the answer that the mortgagees had notice at the time the mortgage was executed, that the bonds for the lots were in the possession of Russell, having been previously deposited in his hands by the mortgagor as a security for certain purposes. It is alleged, however, that the mortgagor informed them at the same time, that although Russell held the bonds in his possession, he had no further lien upon them or the property, his claim having been previously discharged in full. The information they had, apprising them of the fact that the bonds for the lots were in the possession of Russell, was sufficient to put them upon an inquiry into the nature and extent of his claim. If

they relied upon the statements of the mortgagor, they did so at their peril. It was their duty to have ascertained from Russell himself, whether he had any claim upon the property. If they failed to do it, the law deems it their own fault, and considers them constructively notified of his equitable rights."

It is said, in like manner, in Dart on Vendors, chapter 15, section 5, page 786, that if "a purchaser, having notice of a deed as being one that affects the property, is induced to rely upon the vendor's representation of its contents, the court will hold him bound by those contents, although it satisfactorily appeared from the nature of the transaction, that he placed implicit and *bona fide* confidence in the good faith of the vendor."

. And not only so, but also with notice of everything which might reasonably be learned from requiring production of the deed, as, *e. g.*, that it had been deposited as a security; *Peto v. Hammond*, 30 Beav. 495; 8 Jur. N. S. 550."

One who is informed by the vendor that the land which he is about to buy is subject to an unrecorded trust or mortgage, should not be satisfied with an assurance that the debt which the instrument was intended to secure has been paid; *Price v. M'Donald*, 1 Maryland, 403; *Hudson v. Warner*, 2 Harris & Gill, 415. In *Hudson v. Warner*, the answer denied that the defendant had notice of any incumbrance, equitable or legal. It then went on to say, that he inquired of the vendors before buy-

ing, whether there were any outstanding incumbrances, and was informed by them that they had given the complainant a bill of sale of some part of their property as security for his endorsement, but that the complainant had not been called on to pay the note, and that the bill of sale did not in any way affect the goods which they desired to sell; and it was further averred, that the defendant bought on the faith of this information, which he implicitly believed. The court held, that the defendant had been negligent, and could not be regarded as a *bona fide* purchaser. It was his duty to go to the complainant, and inquire of him, instead of trusting the representations of persons who were interested in concealing the real state of the case.

In like manner, where after the sale, and before payment, the purchaser was informed by the vendor of the existence of a deed of trust, in the nature of a mortgage, and at the same time told that the debt was satisfied, the court held, that if the purchaser chose to credit this statement without inquiry, it was at his peril; *Price v. McDonald*.

This course of decision should not be carried to the extent of visiting one who has been himself deceived, as if he were *particeps criminis*. There is a refinement of artifice against which few men are secure. A purchaser who is misled by such means cannot justly be charged with negligence in not making the investigation which would have resulted in a discovery of the fraud. In *Jones*

v. Smith, 1 Hare, 43, the question was whether a mortgagee had notice that the premises had been settled on the mortgagor's wife. It appeared in evidence that the mortgagor stated that a settlement of his wife's property had been made before marriage, but that it did not include the land in question, which belonged to him. The mortgagor then requested to see the instrument, and was told that it could not be obtained without offending an aged relative with whom it had been left for safe keeping, *ante*, 127. It was held by the Vice-Chancellor, and the court above, that the mortgagee might repose on this statement without further inquiry. He was not bound to accept part, and reject the rest; nor could he justly be regarded as in default for not supposing that the person with whom he dealt, would carry out a deliberate fraud by artifice. The same principle was applied in *Rogers v. Jones*, 8 New Hampshire, 264. A creditor there issued an attachment, which bound the land of the debtor. The latter proposed to give a mortgage for the debt, if the creditor would withdraw the attachment; stating that he had signed and sealed a deed, but that the instrument was still in his possession undelivered. The plaintiff thereupon relinquished the attachment, and took the mortgage; and it was held that he was not affected with notice of the deed, which had in point of fact been delivered to the defendant, and then returned by him to the grantor for some purpose which

was not apparent. Parker, J., said, that "if the defendant sought to avail himself of the vendor's statement, he must take the whole together, and so taken, it was not notice that the premises had been conveyed, but that a conveyance was contemplated, and would be made, if the lien of the attachment was removed. That the defendant was in possession of the premises, did not vary the case, or make it requisite to inquire of him. Possession was *prima facie* evidence of notice, subject to rebuttal. The plaintiff had good reason to know that the defendant had no title aside from the deed, and might not less reasonably believe that he did not acquire title under the deed."

The case of *Birdsall v. Russell*, 29 N. Y. 220, may be classed under the second head. There, two coupon bonds, numbered 336 and 337, were stolen from the complainants. The defendant subsequently bought two bonds of the same issue, bearing the numbers 225 and 238, in the usual course of his business. There could be no reasonable doubt under the evidence that these were the plaintiff's bonds, which had been altered to escape detection. It was conceded that the purchase was made in good faith, unless the circumstance that the numbers had apparently been changed, operated as constructive notice. It was held that an inference of notice can not be drawn from that which does not of itself convey the requisite information, unless it appears that the inquiry suggested by the

facts disclosed, would, if fairly pursued, result in the discovery of the defect. There must appear to be, in the nature of the case, such a connection between the facts disclosed and the further facts to be discovered, that the former could justly be viewed as furnishing a clue to the latter. The hidden fact in the case before the court was that the bonds belonged to the plaintiffs, and were stolen from them. The mere knowledge that the numbers on the bonds had been changed gave the purchaser no clue which, if followed up, would necessarily, or even probably, lead to knowledge. The case of *The Cambridge Valley Bank v. Delano*, 48 New York, may be referred to the same principle.

It is well settled under the third head that the inference that a purchaser who is put upon inquiry has notice, may be rebutted by evidence that he made a diligent investigation, which did not lead to a discovery of the complainant's equity; *Williamson v. Brown*, 15 New York, 554.

In *Williamson v. Brown*, the referee before whom the cause was tried, reported that the purchaser "had sufficient information or belief of the existence of an unregistered mortgage to put him on inquiry," and "that he pursued such inquiry to the extent of his information and belief, and did not find that such mortgage existed, or had been given." From these facts, the referee drew the inference, that the plaintiff was chargeable with notice of the mort-

gage. The report was confirmed by the Supreme Court, and a judgment entered for the defendant, which was reversed by the Court of Appeals. Selden, J., said, the "truer doctrine is, that where a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry, and ascertained the extent of such right, or to have been guilty of a degree of negligence equally fatal to his claim, to be considered as a *bona fide* purchaser. This presumption, however, is a mere inference of fact, and may be repelled by proof that the purchaser failed to discover the prior right, notwithstanding the exercise of proper diligence on his part."

How far such an inquiry must be prosecuted, and by what means, are to a considerable extent questions of fact, depending on the circumstances of each case; but it is, nevertheless, possible to lay down some general principles.

The first duty of a purchaser is to search the record, and it will always be a strong point in his favor, that there was nothing there that could operate as notice. So if he hears that which renders it incumbent on him to inquire, and on an examination of the registry has good reason to infer that the statements made to him are without foundation, he may generally rest satisfied in the belief that he has done all good faith demands. Accordingly, where one who is put on inquiry as to the existence of a

sheriff's deed goes to the proper office, and does not find it of record, his obligation is fulfilled, and he need look no further; *Belas v. McCarthy*, 10 Watts, 13, 28; and a similar decision was made in *Jackson v. Van Valkenberg*, 8 Cowen, 266. It has been held in like manner, that the presumption of notice arising from possession, may be rebutted by evidence that the occupant has conveyed the premises by a deed which appears of record, or is produced and exhibited by the vendor. But it has been decided in other instances, that such an occupant may show, as against a purchaser who omits to inquire of him, that the deed is subject to an unrecorded defeasance, or given as a security for a loan, and consequently a mortgage.

An examination of the record will not exonerate the conscience of the purchaser when the alleged equity depends on a fact *in pais*; *Blatchley v. Osborn*, 33 Conn. 266; *Randall v. Silverthorn*, 4 Barr, 173, *ante*; as for instance, that the consideration money of the deed under which the vendor acquired the title was paid by his wife, and that the land is consequently affected with a resulting trust for her benefit; and a purchaser, who has reason to believe that such is the case, from circumstances within his knowledge, is grossly negligent in not inquiring of the original grantor, or some other disinterested person who knows the truth; *Baker v. Bliss*, 39 New York Rep. 79.

A purchaser need not be astute

in discovering defects which are not apparent on the title papers. If an investigation in the usual course of business does not lead to a knowledge of the truth, he need not look further, unless he is cognizant of some circumstance which not only suggests a doubt, but opens a definite path for inquiry. That a mortgage which is recited in the deed by which the premises were conveyed to the vendor as an existing incumbrance, appears of record to have been satisfied before the sale, is not constructive notice of another incumbrance, which is not registered, and of which there is no actual notice, although it finally appears that the former incumbrance was substituted in the recital for the latter, through a mistake which would have been discovered by applying to the original grantor, or the conveyancer who drew the deed; *Cambridge Valley Bank v. Delano*, 48 New York, 327.

All that can ordinarily be required of a purchaser who is informed that a third person has an unrecorded right or interest in the premises, is to call on the alleged claimant for information, and if the latter declines, or is unable to respond, and the purchaser has no available means of ascertaining the truth of the report, he will be safe in accepting the title. If such silence does not amount to an estoppel, it is at least a reason why the purchaser should not be charged with bad faith for not being better informed than the person principally interested; *Massie v. Greenhow*, 2 Patton & Heath; *M'Gehee*

v. Gindrat, 20 Alabama, 951; *Epley v. Witherow*, 7 Watts.

In *M'Gehee v. Gindrat*, a debtor against whom judgment had been recovered for the use of a fictitious person, requested the attorney of record to inform him who was the owner of the judgment, in order that he might pay the debt to him. The attorney, acting under the instruction of the real owner, refused to disclose his name, but informed the debtor that the nominal plaintiff had no right to receive the amount of the judgment, and that it had been transferred to one of his creditors. The debtor afterwards paid the nominal plaintiff, and asked to have the judgment satisfied of record, and it was held that one who refuses to impart a fact peculiarly within his knowledge, in response to a question asked in good faith, ought not to be allowed to allege that the party whom he keeps in ignorance was put on inquiry, and, therefore, had constructive notice, because the inquiry is actually made and fails through his default.

The doctrine is stated in the following terms, in *Dart on Vendors*, 88, chap. III., sect. 1: "We may also, in connection with the above head, observe, that a purchaser suspecting that a third person has a claim on the estate, should (*Sug. 7, Ibbotson v. Rhoades*, 2 Vern. 554) in the presence of witnesses (who may take notice of what passes; *Doe v. Perkins*, 3 Term. R. 749; *Burrough v. Martin*, 2 Camp. 112; *Wood v. Cooper*, 1 Car. & K. 645,) inquire of him

whether such be the fact, and the amount of the claim, at the same time stating his own intention to purchase (2 Vern. 554); and if such person deny the existence of the claim, or assert that it is confined to a special sum, he will in equity be bound by his denial or assertion (*Pearson v. Morgan*, 2 Bro. C. C. 388; and see 6 Vesey, 183, and 3 Vesey & Bearnese, 111). But, although bound to answer truly if at all, a mortgagee, it would appear, may decline to answer unless the intending purchaser offer to redeem. (See *Bugdon v. Bignold*, 2 Y. & C. C. 390.) But it has been more recently held, that where property cannot be obtained without a particular person saying whether he claims it or not, it is not sufficient that he should hold his tongue, but he must state expressly whether he claims it or not. In *re Primrose*, 3 Jur. N. S. 899, where the claimant was visited with costs."

The circumstances under which a purchase is made may be so clearly indicative of notice that the conclusion will follow as a matter of law. See *Kennedy v. Green*, 3 Mylne & Keen, 699; *Parke v. Chadwick*, 8 W. & S. 96. Thus, where it appears that the sale of a mortgage was negotiated by the mortgagor, and that the price was paid to him, the assignee will be presumed to have had notice that the obligation which the mortgage was professedly given to secure, was not valid, because if it were, the right of disposition would be in the assignee, and he would claim and

receive the consideration for the assignment. In *Mullison's Estate*, 18 P. F. Smith, 212, an assignee who had given value on the faith of a certificate from the mortgagor that there was no defence, was postponed on this ground to a judgment which had been entered subsequently to the execution of the mortgage. It was held by Sharswood, Justice, that "the assignee must be held to have taken the mortgages with notice that they were without consideration, but made for the mere purpose of raising money by the sale of them; that they were not owned by the mortgagee but by the mortgagor. This was quite sufficient to put him upon inquiry as to whether there were any intervening liens or incumbrances between the date of the mortgages and his purchase. For in what is an entirely analogous case, it has always been held that where the maker of an endorsed note offers it for discount, that is not in the usual course of business, and is *prima facie* evidence that it is an accommodation note. If the transaction were real, the payee would be the owner of the note; he alone would have a right to sell and dispose of it; *Parke v. Smith*, 4 W. & S. 287; *Eckert v. Cameron*, 7 Wright, 121; *Byles on Bills*, 126, note 1. So, if the mortgagor negotiate the sale of a mortgage, it is a circumstance which ought to put the purchaser upon inquiry."

It seems to have been thought in *Green v. Slayter*, 4 I. Ch. 38, that a purchaser who, when put on inquiry, omits to call on the vendor

for information, will be affected with notice of all that he would have learned, if the latter had disclosed the real state of the case. A similar view was taken in *Sergeant v. Ingersoll*, 7 Barr, 340; 3 Harris, 343, *ante*, 49. There Sergeant held the legal title to a ground rent in trust for Reed, who entered into a covenant with the owner of the land to extinguish the rent, but subsequently sold it to a third person in fraud of the covenant. It was conceded the covenant was unknown to the trustee, and that the purchaser had no actual notice, and a conveyance was thereupon duly executed to her by the trustee; but the court held that it was her duty to have inquired of Reed, and that such an inquiry would have led to a disclosure of the covenant. Gibson, C. J., said, "Reed could sell his equitable ownership only, for the legal title was outstanding in a trustee, and the rudimental principle of equity that he who purchases an imperfect or inchoate title, must stand or fall by the case of his vendor, has never been shaken. Mr. Reed may have undertaken not to convey the legal title himself, but to procure it to be conveyed to her, and hence, it is said, that when she actually received a conveyance of it, she became a *bona fide* purchaser of it. Had she purchased it of Mr. Sergeant, she would have undoubtedly been so, but the fact that she was dealing with one who had it not, was a circumstance to arouse suspicion and prompt inquiry. A purchaser without notice must ap-

pear to have acted not only with good faith, but with extreme vigilance, for equity refuses to protect the careless and the slothful. In *Hiren v. Hill*, 13 Ves. 114, notice that the title deeds were in possession of another, was held to be notice of an equitable claim by him on the estate; and in an anonymous case in 2 Freem. 137, pl. 171, the very point before us was decided. It was held that if the vendee knows at the time of the purchase, that the legal estate is in another, he is bound to take notice of the trust. . . . Had the purchaser demanded of Reed why he had taken the title in the name of Mr. Sergeant, she would have been told that he was bound by a covenant with Mr. Ingersoll to extinguish the ground rent at a time to come, and that his object was to keep it afoot in the meantime. That would have led to a call for the covenant, by which the whole story would have been told."

This decision carries the doctrine of constructive notice to its furthest limit, if not beyond all just bounds. The court seems to have thought not only that the title of the purchaser of an equity cannot rise higher than that of the vendor, but that he is affected with constructive notice of any intervening right or equity arising from the vendor's act or default. The former proposition is unquestionable, unless the purchaser acquires the legal title, but there seems to be no foundation for the latter. It may be the duty of a purchaser from a *cestui que trust* to

inquire of the trustee. This is clear where the subject matter is in the nature of real estate; *Jones v. Jones*, 8 Simons, 633; *Wiltshire v. Rabbetts*, 14 Id. 76; *Wilmoth v. Pike*, 5 Hare, 14; *Peacock v. Burt*; Coote on Mortgages, Appendix, 2103; Sugden on Vendors, vol. 3, 433; Dart on Vendors; but a failure to do so will not put him in default, at all events where the trustee, as in *Sergeant v. Ingersoll* has nothing to impart; *Doe v. Meux*, 1 Hare. But there is no rule of conduct which renders it incumbent to seek for information of the vendor, merely because he does not hold the legal title. If the transaction is a fair one inquiry is superfluous, and it were vain to hope for a disclosure of the truth from one who is fraudulently disposing of that which he has no right to convey.

A purchaser will not be charged with notice by being put on inquiry, unless he has some more authentic means of information than can be found in an application to one who is interested in concealing the truth. It is useless to ask for an explanation or denial which would not be entitled to credence. A failure to inquire of a tenant or occupant, may justly be regarded as negligence, because his silence or misrepresentation will operate as an estoppel, but there is no such guaranty where information is sought from the vendor. The rule that one who knows that the legal estate is outstanding in a trustee, must take notice of the trust, *ante*, 49, only applies to a trust declared in writing or known to the trustee,

and not to a subordinate or derivative equity, arising from the acts of the *cestui que trust*, and studiously concealed from the trustee and the purchaser. The trust in *Sergeant v. Ingersoll*, was to convey to Reed, or to any one whom he might designate, and there was consequently no reason why a purchaser from Reed shall hesitate to accept a conveyance from the trustee.

In *Wilson v. M'Cullough*, 11 Harris, 440, it appeared in evidence that when the plaintiffs, who were a banking corporation, took the mortgage in suit, the validity of an unrecorded marriage settlement by the mortgagor, was discussed by the directors individually and at the meetings of the board, but there was no proof that they knew who were the trustees, or what property was included in the deed. It was also shown that the existence of some such settlement was known to the cashier. The court held that such information was not notice, because it did not appear that the board had any sufficient means of ascertaining the accuracy of the report. The cashier, said Woodward, J., "heard a marriage settlement spoken of, but who were the trustees, what was settled, whether real or personal estate, and on what terms, and when made, he did not hear. Was this notice of the conveyance, which had been made of the particular premises described in the mortgage? Obviously it was not. Nor was it sufficient to put the bank on inquiry. For, of whom could they inquire? If of the grantors, the conveyance was de-

nied, for the mortgage made by them was a solemn assertion of their ownership of the premises. Indeed it is a fair presumption from the transaction, especially from Mrs. Wilson's joining in the mortgage, that all proper inquiries were made in that quarter, and that the title was represented as in her. Of the trustees they could not inquire, for even the cashier had not heard them mentioned, nor was any person in possession of the premises under a title inconsistent with that of the mortgagors. The public register was searched in vain, and no clue whatever was furnished to the cashier, by which he or the directors could come to a knowledge of the truth."

The doctrine of constructive notice, as distinguished from notice in fact, has been carried quite as far as sound justice and policy dictate, and ought not to be pushed to the extent of denying a purchaser the benefit of the presumption in favor of innocence, to which every one is entitled until he is proved to have acted in bad faith, or to have been guilty of the gross neglect which is equivalent in effect to fraud. "There is no case which goes the length of saying, that a failure of the utmost circumspection shall have the effect of postponing a party as if he were guilty of fraud, or had actual notice;" 1 Story's Eq., sec. 400; *Woodworth v. Paige*, 5 Ohio, N. S. 76. In *Ware v. Lord Egmont*, 4 De Gex, Mac. & G. 473; 31 English Law & Eq. 89, the chancellor said, "I must not part with this case without ex-

pressing my entire concurrence in what has on many occasions of late years fallen from judges of great eminence on the subject of constructive notice, namely, that it is highly inexpedient for courts of equity to extend the doctrine—to attempt to apply it to cases to which it has not hitherto been held applicable. Where a person has actual notice of any matter of fact, there can be no danger of doing injustice if he is held to be bound by all the consequences of that which he knows to exist. But where he has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the court to say not only that he might have acquired the notice with which it is sought to affect him—that he would have acquired it but for his gross negligence in the conduct of the business in question." So in *Woodworth v. Paige*, the court unqualifiedly affirmed the dicta of the Vice Chancellor in *Jones v. Smith*, 1 Hare, 43, that, "if there is no fraudulent turning away from a knowledge of the facts which the '*res gestæ*' would suggest to a prudent mind; if mere want of caution, as distinguished from fraudulent and wilful blindness, is all that can be imputed to the purchaser, then the doctrine of constructive notice will not apply—then the purchaser will in equity be considered, as in fact he is, a *bona fide* purchaser without notice."

NOTICE TO AN AGENT. It is established in accordance with the principal case, that notice to an

agent in the course of the business which he is transacting for the principal, is notice to the principal for all the purposes of that transaction; *Hovey v. Blanchard*, 13 New Hampshire, 145; *Astor v. Wells*, 4 Wheaton, 466; *Barnes v. M'Christie*, 3 Penna. 67; *Jackson v. Sharp*, 9 Johnson, 163; *Jackson v. Winslow*, 9 Cowen, 13; *Jackson v. Leek*, 19 Wend. 339; *Westervelt v. Haff*, 2 Sandford, 98; *Griffith v. Griffith*, 2 Paige, 315; *Blair v. Owles*, 1 Mumford, 38; *Jones v. Bamford*, 21 Iowa, 217; *Myers v. Ross*, 3 Head. 59.

In other words, one who acts through another will be presumed to know all that the agent learns during the transaction, whether it is actually communicated to him or not, *ante*, 145. There is no difference in this respect between actual and constructive notice, for if there were, an agent would be employed whenever it was convenient to remain in ignorance; *The Bank of the U. S. v. Davis*, 2 Hill, 451, 461. Or, as the reason of the rule was stated by Lord Brougham, "policy and the safety of the public forbid a man to deny knowledge while he is so dealing as to keep himself ignorant, or so that he may keep himself ignorant, and yet all the while let his agent know and himself perhaps profit by that knowledge;" *Kennedy v. Green*, 3 Mylne & Keen, 699, 719.

The directors or trustees of a corporation are the general agents of the corporation when assembled as a board, and notice to them, or notice to a director individually, while acting in the business of the corpora-

tion, or under circumstances which render it incumbent on him to communicate his knowledge to the board, is subject to the general rule that notice to an agent in the course of his employment, is notice to the principal. See *The Fulton Bank v. The Canal Co.*, 4 Paige, 127; *The Bank of the U. S. v. Davis*, 2 Hill. 451; *The Fulton Bank v. Benedict*, 1 Hall, 480; *The Washington Bank v. Lewis*, 22 Pick. 24. The principle is the same when notice is given to the cashier or president of a corporation, in matters within the scope of his official duty; *The Fulton Bank v. The Canal Co.*; *The New Hope Bridge Co. v. The Phoenix Bank*, 1 Comstock, 156; *The Branch Bank v. Steele*, 10 Alabama, 195.

In like manner notice to a trustee is notice to the *cestui que trust*, and it is immaterial that the notice was given before the conveyance in trust was executed, if the whole forms one transaction; *Myers v. Ross*, 3 Head. 60. So if A. having notice buys for B. and the latter ratifies the purchase, he is affected with notice, although he did not employ B. or know of his design; *Myers v. Ross*, *ante*.

It is equally well settled, that where two or more persons are employed severally or jointly as agents in the purchase of an estate, or the transaction of business of any other kind, notice to one of them while so engaged, will be as effectual as regards the principal as if it were given to all. This is obvious because the responsibility of the principal for the conduct of each of the agents is

as great as if he were the only one; and because each of them is under an equal obligation to communicate his knowledge to the principal; *The Bank of the United States v. Davis*, 2 Hill, 451, 464. It follows, that notice to one of the directors of a bank while engaged in business of the principal, is notice to the bank itself; *The U. S. Bank v. Davis*. "The corporation," said Nelson, Chief Justice, "acts and speaks through the several directors, who jointly represent it in the particular transaction. In judgment of law it is present conducting the business of the institution itself; the acts of the several directors are the acts of the bank; their knowledge, the knowledge of the bank; and notice to them, notice to the bank."

The principle is the same, whether the agency is express or implied; and where land is conveyed to the members of a firm in satisfaction of a partnership debt, notice to one of the partners will affect all; *Watson v. Wells*, 5 Conn. 468. But the mere circumstance that a purchaser is made by two jointly, will not make them agents for each other, or render notice to one binding on both; *Flagg v. Mann*, 2 Sumner, 486, 534; *Snyder v. Sponable*, 1 Hill, 567; 7 Id. 427; and in *Snyder v. Sponable*, it was held to follow, that when a conveyance is made to a husband and wife as joint tenants, notice to the husband will not affect the wife where the consideration moves from her, although the case would be different, if the purchase-money came from his estate. Bronson,

J., said that "it did not appear that the relation of principal and agent existed in fact or impliedly between the vendees. Both were present at, and took part in the making of the contract, and the deed was delivered to both. One of several joint purchasers might act as agent for the others, and if he did, notice to him would bind the others. But such an inference would not be drawn in the absence of proof. Moreover, married women, infants, lunatics and other persons not *sui juris*, were in general capable of appointing an attorney."

It would seem, notwithstanding the doubt thrown out in the last sentence, that the incapacity of a married woman to act by attorney, will not preclude her from delegating any authority that may be requisite for the care and management of her estate; and that if she accepts and profits by the act of an agent, she must take it as a whole, and will be affected by any knowledge on his part or notice to him, that would have invalidated the sale, if he had bought for himself; *Duke v. Balme*, 16 Minnesota, 306; *Clark v. Fuller*, 39 Conn. 238.

The rule will not be carried beyond its reason; *The Bank of the U. S. v. Davis*, 2 Hill, 451. It forbids a man to acquire an advantage at the expense of his neighbor by using the eyes of another, but it does not ordinarily affect him with notice of that which he would not have learned with ordinary diligence, if he had transacted the business in person. No-

tice to an agent, consequently, is not notice to the principal, unless it occurs in the course of the transaction in which he represents the principal; *Bracken v. Miller*, 4 W. & S. 102; *Hood v. Fahnestock*, 8 Watts, 489; *The New York Central Ins. Co. v. The National Ins. Co.*, 20 Barb. 468; *Jackson v. Sharp*, 9 Johnson, 163; *The Bank of the United States v. Davis*, 2 Hill, 451; *Winchester v. The Baltimore Railroad Co.*, 4 Maryland, 231; *The Howard Ins. Co. v. Halsey*, 4 Selden 271; *Roberts v. Fleming*, 53 Illinois, 598; *Smith's Appeal*, 11 Wright, 128; *Weisser v. Dennison*, 6 Selden, 68; *Mehan v. Williams*, 12 Wright, 238; *The Farmers' Bank v. Payne*, 25 Conn. 444; *Willis v. Valette*, 4 Metcalfe, Ky. 186; *Keenan v. The Missouri Ins. Co.*, 12 Iowa, 106; *Pierce v. The Red Bluff Hotel*, 31 California, 160; *McCormick v. Wheeler*, 36 Illinois, 115; *Kennedy v. Green*, 3 Myle & Keen, 699; *Martin v. Jackson*, 3 Casey, 504, 508. It is now well settled, said Sergeant, J., in *Hood v. Fahnestock*, that if "one in the course of his business as agent, attorney, or counsel for another, obtains knowledge from which a trust would arise, and afterwards becomes the agent, attorney, or counsel for a subsequent purchaser in an independent and unconnected transaction, his previous knowledge is not notice to such other person for whom he acts. The reason is, that no man can be supposed to carry in his mind the recollection of former occurrences; and, moreover, in the case

of the attorney or counsel, it might be contrary to his duty to reveal the confidential communications of his client. To visit the principal with constructive notice, it is necessary that the knowledge of the agent or attorney should be gained in the course of the same transaction in which he is employed by his client."

So in *The New York Ins. Co. v. The National Ins. Co.*, Nelson, J., remarked: "That although in general whatever is known to the agent must be presumed to be known to the principal, I am inclined to think that the better opinion is, that this rule is confined to that class of cases, where the knowledge of the fact comes to the agent while he is acting for his principal, in the course of the very transaction which becomes the subject of the suit."

It results from these decisions, that a principal is not chargeable with notice of that which is brought to the knowledge of the agent, while the latter is acting for himself or for a third person; *McCormick v. Wheeler*, 36 Illinois, 114; see *Winchester v. The Susquehanna Railway Co.*, 4 Maryland, 221. Such is clearly the rule where the transaction in which the notice is given is anterior; and the better opinion would seem to be that it applies where an agent, who is employed simultaneously by different principals, becomes acquainted with a fact in conducting the business of one, which he fails to communicate to the other, unless the silence of the agent is a fraud for which the principal is answerable.

For a like reason, an executor will not be charged, as such, with notice, by showing that the facts were communicated to him during the testator's life; *Gold v. Death*, Croke Jac. 381, Hobart, 92; nor will notice to one before he becomes trustee affect the *cestui que trust*; *Ross v. Horton*, 2 Cushman, 591; *Henry v. Morgan*, 2 Binney, 497.

It results from the same principle that notice to an officer or director of a banking or railway company, will not operate as notice to the body corporate, unless he is acting for the corporation when he receives the notice, or it is part of his official duty to inform the board; *Winchester v. The Railroad*, 4 Maryland, 221; *The U. S. General Ins. Co. v. The U. S. Ins. Co.*, 11 Maryland, 517; 3 Maryland Ch. 331; *The Fulton Bank v. The New York and Sharon Coal Co.*, 4 Paige, 127; *The North River Bank v. Aymar*, 3 Hill, 262; *The Farmers' Bank v. Payne*, 25 Conn. 444; *The City Bank v. Bernard*, 1 Hall, 70. Hence, information received by a president or director in his private capacity, or derived from rumor, or through channels which are accessible to all, will not have the effect of notice, unless he is shown to have communicated it to the other directors in such a way as to render it incumbent on them to take cognizance of it in the collective capacity in which they represent the corporation; *The General Ins. Co. v. The United States Ins. Co.*; *Winchester v. The Railroad*.

It has accordingly been held in numerous instances, that knowledge acquired by an officer or director of a bank or a railway company in the course of his own affairs, is not notice to the company, unless it appears that the business in which it is alleged to have operated as notice was transacted by him individually, or as one of the board, and that such information was present to his mind and should have influenced his conduct. See *The Fulton Bank v. The New York and Sharon Canal Co.*, 4 Paige, 127; *Miller v. The Illinois Central R. R. Co.*, 24 Barb. 312; *The Seneca County Bank v. Neass*, 5 Denio, 337. So the same person may be a director in two corporations, and conversant with the affairs of both, without rendering what he learns in acting for either of them notice to the other; *The Fulton Bank v. The New York and Sharon Canal Co.*, ante, 140.

Conversely, proof that the agent of the purchaser is an officer or director of a banking corporation, will not charge the principal with notice of equities growing out of an antecedent transaction between the vendor and the bank; *Dunlap v. Wilson*, 32 Illinois, 517.

In like manner, the knowledge which a director of a bank acquires by reading an advertisement of the dissolution of a firm, will not operate as notice to the bank, or preclude it from taking a new note in the firm name from one of the co-partners. Cowen, J., said, that notice to a director who had a general authority to renew, or who had re-

newed the note in question, might have been notice, and so perhaps, if notice had been given to him for the express purpose of being communicated to the board. But as he had no reason to suppose, when he was informed of the dissolution, that it was in any way material to the bank, or that the bank could in any way be prejudiced by it, there was no presumption on the ground of duty or interest that he communicated his knowledge to the bank.

The rule that notice in one transaction is not notice in another, applies whether the information is given to the agent or the principal, but it is true in both cases, that if one has such knowledge, as to render his conduct fraudulent, it is immaterial when it was acquired, *ante*, 155.

The application of these principles is sometimes a matter of much nicety. In *The Fulton Bank v. The New York and Sharon Canal Co.*, 4 Paige, 127, a bill was filed by the bank to restrain the canal company from recovering certain moneys which had been deposited with the complainants. It appeared from the *allegata* and proofs that Cheesebrough was president and Brown a director of the Fulton Bank, and Brown was president, and Cheesebrough, a director of the New York and Sharon Canal Company, and both were also members of the committee which had charge of the finances of the Canal Company. At a meeting of the committee, on the 7th of September, at which Brown and Cheesebrough were

present, it was agreed that the money of the Canal Company should be deposited in the Fulton Bank, and remain there subject only to be drawn out by the finance committee. It was accordingly deposited in the bank, and credited to the canal company; but Brown left his signature, "G. W. Brown, Pres't," with the bank, as the signature upon which the money was to be drawn. He subsequently drew the money without the consent of the committee, and it was lost through his insolvency. The chancellor said that the agreement by Cheesebrough and Brown that the money should be deposited and remain on interest, exceeded their authority as president and director of the bank, and the only use the defendants could make of the agreement, was to show that the president of the bank knew that it was not the intention of the canal company that the money should be drawn without the consent of the finance committee. Hence it became necessary to inquire whether the complainants were chargeable with notice that Brown had no right to draw the money from the bank, although he left his signature in the book kept for that purpose. If the complainants were chargeable with such notice, the payments were made in their own wrong, and the canal company was entitled to treat the money as still in bank. "There can be no actual notice to a corporation aggregate, except through its agents or officers. The directors or trustees, when assembled as a board, are the general agents,

upon whom a notice may be served, and which will be binding upon their successors and the corporation. But notice to an individual director, who has no duty to perform in relation to such notice, cannot be considered a notice to the corporation. The notice which Brown and Cheesebrough had of what took place at the meeting of the seventh of September, was not of itself legal notice to the bank that the fund was placed under the control of the committee, and that Brown, although he left his signature, and apparently had the control of the money the next morning, was not in fact authorized to draw it from the bank. If Cheesebrough had been authorized by the bank, as their president and agent, to agree to receive the money on deposit, the agreement made with him as such agent would have been notice to the corporation, although he neglected to communicate the facts to the other officers of the bank, or to the board of directors. It is well settled that notice to an agent of a party, whose duty it is, as such agent, to act upon the notice, or to communicate the information to his principal, in the proper discharge of his trust as such agent, is legal notice to the principal; and this rule applies to the agents of corporations as well as others. From what took place on the evening of the seventh of September, Cheesebrough knew that this fund was placed under the control of the finance committee, and that Brown, as president of the canal company, had no right to draw it out of the bank.

But as there was nothing said or done at the time to excite a suspicion that Brown would attempt to practice a fraud, either upon the complainants or the canal company, by attempting to draw the money from the bank without authority, it was not necessary for Cheesebrough to communicate that information to the tellers or other officers of the bank; unless it became his duty to act, in his capacity as president, in relation to such deposit, from the fact of his knowing that Brown was about to withdraw the same wrongfully. It appears by the testimony, that in virtue of his office of president, he had a general superintending control over the clerks, tellers, and other officers of the bank. It was his duty, therefore, to forbid their paying any check which he knew to be drawn improperly and without authority, and if he should neglect to discharge such a duty, he would be personally liable to the institution for his improper conduct. If, therefore, Cheesebrough was present in the bank when the money was deposited, and knew that Brown had left his signature, as being authorized to draw out the money in his own name as president, it was his duty to give notice to the tellers and clerks of the facts which had come to his knowledge the evening before, and to forbid them from paying out the money, without the concurrence of the finance committee, or the order of the directors of the canal company. And if I was satisfied that Cheesebrough was present, and knew what took

place in the bank at that time, or was informed thereof previous to the actual payment of the money to Brown, I should have no hesitation in saying that the companies were chargeable with notice of the intended fraud, and that they were bound to pay the money a second time."

The distinction taken in this case is refined, but not on that account necessarily less just. Brown's knowledge was not notice to the bank, unless he acted for the bank subsequently in a way to make it requisite that he should communicate what he knew. His leaving his signature as that on which the money was to be drawn, was not such an act, because it was done on behalf of the canal company, and not of the bank. Had Cheesebrough been present when the deposit was made in that form, or become acquainted with it afterwards, it would have been his duty as president of the bank, to use the knowledge, which he had acquired as director of the canal company, for the benefit of the bank, and to prevent a fraud on the company. But as the evidence on this head was conflicting, the chancellor affirmed the decree which had been rendered in the court below.

It may be inferred from the language of the chancellor, that if Brown had been present at a meeting of the directors of the bank, when his authority to draw without the sanction of the finance committee was under consideration, it would have been incumbent on him to inform his colleagues that he had no such power,

and they would have had notice constructively whether the communication was or was not made. In *The Bank of the United States v. Davis*, 2 Hill, 452, ante, 169, a bill of exchange was sent by the defendant for discount to a director of the plaintiff's bank, who fraudulently procured the discount to be made for himself, and received the proceeds. It was held that the bank was chargeable with notice of the fraud, and could not recover upon the bill. Nelson, C. J., said that it was no answer to say that the director was not to be regarded as acting in his official capacity on behalf of the bank, but for himself, while engaged in perpetrating the fraud. It appeared from the evidence, that if he was acting for himself, he was also acting for the bank. He was present as one of the board of directors, engaged in the business of consulting and advising his associates with respect to the character of the paper presented at the time for discount, and advised, and doubtless recommended, in his character as director, the bills in question to the favorable notice of the board. In so doing, he represented the bank and it was immaterial that he was also the defendant's agent, or had a purpose of his own.

The mere circumstance that the president of a railway company, other body corporate, is the grantor in the deed by which they acquire title, will not, it has been said, affect them with notice of the equities to which the estate was subject to in his hands. It must, at

least, appear that he was present at a meeting of the board when the purchase was resolved on, or acted on behalf of the corporation in some other way during the course of the transaction; *The La Farge Ins. Co. v. Bell*, 22 Barb. 54; *Winchester v. Susquehanna Railway Co.*, 4 Maryland, 221, 239.

Le Grand, C. J., said: "It is undoubtedly true, as a proposition of law, that the principal is affected with the knowledge, and bound by the acts of the agent, but this principle can have no application to a case in which the one party does not act as agent, but avowedly for himself and adversely to the interests of the other. In the case now under consideration, Winchester did not profess, and in fact did not represent the company." In *The La Farge Ins. Co. v. Bell*, 22 Barb. 54, Emmet J., said, "that if the position of grantor as a director could so far identify him with the plaintiffs in any case, as to charge them with notice of all the facts with which he was personally acquainted, it would not do so when the facts concerned his own private affairs, and the transaction was one in which he was dealing with the company in his own behalf, and acting for himself and against them."

In *Weisser v. Dennison*, 6 Selden, a confidential clerk, who was intrusted with his employer's bank book, and took it habitually to the bank for settlement, forged various checks on the bank at different times in his employer's name, which were paid. The sums thus obtained were small in comparison

with the total account for the same period, and therefore, less likely to excite suspicion. During the interval, the bank book was settled several times, the balance struck, and the book returned with the cancelled checks as vouchers through the clerk, who abstracted those which had been forged before handing the book to his principal. It was contended that the clerk's knowledge was notice to his principal, and that the latter must consequently be regarded as having ratified the account by failing to object in due season. It was held by Allen, Justice, that, inasmuch as the knowledge of the agent was acquired in the course of an act done fraudulently beyond the scope of his employment, it did not affect the principal, who could not, on well settled principles, be precluded by his acquiescence, while ignorant. It was also said, that there was no such duty on his part to examine the vouchers furnished by the bank, as would render the omission to do so negligence, or render it equivalent to notice. On this head the decision would seem questionable.

The doctrine that notice to an agent is not notice to one for whom he acts subsequently in a different transaction, admits of an exception where the information acquired or communicated by the agent amounts to knowledge, and justifies the inference that the facts were present to his mind, and should have been communicated to the principal. See *Pritchell v. Sessions*, 10 Richardson's Law, 293; *Williams v. Tatnall*, 27 Illi-

nois, 253. The case of *The Distilled Spirits*, 11 Wallace, 356; *Hovey v. Blanchard*, 13 New Hampshire, 145; *Patton v. The Ins. Co.*, 40 New Hampshire, 375; *Williams v. Tatnall*, 25 Illinois, 553; *Wiley v. Knight*, 27 Alabama, 336. It is well settled that no one can justifiably retain that which has been acquired through a *suppressio veri*, or misrepresentation, however free he may have been from participation in the fraud; and there is no clearer case for the application of this rule, than where an agent buys for his principal in a way to prejudice the title of one whom he knows to be the rightful owner. But this result will not follow, unless the proof of knowledge is clear; and it should not be inferred from the mere circumstance that the agent ought to have informed himself, because this would be to found one presumption on another. See *Dunlap v. Wilson*, 32 Illinois, 517.

In *Norwood v. Dresser*, 17 C. B. 466, timber, which had been sent to a factor for sale, was offered by him as his own property, and bought by a broker for the defendant, with full knowledge that it belonged to the plaintiff; and it was held that the broker's knowledge was the knowledge of his principal, although obtained in the course of a prior transaction, and the defendant could not set off a debt due from the factor in an action brought by the plaintiff for the price. So the knowledge of an attorney who issues an attachment execution on a judgment, that the property levied on is subject to a

trust, is notice to his client, although the attorney acquired the information before he was retained.

It was held in like manner, in the case of *The Distilled Spirits*, 11 Wallace, 356, that the doctrine that notice to the agent is notice to the principal, applies not only to knowledge acquired by the agent in the particular transaction, but to knowledge acquired by him in a prior transaction, and present to his mind at the time he is acting as such agent, provided it be of such a character as he may communicate to his principal without breach of professional confidence.

Bradley, J., said, in delivering judgment "in England, the doctrine now seems to be established, that if the agent at the time of effecting a purchase, has knowledge of any prior lien, trust, or fraud, affecting the property, no matter when he acquired such knowledge, his principal is effected thereby. If he acquire the knowledge when he affects the purchase, no question can arise as to his having it at the time; if he acquired previous to the purchase, the presumption that he still retains it, and has it present to his mind, will depend on the lapse of time, and other circumstances. Knowledge communicated to the principal himself, he is bound to recollect, but he is not bound by knowledge communicated to his agent, unless it is present to the agent's mind at the time of affecting the purchase. Clear and satisfactory proof that it was so present, seems to be the only restriction required by the

English rule, as now understood. With the qualification that the agent is at liberty to communicate his knowledge to his principal, it appears to us to be a sound view of the subject. The general rule that the principal is bound by the agent's knowledge, is based on the principle of law, that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty. When it is not the agent's duty to communicate such knowledge, but it would be unlawful for him to do so: as, for example, when it has been acquired confidentially as attorney for a former client in a prior transaction, the reason of the rule ceases, and in such a case an agent would not be expected to do that which would involve the betrayal of professional confidence, and his principal ought not to be bound by his agent's secret and confidential information."

It has been said that the rule that notice to the agent is notice to the principal, depends on the presumption that the agent will fulfil his duty by informing the principal, and does not hold good where he is practicing a deception on the latter, and interested in concealing the truth. See *The Fulton Bank v. The New York & Sharon Canal Co.*, 14 Paige, 127; *Thompson v. Cartwright*, 33 Beavan, 189. In the case last cited, it was said to have been established in *Kennedy v. Green*, 3 Mylne & Keen, 699, that if the solicitor employed by the client,

was the actual perpetrator of the fraud, it was reasonably certain that he would not communicate that fact to his client, and that consequently the client could not be treated as having had notice of that fact; and the same inference may be drawn from the language held in *The Fulton Bank v. The Canal Co.*, ante, 172. However true this may be, where the agent is acting for both parties, it does not apply as against a third person who is injured by the fraud; and the loss will then be thrown on the principal, as having given occasion for the wrong, by reposing undue confidence in the agent, ante. See *Davis v. The Bank of the United States*, 2 Hill, 452; *Bank of New Milford v. The Town of New Milford*, 36 Connecticut, 93.

In the case last cited, one who was at the same time treasurer of a town, and cashier of a bank, borrowed \$3,000 from the funds of the bank professedly for the use of the town, and executed a note to the bank for the amount, as treasurer of the town. It was held that his fraud as treasurer was known to him as cashier, and was therefore the knowledge of the bank, and that the town was not liable on the note.

To make the rule applicable, the agent must be authorized to represent the principal, as it regards the matter in hand. One who is delegated to perform a ministerial act is not within the rule; nor will it be contended that a clerk who is sent to learn the price of a house, or when posses-

sion can be given, is an agent in such sense that what he is told incidentally with regard to the title, will be notice to the principal, although not made known.

In like manner the employment of a solicitor to do a mere ministerial act, such as procuring the execution of a deed, does not so constitute him an agent as to affect his client with constructive notice of matters within the knowledge of the solicitor; *Wyllie v. Pollen*, 32 Law Journal, Ch. 782.

And it has been held in numerous instances, that notice to an agent will not bind the principal beyond the limits within which the agent could bind the principal by his acts; *Weisser v. Dennison*, 6 Selden, 68. Accordingly, where the power of an agent of an insurance company is limited to receiving applications for insurance, and transmitting them to the company, his knowledge that the premises are erroneously described by the insured, will not be imputed to his principals, or preclude them from relying on the misdescription as a defence to an action for a loss. See *Wilson v. The Conway Fire Insurance Company*, 4 Rhode Island, 141, 152; 5 American Leading Cases, 922; 1 Smith's Leading Cases, 865, 7 ed.

It would, also, appear that to render the knowledge of an attorney the knowledge of his principal, he must be an attorney in fact. One who is asked for a professional opinion is an adviser rather than an agent. If an agent who is employed to invest money, or to conduct the negotiation

for an estate, buys with notice that the premises belong in equity and good conscience to a third person, it is immaterial whether his knowledge was acquired at the time, or in the course of an antecedent transaction. In either aspect the conduct of the agent is fraudulent, and the principal cannot take the property without being responsible for the means through which it was acquired. But the case is obviously different where an attorney who has been retained to examine a title, conducts the investigation in the usual course of business, without discovering a break or flaw, and so informs his client, without disclosing a fact which he has learned incidentally in examining the same title for another party. Under these circumstances the purchase is not made through the agent, nor does he practice a fraud or deception on the equitable owner. His failure to disclose the truth may be wrongful, or it may be dictated by a sense of professional obligation to the person for whom he was acting when he obtained the information. But there is nothing to affect the conscience of the principal; nor can he be said to have constructive notice of that which he would not have ascertained if he had examined the title instead of employing an attorney.

In *Basset v. Avery*, 15 Ohio, N. S. 299, the plaintiff before purchasing a promissory note, sent one Starr to inquire of the makers whether it was good. They replied that it was not; but Starr fraudulently informed the plain-

tiff that the instrument would be paid, and he thereupon gave value for it in good faith. It was held that this was not notice to the plaintiff. White, Justice, said, that "to charge the plaintiff with declarations made to Starr, it should appear that he derived title through Star's agency, or at least that Star was employed at the time in the discharge of a duty which the plaintiff owed to the makers of the note. The plaintiff bought from the payee, and not through Starr, or of the makers of the instrument, and was under no obligation to inquire of them."

It may be observed of this decision, that one who sends to inquire, makes the messenger his agent for the purpose of bringing back the reply, at all events so far as it is responsive to the inquiry. Such a messenger is not less an agent than if he were sent for a document or chattel. Moreover, it might well have been that the makers of the note would have given the information directly to the plaintiff, if the question had not been put to them through Starr.

One who does not employ an agent may, nevertheless, be affected constructively with notice of what the agent would have learned if employed. In *Kennedy v. Green*, 3 Mylne & Keen, 699, a solicitor fraudulently induced his client to assign a mortgage. The defendant subsequently bought the mortgage from the solicitor, without employing an attorney or conveyancer to examine the title. Lord Brougham held that he did not thereby make the solicitor his at-

torney, but that he was nevertheless chargeable with notice of whatever a competent attorney would have observed, if employed. And as there were circumstances which would have led a man of business to a discovery of the fraud, the plaintiff could not be regarded as a *bona fide* purchaser. To hold otherwise, would be to enable him to profit by the neglect of a usual and proper precaution.

The doctrine that notice to the agent is notice to the principal, would seem to involve two principles, which though cognate, are yet different; one that the agent is identical with the principal for all the purposes of the agency; the other that the principal cannot acquire a title through a wrong done by the agent. By virtue of the first, all that is brought to the knowledge of the agent while acting in the course of his employment, is constructively known to the principal, but nothing that he learns outside of that employment or in acting for third persons. The second extends far enough to include every case, where the principal claims through an act which the agent knew to be injurious, whether the knowledge of the latter was obtained while acting for the principal, or in the course of a distinct employment. This distinction may perhaps serve to reconcile cases that are apparently at variance.

If the view taken in this note is correct, the doctrine that notice to an agent is notice to the principal may be reduced to three heads; 1. Where the agent receives actual

notice in the course of the transaction; 2. Where he has constructive notice of that which the principal would have learned if he had examined the title in the usual course of business; 3. Where the purchase is made through an agent who has knowledge which would render his conduct fraudulent if he bought for himself. The first two result from the doctrine of notice, the last is a branch of the rule that a principal cannot acquire title through the fraud of his agent.

NOTICE FROM POSSESSION. It is held both in England and the United States, that actual and unequivocal possession is notice, not so much because it justifies an inference that the purchaser is aware of the title of the occupant, as because it is incumbent on one who is about to purchase real estate, to ascertain by whom and in what right it is held or occupied; *Sears v. Munson*, 23 Iowa, 483; *Peterman v. Gatz*, 5 Gilman, 686; *Weld v. Madden*, 2 Clifford, 584; *Phillips v. Costley*, 40 Alabama, 486; and the neglect of this duty is one of the defaults which unexplained are equivalent to notice; *M'Kenzie v. Perrill*, 65 Ohio, 162; *Perkins v. Swank*, 43 Mississippi, 349; *The Bank v. Flagg*, 3 Barb. Ch. 317; *Morrison v. March*, 4 Minn. 422; *Warren v. Richmond*, 53 Illinois, 52; *Gladwell v. Spaugh*, 36 Indiana, 319; *M'Kenzie v. Perrill*, 15 Ohio, N. S. 162; *Hubbard v. Lord*, 20 Iowa, 159; *Sailor v. Hertzog*, 1 Whar-ton, 269; *Wood v. Farmere*, 7 Watts, 385; *Diehl v. Page*, 2 Green, Ch. 143; *Bailey v. White*,

13 Texas, 114; *Baldwin v. Johnson*, Saxton, 441; *Disbrow v. Jones*, Harrington, Ch. 48; *Baynard v. Norris*, 5 Gill, 538; *Webber v. Taylor*, 2 Jones, Eq. 9; *Ringgold v. Bryan*, 3 Maryland, Ch. 488; *Davis v. Hopkins*, 15 Illinois, 519; *Keys v. Test*, 33 Id. 316; *Reeves v. Ayres*, 38 Id. 418; *Williams v. Brown*, 14 Id. 205; *Prettyman v. Wilkey*, 19 Id. 241; *Cabeen v. Breckenride*, 48 Id. 91; *Landes v. Brant*, 10 Howard, 348; *Bailey v. Richardson*, 15 English Law and Equity, 218. It follows that where creditors can be postponed by notice, possession may be notice to a judgment creditor, and preclude him from obtaining a lien on the equitable estate or interest of the occupant; *Wallace v. Gridley*, 36 Illinois, 523, *ante*; *M'Keekine v. Haskins*, 23 Maine, 230.

It is well settled that to be effectual as notice, possession must be sufficiently distinct and unequivocal to put the purchaser on his guard; *Boyce v. Williams*, 48 Illinois, 371; *Butler v. Stevens*, 26 Maine, 484; *Bell v. Twilight*, 2 Foster, 50; *Wright v. Wood*, 11 Harris, 130; *Coleman v. Barklew*, 3 Dutcher, 357; and of such a nature, that if continued adversely for twenty-one years, it would be a bar under the statute of limitations; *Martin v. Jackson*, 3 Casey, 504. See *Williams v. Sprigg*, 6 Ohio, N. S. 585; *Mehan v. Williams*, 12 Wright, 258. Or, as it is elsewhere expressed, "possession to be notice must be open, visible, exclusive and unambiguous, not liable to be misunderstood or misconstrued;" *Ely v. Wilcox*, 20 Wis.

consin, 530; *Patten v. Moore*, 32 N. H. 384. A mixed or ambiguous possession does not meet the requirements of this rule; *Bell v. Twilight*, 2 Foster, 500; *Bush v. Golden*, 17 Conn. 594. The use of a vacant unimproved lot by the occupants of an adjacent dwelling, for drying clothes, or other purposes of a like kind, is not notice that they have or assert an equitable ownership in the lot; *Williams v. Sprigg*. So where the defendant went into possession under a parol agreement for the purchase of part of a tract of land, and erected a mill and outbuildings for his workmen, but the boundary was not defined, and there were buildings of the same kind on the unsold portion of the tract, which were used for like purposes by the vendor, so that the whole would strike the eye as one establishment, it was held that the defendant's possession did not operate as notice to a purchaser at a sheriff's sale under an execution against the vendor; *Billington v. Welsh*, 5 Binney, 132.

The same point was determined in *Mehan v. Williams*. "What makes inquiry a duty," said Strong, J., "is such a visible state of things as is inconsistent with a perfect right in him who proposes to sell. *Holmes v. Stout*, 3 Green, Ch. 492, and 2 Stockton, 419; *M'Mechan v. Griffing*, 3 Pick. 149; *Haurick v. Powell*, 9 Alabama, 409.

"These, and many other cases show that the possession which affects a purchaser with notice, must be clear, open, notorious and

unequivocal, and that a possession or act done upon the land, which may lead to an inference of trespass as well as of title, is insufficient."

In like manner, where one owning and in possession of part of a lot of land not divided by any partition fence, purchased the residue, consisting principally of woodland, and which had not been occupied by the grantor, repaired the fence around the lot, pastured cattle in it, sold trees from the part purchased, and removed an old hovel standing in the same part, it was held that these acts did not constitute such an occupancy as would operate as notice to a subsequent purchaser; *M'Mechan v. Griffing*, 3 Pick. 149. In this instance, however, the first purchaser owned an undivided moiety of the lot as tenant in common with the vendor, before acquiring title to the whole, and more was consequently requisite to show that he held adversely to the latter, than would be necessary in the case of a stranger.

A manifest and continuing change of occupancy, which would lead an observer to infer that there had been a change or transfer of title, may, however, operate as notice, although the party does not reside on the premises. In *Krider v. Lafferty*, 1 Wharton, 303, a purchaser under an unregistered deed took possession of the ground, planted it with willows, for the purpose of supplying himself with materials in his trade as a basket maker, and continued to occupy it, growing willows upon it, and cutting them every year at

the proper season. The court held, that such a visible change in the appearance and occupation of the ground, was sufficiently distinct and notorious to put a subsequent purchaser upon inquiry as to the occupant's title, and being sufficient for that purpose was good notice in equity. See *Smith v. Low*, 1 Atkins, 490.

Paving the sidewalk of a town lot, and putting up a placard offering the premises for sale, and referring applicants to an agent, has also been held sufficient notice of ownership to put subsequent purchasers on their guard; *Hatch v. Bigelow*, 39 Illinois, 136. But cutting timber from time to time by one who does not reside on or continuously occupy the land, is not such a possession as will put a purchaser on inquiry, or operate as notice; *Holmes v. Stout*, 3 Green, Ch. 492; 2 Stockton's Ch. 419. A similar decision was made in *Meehan v. Williams*, 12 Wright, 238, where Strong, J., said, that "to be effectual as notice, possession must be occupancy; something more than occasional entries." For a like reason, where the receipt of rent is relied on as evidence of a constructive possession, and consequently of notice, it must appear to have been received adversely to the holder of the legal title and not as his agent; *Martin v. Jackson*, 3 Casey, 506-9.

While the authorities agree on these points, there is much difference of opinion as to whether the presumption of notice is absolute or capable of being rebutted. It has been held in numerous in-

stances that possession is constructive notice, or in other words, a legal inference which will be drawn without regard to circumstances. See *Chesterman v. Gardner*, 5 Johnson, Ch. R. 39; *Gouverneur v. Lynch*, 2 Paige, 300; *Grimstone v. Carter*, 3 Id. 421; *Krider v. Lafferty*, 1 Wharton, 304; *Lightner v. Mooney*, 10 Watts, 412; *Sailor v. Hertzog*, 4 Wharton, 259; *M'Cullough v. Cowher*, 5 W. & S. 427; *Jacques v. Weeks*, 7 Watts, 261; *Lewis v. Bradford*, 10 Id. 67; *Kerr v. Day*, 2 Harris, 112; *Macon v. Sheppard*, 2 Humphreys, 335; *Hardy v. Summers*, 10 Gill & Johnson, 316; *Hackwith v. Damron*, 1 Monroe, 237; *Knox v. Thompson*, 1 Little, 350; *Buck v. Hallway*, 2 J. J. Marshall, 178; *Miller v. Schackelford*, 4 Dana, 258; *Burt v. Cassity*, 12 Alabama, 734; *Scroggins v. Dougal*, 8 Id. 382; *Brice v. Brice*, 5 Barb. 535; *Dixon v. Doe*, 1 Smedes & Marshall, 70; *Willy v. Hightower*, 6 Id. 345; *Argenbright v. Campbell*, 3 Henning & Munf. 144; *Johnston v. Glancy*, 4 Blackford, 94; *Webster v. Maddox*, 6 Maine, 256; *Knox v. Plummer*, 7 Id. 464; *M'Laughlin v. Shepherd*, 32 Id. 143; *Hanly v. Morse*, Ib. 287; *Tuttle v. Jackson*, 6 Wend. 213; *Parks v. Jackson*, 11 Id. 442; *Jenkins v. Bodley*, Smedes & Marshall, Ch. 338.

The opinion, nevertheless, seems to be that although evidence that the complainant was in possession of the premises, casts the burden of proof on the purchaser of showing why he did not ascertain from

him by what right he held, it is still admissible to show that the circumstances were such as to justify the purchaser in assuming that the possession was held under the vendor, and consistent with his right to convey; *Williamson v. Brown*, 15 New York. An admission to that effect under the occupant's hand and seal, would clearly excuse a failure to inquire of him, and no admission can well be more direct than the acceptance of a lease which the lessor has in his possession, and exhibits to the purchaser; *Leach v. Ansbacher*, 5 P. F. Smith, 85. *Leach v. Ansbacher*, 5 P. F. Smith, 85. "When, said Thompson, J., "the purchaser knows that the occupant is in possession under a lease, the knowledge of the lease dispenses with the inquiry how the possession is held. This knowledge the purchaser had, and of the very terms of the lease. That was enough for him. He was not bound to inquire of the tenant if the lease was fair or fraudulent, or whether there was a trust notwithstanding; Sugden on Vendors, 3391."

In like manner, where one who was about to lend money on mortgage knew that the occupant of the mortgaged premises had entered as a tenant on sufferance, and still bore that relation on the previous day, it was held not to be incumbent on him to inquire of the occupant, although the latter had in fact received a conveyance from the mortgagor on the morning of that day. It was said to be immaterial that the mortgagor spoke of the deed, because he at

the same time declared that it had not been delivered, and corroborated his assertion by the production of the instrument; *Rogers v. Jones*, 8 New Hampshire, 264, *ante*.

For a like reason where the occupant's possession is consistent with his title as disclosed of record, he will not be permitted to rely on it as notice of another and different title to the injury of a purchaser who buys on the faith of the recorded title; *Great Falls Co. v. Wooster*, 15 N. H. 312. See *Smith v. Yule*, 31 California, 186; *Woods v. Farmere*, 7 Watts, 388. Hence, where a mortgagee went into possession of the mortgaged premises under a parol sale by the mortgagor, the court considered that it was not notice to a subsequent purchaser, because the latter might reasonably infer that he held under the mortgage, and not by virtue of the unrecorded contract; *Plumer v. Robertson*, 6 S. & R. 184. Tilghman, C. J., said, that where "the land is in possession of a third person, a prudent man will not purchase without making inquiry into the title of the occupant, but where the person who is in possession has placed upon record a title consistent with that possession, it may well be taken for granted that he holds under the recorded title; especially in this commonwealth, where every interest affecting the title to land may and ought to be recorded."

It was declared in like manner in *Woods v. Farmere*, that "in Pennsylvania every written title may be registered; and where an occupant announces but one of his titles, he

does an act which for its tendency to mislead ought to postpone the other. By exhibiting a conveyance to which, by his own showing, his possession may be referred, he does what he can to turn a purchaser from the direct path of inquiry."

The principle is nearly, if not quite the same, where one who has executed an absolute deed relies on his continuance in possession as notice of an unrecorded defeasance, or that the title is subject to a resulting trust. Such an instrument is an unequivocal declaration that the grantor has parted with his right, title and interest, and that third persons will be safe in buying from the grantee. A purchaser should not, under these circumstances, be required to look behind the deed for an equity which the parties have in effect concealed. The presumption in every such instance is, that the grantor remains in possession as a tenant at sufferance; *The New York Life Ins. Co. v. Cutler*, 3 Sandford, 176; and if this is open to rebuttal as between the parties, it should be conclusive in favor of a purchaser who has no actual notice.

The case is, if possible, still stronger when the deed is acknowledged and registered, while the registry contains nothing to indicate that the grantor's interest subsists despite the conveyance; *Bloomer v. Henderson*, 8 Michigan, 395. If a loss ensues, it should obviously be thrown on the grantor, who has contributed to mislead the purchaser; *Scott v. Gallagher*,

14 S. & R. 333, 334; *Newhall v. Pierce*, 5 Pick. 449; *Wood v. Farmere*, 7 Watts, 382.

So in *Jacques v. Weeks*, 7 Watts, 261-287, Kennedy, Justice, said: "That if one who having executed a deed and suffered it to be recorded, omits to record an accompanying defeasance and relies on his remaining in possession as notice, may justly be reproached with negligence, such a charge cannot be made where the equity arises from the nature of the consideration as a loan, or from an oral promise to reconvey on receiving back the price, and is consequently insusceptible of registration. In *The Metropolitan Bank v. Godfrey*, 23 Illinois, 579, 607, the grantor's possession was in like manner held to be notice that an absolute deed was a security for a debt, and consequently subject to a right of redemption; and the same point was decided in *Wright v. Bates*, 13 Vermont, 341.

It was held with less reason in *Grimstone v. Carter*, 3 Paige, 421, 439, that where an absolute conveyance which has been duly acknowledged and registered, is attended with an unregistered agreement in writing to reconvey, which in fact renders it a mortgage, the grantor has a mere equity which is not within the recording acts, and will not therefore be precluded from relying on his continuance in possession as notice to a purchaser from the grantee.

It has, notwithstanding, been held in other instances, that an absolute deed divests the grantor not

only of his legal title, but of the right of possession, and that when such a grantor is found in the exclusive occupancy of the premises after the delivery of the deed, a purchaser is not entitled to "give controlling prominence to the legal effect of the deed," in disregard of the other "notorious prominent antagonistic fact," that the grantor is in possession, and uses the land as if he had not conveyed, and if the purchaser chooses to rely on inference, instead of reducing the matter to certainty by inquiry, he must submit to the loss, if he is deceived; *Pell v. M'Elroy*, 36 Cal. 268; *Hopkins v. Garrard*, 4 B. Monroe, *supra*; *Grimstone v. Carter*, 3 Paige; *Russell v. Swazey*, 22 Michigan, 236.

The grantor's continuance in possession, may, agreeably to this view, be notice that the deed is in effect a mortgage, and subject to a right of redemption; *Jacques v. Weeks*, 7 Watts, 261; *Wright v. Bates*, 13 Vermont, 341; *Grimstone v. Carter*; or that the premises have been mortgaged or reconveyed to him as a security for the purchase money; *M'Kicknie v. Haskins*, 23 Maine, 230; *Webster v. Maddox*, 6 Id. 256; although such a conclusion will not be drawn unless his possession is exclusive, nor when the grantee enters, and both dwell together on the premises; *Butler v. Storms*, 26 Maine, 484.

It was held in like manner, in *Hood v. Fahnestock*, 1 Barr, 170, that where a grantor who conveys in fraud of his creditors, remains in possession through his tenants,

a purchaser from the grantee is chargeable with notice of the fraud; and the same point was determined in *Roberts v. Anderson*, 3 Johnson Ch. So where the owner of a mill, which was supplied with water by a race passing through an adjacent meadow, which also belonged to him, conveyed the meadow without reservation, but still continued to use the mill race; these circumstances were held to be notice to a subsequent purchaser of an equitable right on his part to the race in the nature of an easement; *Randall v. Silverthorn*, 4 Barr, 173.

In *Randall v. Silverthorn*, 4 Barr, 173; *Rogers v. Farmere* was said to determine that an owner of distinct titles, who gives record notice of one of them, abandons as to subsequent purchasers the other, of which his possession would otherwise be implied notice, unless, perhaps, where the purchaser has actual notice. It would seem that one who by the acknowledgment and delivery of a deed, enables the grantee to register a title which is to all appearance absolute, should, for a like reason, be precluded from relying on his continuance of possession as notice of an equity at variance with the deed.

It has also been held that possession taken or held by virtue of one right, is not notice of another, which the occupant acquires subsequently, unless it is attended by some change sufficiently visible and notorious to put purchasers on their guard; *Matthews v. Demerit*, 22 Maine,

315; *M'Mehan v. Griffin*, 3 Pick. 154: "Suppose," said Shaw, C. J., in the case last cited, "that a lessor should grant the land to the lessee, he being in possession under the lease, and the next day should make a second grant to a third person, who knew that the lessee the day before was in possession under the lease, how does this continued possession furnish evidence of notice of his purchaser? To imply notice in such case, is to presume a fact without proof, and against probability." Accordingly, where two tenants in common made partition of the land orally, and one soon afterwards conveyed his share to the other, who occupied the premises as owner, it was held that as he might have done this by virtue of his right as a cotenant, it could not be regarded as notice that he had acquired a title to the whole; *M'Mehan v. Griffin*. The same point may be found in *Kendall v. Lawrence*, 22 Pick. 542; *Williams v. Spriggs*, 6 Ohio, N. S. 585, and *Bush v. Golden*, 17 Conn. 594, 602.

The better opinion, nevertheless, is, that the possession of one who enters without right, or by virtue of a right which is consistent with the vendor's right to convey, is notice of a title subsequently acquired, unless it appears that the nature of such previous possession was known to the purchaser, and put him off his guard; *Matthews v. Demerritt*, 22 Maine, 312. Such a conclusion is entirely consistent with the doctrine of *Rogers v. Jones*, 8 New Hampshire, 264; *ante*, 183.

It is clear that possession will not cease to be effectual as notice, because another title is devised to the occupant, or cast upon him by the law, and a subsequent purchaser, who neglects to inquire under such circumstances, takes the risk; *Woods v. Farmere*, 7 Watts, 382. In *Woods v. Farmere*, a son entered under a parol sale from his father. Judgment was subsequently obtained against the latter, who died, leaving the premises to his son by will, and it was held that a purchaser under the judgment had notice of the son's equity, although the latter had by proving the will indicated that he claimed as devisee, and was consequently bound by the judgment.

To render possession notice, it must exist at the time of the sale, and it is not incumbent on a purchaser to inquire as to the title of a prior occupant who has abandoned the premises; *Hewes v. Wiswell*, 8 Maine, 94; *Boggs v. Varner*, 6 W. & S. 474; *Meehan v. Williams*, 12 Wright, 238. "All the authorities agree," said Strong, Justice, in the case last cited, "that possession is not notice except during its continuance, and even when the vendor is out of possession, the vendee is not bound to take notice of the antecedent possession of third persons."

The question was examined in *Williamson v. Brown*, 15 New York, 354, and the following conclusion reached: "Possession by a third person under some previous title, has frequently, but inaccurately, been said to amount to constructive notice to a purchaser of

the nature and extent of such prior right. Such a possession puts the purchaser upon inquiry, and makes it his duty to pursue his inquiries with diligence, but is not absolutely conclusive upon him. In *Hamburg v. Litchfield*, 2 Mylne & Keene, 629, when the question arose, the Master of the Rolls said: "It is true, that when a tenant is in possession of the premises, a purchaser has implied notice of the nature of his title; but if, at the time of his purchase, the tenant in possession is not the original lessee, but merely holds under a derivative lease, and has no knowledge of the covenants contained in the original lease, it has never been considered that it was want of due diligence in the purchaser, which is to fix him with implied notice, if he does not pursue his inquiries through every derivative lessee until he arrives at the person entitled to the original lease, which can alone convey to him information of the covenants."

"This doctrine is confirmed by the language of Judge Story, in *Flagg v. Mann et al.*, 2 Sumner, 554. He says: "I admit, that the rule in equity seems to be, that where a tenant or other person is in possession of the estate at the time of the purchase, the purchaser is put upon inquiry as to the title; and if he does not inquire, he is bound in the same manner as if he had inquired, and had positive notice of the title of the party in possession."

It is still further confirmed by the case of *Rogers v. Jones*, 8 N. Hamp. 264. The language of Par-

ker, J., in that case, is very emphatic. He says: "To say that he (the purchaser) was put upon inquiry, and that having made all due investigation, without obtaining any knowledge of title, he was still chargeable with notice of a deed, if one did really exist, would be absurd;" *Daniels v. Davidson*, 16 Vesey, 253; 17 Id. 433; *Kerr v. Day*, 2 Harris, 112."

It results from what is thus said, and would seem to be clear on principle, that the presumption of notice arising from possession may be rebutted by proof that the purchaser made an unsuccessful effort to ascertain the truth by inquiring of the occupant; because nothing more should be required in any such case, than the use of such means of information as are accessible with due diligence, in the usual course of business; *Williamson v. Brown*, 15 New York, 354, 361.

The weight of authority seems to be, that the possession of a tenant is notice not only of the lease, but of an equity arising under a collateral agreement with the landlord; *Knight v. Bowyer*, 23 Beavan, 609, 641. Bell, J., said, in *Kerr v. Day*, 2 Harris, 112, "that where a tenant for years agrees to purchase, his possession, though under the lease, is notice of his equitable interest as purchaser, to a subsequent purchaser, who is bound to inquire and inform himself of all the contents of the lease and the covenants contained in it, as well as of all the estates and interests claimed by the tenant." This opinion was based on the au-

thority of *Taylor v. Hibbert*, 2 Vesey, 437; 17 Vesey, 433, where Lord Eldon observed: "The tenant, being in possession under a lease, with an agreement in his pocket to become the purchaser, these circumstances altogether give him an equity repelling the claim of a subsequent purchaser, who made no inquiry as to the nature of his possession." The point did not, however, arise in *Kerr v. Day*, because the agreement to purchase was embodied in the lease.

It is a disputed question, whether the effect of possession as notice is limited to the title of the occupant, or extends to that of the person under whom he holds. Agreeably to the former view, the possession of a tenant is not notice of the landlord's title. "Knowledge of possession," said Sergeant, J., in *Jacques v. Weeks*, 7 Watts, 261, 272, "has not the effect of visiting the purchaser with notice of every fact and circumstance which he might have learned by making inquiry of the possessor; and if we recur to first principles, it would seem that the utmost that could fairly be implied from the possession by another person than the grantor, is that such possessor has some claim or title to the land, and therefore the purchaser, generally speaking, is to be considered as taking subject to such claim or title." The same view was taken in *Flagg v. Mann*, 2 Sumner, 486, 557, and *Beattie v. Beattie*, 21 Missouri, 313; while it was said in *Birnhart v. Greenshields*, 9 Moore P. C. C. 36; 28 English Law &

Eq. 77, that "there is not only an entire absence of authority for the idea that a purchaser who omits to inquire into the title of an occupier of land, will be affected with notice of other equities than those of the occupier himself, but that whatever authority there is, goes directly to negative such a proposition." In *Vesey v. Parker*, 23 Maine, 180, it was decided that the attornment of the grantor's tenants did not supply the want of registry, because there was no visible change of possession to indicate that there had been a change of title, which necessarily implies that the purchaser was not bound to inquire of the tenant.

The cases in Pennsylvania and some of the other States, adopt the more stringent rule, that it is the duty of the purchaser to inquire of the person in possession of the premises, and ascertain by what right he holds, and that the purchaser will consequently, where such occupant is a tenant, be charged with notice of the landlord's title; *Dickey v. Lyon*, 19 Iowa, 544; *Nelson v. Wade*, 21 Id. 49; *O'Rourke v. O'Connor*, 39 California, 442; *Kerr v. Day*, 20 Harris, 112; *Wright v. Wood*, 11 Id. 130; *Sailor v. Hertzog*, 4 Wharton, 259; *Hood v. Fuhnestock*, 1 Barr, 470; *Sergeant v. Ingersoll*, 3 Harris, 343, 348; *The Bank v. Flagg*, 3 Barb. Ch. 317; *Pittman v. Gaty*, 5 Gilman, 186; *Morrison v. March*, 4 Minnesota, 422. In *The Bank v. Godfrey*, 23 Illinois, 607, one who had executed an absolute deed, remained in actual possession of part of the land,

and held the rest through his tenants, and it was held, that a subsequent purchaser had constructive notice that the deed was in fact a mortgage.

It seems to be established in England, under the recent course of decision, that a landlord holding through his tenant, is an occupant in the sense of *Birnhart v. Greenshields*; and a purchaser who knows that the rent of the premises which he is about to buy is paid to a third person, is thereby affected with notice of the equities of such person; *Knight v. Bowyer*, 23 Beavan, 609; 2 De Gex & Jones, 421, *ante*. So knowledge that the land is not in the possession of the vendor, will render it incumbent on the purchaser to inquire of the persons who are in possession, and fix him with notice of all that he would have ascertained had the inquiry been made. But it does not follow, that one who has no reason to suppose that the vendor is not in actual or constructive possession, will be charged with constructive notice of the equity of a third person by a failure to inquire of the tenant.

NOTICE FROM TITLE PAPERS. It is thoroughly well established that a purchaser will have constructive notice of everything which appears in the deeds or instruments which prove and constitute the title, and is of such a nature that if brought directly to his knowledge it would be actual notice. This is the more obvious because the right of a purchaser cannot go beyond his title, and whatever appears on the face of

the title papers, forms an integral part of the title itself; *Neale v. Hagthorp*, 3 Bland, 531, 586; *Hagthorp v. Hook's Administrators*, 1 Gill & J. 270; *Oliver v. Piatt*, 3 Howard, 333; *Mason v. Fayne*, Walker's Ch. 459; *Johnston v. Gwathmey*, 4 Littell, 317; *Christmas v. Mitchell*, 3 Iredell's Eq. 535; *Sigourney v. Mann*, 7 Conn. 324; *Baker v. Mather*, 25 Michigan, 51; *Kerr v. Kitchen*, 5 Harris, 433; *Brown v. Eastman*, 11 New Hampshire, 588; *Burris v. Rouel-hac*, 2 Bush, 39; *Campbell v. Roach*, 45 Alabama, 667. Such notice, therefore, is of the most conclusive nature, and insusceptible of being explained away or rebutted; *Nelson v. Allen*, 1 Yerger, 360; *Johnson v. Thwaett*, 18 Alabama, 741; *Graves v. Graves*, 1 A. K. Marshall, 165; *Honore's Executors v. Blakewell*, 6 B. Monroe, 67; *Wailes v. Cooper*, 24 Mississippi, 208; and when appearing from the documents or papers accompanying the answer, will overrule a positive denial of notice in the answer itself; *Neale v. Hagthorp*. The principle applies to every instrument through which the title of the purchaser is deduced, and which is essential to its completeness. Hence when a title cannot be made out without going back to a devise, or it is a link in the chain of title, a purchaser will have notice of every clause which affects the quality or duration of the estate, or through which others have or may acquire a right; *Harris v. Fly*, 7 Paige, 421; *M'Ateer v. M'Mullen*, 2 Barr, 32. In like manner where a deed

which constitutes a link in the chain of title leads directly to another deed, or discloses facts and circumstances which are material to the right conveyed, the purchaser will be presumed to have ascertained everything which would have become known to him if he had followed up the clue; *Walton v. Nash*, 31 Mississippi, 324; see *Greer v. Knapp*, 6 Paige; *The Howard Ins. Co. v. Halsey*, 4 Sanford, 427; 4 Selden, 271; *Acer v. Westcott*, 1 Lansing, 123. A purchaser who buys part of a tract of land subject to an incumbrance which covers the whole, must take notice of a recital or description in his deed which shows that another portion of the same tract has been conveyed to a third person, and is consequently not liable to contribute to the payment of the incumbrance; *George v. Kent*, 7 Allen, 16; *Brown v. Simons*, 46 New Hamp. 475; *post*, notes to *Aldrich v. Cooper*. The rule is the same with regard to public grants as to those of individuals, and one claiming a title originating in a patent from the state, will be held to have notice of every thing that appears on the face of the patent; *Bonner v. Ware*, 10 Ohio, 465; *Brush v. Ware*, 15 Peters, 93, 111; *Urkett v. Coryell*, 5 W. & S. 60.

The recital or description which is relied on as notice, must be in the course of the title, and it is not enough that it appears collaterally from another instrument between the same parties, but relating to a different subject matter; *Boggs v. Varner*, 6 W. & S. 469.

In *Boggs v. Varner*, a convey-

ance was made to the defendant, which described the premises as bounded by a lot demised to John Boggs. Boggs was at that time in actual possession of the lot under an unregistered deed from the same grantor, but subsequently moved away, and the lot was thereafter conveyed to the defendant. It was held that the description in the former deed was not evidence that the defendant had notice, even when coupled with proof that he was aware that Boggs had occupied the lot. Sargeant, J., said, "that to admit a recital in the title papers to a different piece of property was notice, and would lead to dangerous consequences, because it was impossible for any one to recollect the recitals in past conveyances. If such a rule were adopted, no man could safely purchase without a careful examination of every deed which he had at any time received. A purchaser was not bound to take notice of anything in a deed which did not affect what he was then buying, and could not therefore reasonably be expected to carry with him into a subsequent transaction the memory of that which had no significance at the time. It was an established principle that notice in one transaction would not charge the purchaser in another, unless the circumstances were such as to justify an inference of knowledge.

A reference in the conveyance to the purchaser to a deed to a third person may render it part of his title, though originally collateral, and he will then have notice not only of the deed so referred to,

but of every fact which is a reasonable and necessary inference from the facts which it sets forth; *George v. Kent*, 7 Allen, 16, *ante*; and it has been held seemingly with less reason, that the same result will follow where one executes a deed which refers to another deed as containing a description of the subject matter. See *Garson v. Knapp*, 2 Paige, 35; *The Howard Ins. Co. v. Halsey*, 4 Sanford, 421; 4 Selden, 271. In the *Howard Ins. Co. v. Halsey*, part of a farm which had been mortgaged to the appellants was conveyed to one Wildes, and the residue not long afterwards to Hunt. The mortgagee, who was ignorant of the conveyance to Wildes, received a proportionate share of the mortgage debt from Hunt, and released the land which had been conveyed to him from the lien by an instrument under seal, describing it "as part of the premises conveyed by Hunt, the releasee to William Paulding, by deed bearing date February 25th, and therein described as parcels 1, 3 and 4." The deed thus referred to, bounded parcel No. 1, as "adjoining the land now or late of George Wildes." Johnson, J., said: "This reference made the deed referred to and the description of the premises thereby conveyed, as much notice of its contents as if they were recited in the release. The appellant, therefore, had this state of facts presented to him, that in a conveyance by a grantee of the mortgagor of part of the mortgaged premises, another part was described as not belonging to the mortgagor, but as now or late

the property of George Wildes. This was sufficient to arrest the attention of the appellants and put them on inquiry. It had been contended during the argument that the Paulding deed gave no information that Wildes' land was a part of the mortgaged premises. This objection was founded on the erroneous idea that the appellants could not locate the land described in the release. This they obviously could do, or were bound to be able to do. They knew, or ought to have known, that a strip of land lying west of the premises conveyed to Hunt was not released, and yet that strip was described in the deed which had been incorporated with the release by reference as belonging not to the mortgagor, but to a third person. It followed that although the appellants had no actual notice or knowledge of the conveyance to Wildes, yet they had constructive notice, and were therefore precluded from throwing a burden on him which ought to devolve exclusively on the subsequent grantee." A similar question arose in *Guion v. Knapp*, and was determined in the same way.

These decisions may be thought to carry a useful doctrine beyond the reason on which it depends. A purchaser may justly be presumed to have availed himself of every accessible means of information, because it is his duty, not less than his interest, to ascertain the validity of the title. But a mortgagee, who is asked to release a part of the mortgaged premises, is under no obligation to inquire whether the mortgagor has con-

veyed the residue in whole or in part. If he were, it would be incumbent on him to search the record, which is confessedly not the case; *Stuyvesant v. Hall*, 2 Bab. Ch. 151; *The Howard Ins. Co. v. Halsey*, 4 Selden, 271, 274; *post*, notes to *Aldrich v. Cooper*. There is consequently little ground for charging him with notice of the contents of a deed, of which he has no actual knowledge, although it is referred to in the release, and still less for supposing that he has notice of all that might be deduced from a comparison of the deed so referred to with the mortgage, or from reading it in view of the mortgaged premises.

The acceptance or execution of a deed is actual¹ rather than constructive notice of its contents; *Hackwith v. Damrore*, 1 Monroe, 237; *Knouff v. Thompson*, 4 Harris, 357, 364; *Kerr v. Kitchen*, 5 Id. 438; and may, therefore, extend to subsequent transactions. See *Guion v. Knapp*, 6 Laige, 35. In *Guion v. Knapp*, part of the land covered by a mortgage was sold, and a purchase-money mortgage taken, which was subsequently assigned to the holder of the paramount incumbrance, and it was held that he was thereby affected with notice of the sale, and could not release the residue of the land without discharging the whole. In like manner, one who receives a conveyance of an undivided moiety, in which the premises are described as subject to an incumbrance, cannot allege that he was ignorant of the incumbrance, in a suit brought

on a subsequent contract of sale, for the price of the other moiety; *Bellas v. Lloyd*, 2 Watts, 401.

It is well settled, that a vague and general statement, in whatever form, will not operate as notice. To bind the conscience of a purchaser by a recital, it must consequently be sufficiently clear and distinct to convey the requisite information, or put him on his guard. That a fact is set forth in the line of the title, will not make it constructive notice, unless it would have operated as actual notice, if communicated directly to the purchaser; *French v. The Loyal Company*, 5 Leigh, 627; *Lodge v. Simonton*, 2 Penna. R. 439; *Bell v. Twilight*, 2 Foster, 500; *Kane v. Denniston*, 10 Harris, 202; *White v. Carpenter*, 2 Paige, 217. In the language of Chancellor Walworth, in *White v. Carpenter*, the recital "must be such as to explain itself by its own terms, or refer to some deed or circumstance which explains it, or leads to its explanation."

LIS PENDENS AS NOTICE "*Lis pendens*, which in a chancery suit begins with the filing of the bill and service of subpoena, and continues until the final orders are taken in the case, is notice of every fact contained in the pleadings which is pertinent to the issue, and of the contents of exhibits to the bill which are produced and proved;" *Carter v. The Bank*, 22 Alabama, 743. It follows that a purchase from the defendant in a bill to establish a trust or enforce an equitable right of any kind, will not confer a valid title as

against the complainant. The rule grew out of the peculiar jurisdiction of chancery, which acting through the conscience of the party, and not on the property in dispute, might be defeated by a sale, *pendente lite*, if the purchaser were not affected constructively with notice. It has, therefore, little or no place in the ordinary course of procedure at law, because if the plaintiff's right is good against the defendant, it will be equally valid against a *bona fide* purchaser. But this observation does not hold good when the suit is brought to set aside a sale or conveyance on the ground of actual or constructive fraud, as in the case of an ejectment issued by one claiming under an unregistered deed against a subsequent grantee with notice.

A *lis pendens* does not exist or operate as notice until the bill is filed and the subpœna actually served on the defendant the one being requisite to give the court jurisdiction, and the other to apprise the purchaser of the nature of the equity, and direct his attention to the right or property in dispute; *Leitch v. Wells*, 48 New York, 585; *Hayden v. Bucklin*, 9 Paige, 512.

The pendency of the suit ordinarily dates from the service of the subpœna; but where the purchaser bought immediately afterwards and before the writ was returned, the court held that the presumption of notice was rebutted, and that the purchaser acquired a valid title; *King v. Bell*, 28

Conn. 593. See *Norton v. Burge* 35 Id. 250, 260.

The doctrine was established in this country in *Murray v. Ballou*, 1 Johnson, Chancery, 566; *Murray v. Finster*, 2 Id. 155, and *Heatley v. Finster*, Ib. 158, where a bill filed against a trustee, charging him with a breach of trust, and praying that he might be enjoined from disposing of the property, was held to be constructive notice to the defendant, who purchased the premises in question, after the service of the subpœna on the trustee. "Admitting," said Chancellor Kent, "that the defendant had no knowledge, in fact, of the suit of Mrs. Green against Winters when he made the purchase, he is, nevertheless, chargeable with legal or constructive notice, so as to render his purchase subject to the event of that suit. The established rule is, that a *lis pendens*, duly prosecuted, and not collusive, is notice to a purchaser so as to affect and bind his interest by the decree; and the *lis pendens* begins from the service of the subpœna after the bill is filed.

The counsel for the defendants have made loud complaints of the injustice of this rule, but the complaint was not properly addressed to me, for, if it is a well settled rule, I am bound to apply it, and it is not in my power to dispense with it. I have no doubt the rule will sometimes operate with hardships upon a purchaser without actual notice; but this seems to be one of the cases in which private mischief must yield to general con-

venience; and, most probably, the necessity of such a hard application of the rule will not arise in one out of a thousand instances. On the other hand, we may be assured, the rule would not have existed, and have been supported for centuries, if it had not been founded in great public utility. Without it, as has been observed in some of the cases, a man, upon the service of a subpoena, might alienate his lands, and prevent the justice of the court. Its decrees might be wholly evaded. In this very case, the trustee had been charged with a gross breach of his trust, and had been enjoined by the process of the court, six months before the sale in question, from any further sales. If his subsequent sales are to be held valid, what temptation is held out to waste the trust property, and destroy all the hopes and interest of the *cestui que trust*? A suit in chancery is, in such cases, necessarily tedious and expensive, and years may elapse, as in this case, before the suit can be brought to a final conclusion. If the property is to remain all this time subject to his disposition, in spite of the efforts of the court to prevent it, the rights of that helpless portion of the community, whose property is most frequently held in trust, will be put in extreme jeopardy. To bring home to every purchaser the charge of actual notice of the suit, must, from the very nature of the case, be in a great degree impracticable. The only safe and efficient means of preventing such fraud and injustice, is to charge the purchase

with dealing with the trustee at his peril. The policy of the law does, in general, cast that peril upon the purchaser. *Caveat emptor*, is the settled maxim of the common law. It is his business to inquire and to look to the person to whom he deals. If he knows him to be a trustee, then let him inquire of the *cestui que trust*, or let him ask at the register's office, whether there be any suit pending against such trustee. He can always be safe if he uses due diligence, but the other party has no means of safety beyond his application to the court. Whatever may be thought of the rule, it appears to me to be less severe than that acknowledged rule of the common law, on which our courts have repeatedly acted, that a conveyance of land, without any warranty or covenant of title, will not enable the purchaser to resort back to the seller, even if the title should fail; (*Frost v. Raymond*, 2 Caine's Rep. 188;) and if he has covenants to secure his title, he can seek for no more than the consideration which he has paid, without any allowance for the rise in the value of the land, or the value of the improvements; (*Pitcher v. Livingston*, 4 Johnson, Rep. 1.)

The doctrine laid down in these instances, is generally adopted in the United States by courts of equity; *Griffith v. Griffith*, 1 Hoffman, 153; *Jackson v. Ketcham*, 8 Johnson, 479; *Harris v. Carter's Adm'rs*, 3 Stewart, 233; *Tongue v. Morton*, 6 Harris & Johnson, 21; *Owings v. Myers*,

3 Bibb, 279; *Jackson v. Andrews*, 7 Wend. 152; *Chapman v. West*, 17 New York, 125; *Patterson v. Brown*, 32 Id. 81; *Bakeman v. Montgomery*, 1 M'Carter, 106; *M'Pherson v. Hansell*, 2 Beesely, 299; *Roberts v. Fleming*, 53 Illinois, 198; *Walker v. Butz*, 1 Yeates, 574; *Chandron v. Magee*, 8 Alabama, 578; *Carter v. The Bank*, 22 Id. 743; *Jackson v. Warren*, 32 Illinois, 331; *Cooley v. Brayton*, 16 Iowa, 10; *Loomis v. Riley*, 24 Id. 307; *Green v. White*, 7 Blackford, 242; *Bakeman v. Montgomery*, 1 M'Carter, 106; *Gassom v. Donaldson*, 18 B. Monroe, 231; *Norton v. Barge*, 35 Conn. 250; *Whiting v. Beebe*, 7 English, 564; *Ashley v. Cunningham*, 16 Arkansas, 168; *Gilman v. Hamilton*, 16 Illinois, 225; *Inloe's Lessee v. Harvey*, 11 Maryland, 519; *Harrington v. Slade*, 22 Barb. 166; *Pratt v. Hoag*, 5 Duer, 631; *Hersey v. Turbett*, 3 Casey, 418; and by courts of law when acting on and enforcing equitable principles.

It is well settled under these decisions, that a bill to foreclose a mortgage or establish a resulting or constructive trust, is constructive notice to purchasers, and to creditors who obtain judgment after the institution of the suit. See *Horn v. Jones*, 28 California, 194; *Wickliffe v. Bell*, 1 Bush, 427; *Knowles v. Roblin*, 20 Iowa, 101; *Edwards v. Blanksmith*, 35 Georgia, 213; *Boyer v. Cockerill*, 3 Kansas, 282. So one who buys from the defendant, in an ejectment brought to enforce an equity under the course of procedure in

Pennsylvania, has notice, and is as much concluded by the verdict and judgment, as if he were a party to the suit; *Hersey v. Tarbett*; *Hill v. Oliphant*, 5 Wright, 364; *Bolin v. Connelly*, 23 P. F. Smith, 346. See *Salisbury v. Morris*, 7 Lansing, 359. So an attachment of property, which like land is not negotiable, is binding on a purchaser *pendente lite*; *Tuttle v. Turner*, 28 Texas, 789; *Norton v. Birge*, 35 Conn. 250, 261.

In like manner, the pendency of a suit may supply the want of registration; *Chapman v. West*, 17 New York, 125; *Carter v. The Bank*, 22 Alabama, 743; and in this case a judgment was postponed to an unrecorded mortgage, on the ground that a bill had been filed to foreclose the mortgage before the judgment was rendered. But the rule does not apply where actual notice is required by statute, or under the construction adopted by the courts; *Newman v. Chapman*, 2 Randolph, 93; *City Council v. Page*, Speers' Eq. 209, 212; *Mecutcheon v. Miller*, 31 Mississippi, 65. See *Wyatt v. Barnwell*, 19 Vesey, 439.

There is ordinarily no occasion for the doctrine of *lis pendens* where personal property is concerned; the rule being that the title of a purchaser of a chattel or *chose in action* does not rise above the vendor's, *ante*. It is, nevertheless, as true of personal property as it is of real, that one who acquires the legal title in good faith may hold it against a latent equity; *Leitch v. Wells*, 48 New York, 585. The question of notice

is material under these circumstances, and the course of decision is, that a purchase of goods or securities from a trustee, pending a bill filed to enforce the trust, is invalid and may be set aside; *Scudder v. Van Amburgh*, 4 Edwards, 29; *Bolling v. Carter*, 9 Alabama, 770; *Shelton v. Johnson*, 4 Sneed, 672; *Leitch v. Wills*, 48 Barb. 637; *Diamond v. The Lawrence Co. Bank*, 1 Wright, 353; *Murray v. Lylburn*, 2 Johnson's Chancery, 441; see *Leitch v. Wells*.

In *Murray v. Lylburn*, a bill was filed against Winter, who held certain lands in trust for the complainant, charging him with a breach of trust, and he was thereupon enjoined from selling any of the trust estate or assigning the securities or proceeds thereof. Winter, notwithstanding, sold a lot of land belonging to the trust, and took a bond and mortgage for the purchase-money, which he assigned to the defendant Lylburn, who gave value for it in good faith. Chancellor Kent said: "The right of the complainant to pursue the bond and mortgage into the hands of the assignee, depends on the constructive notice to all the world, arising from the bill and supplementary bill, filed in 1809, against Winter for a breach of trust. The object of that suit was to take the whole subject of the trust out of his hands, together with all the papers and securities relating thereto. If Winter had held a number of mortgages and other securities in trust, when the suit was commenced, it would not be pretended that he might safely

defeat the object of the suit and the justice of the court, by selling those securities. If he possessed cash, as the proceeds of the trust estate, or negotiable paper not due, or perhaps movable personal property, such as horses, cattle, grain, &c., I am not prepared to say the rule is to be carried so far as to affect such sales. The safety of commercial dealings would require a limitation of the rule; but bonds and mortgages are not the subject of ordinary commerce, and they formed one of the specific subjects of the suit against Winter, and the injunction prohibited the sale and assignment of them, as well as of the lands held in trust. If the trustee, pending the suit, changed the land into personal security, as he did in this case, I see no good reason why the *c'estui que trusts* should not be at liberty to affirm the sale, and take the security; and whoever afterwards purchased it, was chargeable with notice of the suit." A purchase of stocks *pendente lite*, was set aside on like grounds in *Leitch v. Wills*, 48 Barb. 637, but the decision was reversed by the court above; 48 New York, 585.

The rule that a pending bill is notice, does not reach far enough to hamper the circulation of money or negotiable securities; for as to these the market is always overt, and the course of business does not afford time or opportunity for an examination of the record; *Kieffer v. Ehler*, 6 Harris, 388, 391; *Winston v. Westfeldt*, 22 Alabama, 760; *Leitch v. Wells*, 48 New York, 585. It follows that

the endorsement of a promissory note before maturity in good faith and for value, will confer a valid title, although an injunction has been served on the endorser, and he is guilty of a contempt of court; *Winston v. Wesfeldt*; *Stone v. Elliott*, 11 Ohio, N. S. 252, 260. For a like reason the service of an attachment on the maker of a note, will not invalidate an endorsement by the payee; *Keiffer v. Ehler*.

To render a *lis pendens* notice, the allegation must be sufficiently clear and precise to direct the attention of the purchaser to the property which the complainant seeks to charge by the bill; *Lewis v. Madison*, 1 Munford, 303; *Low v. Pratt*, 53 Illinois, 438; *Miller v. Shurz*, 2 Wallace, 237; and it will not be enough to aver that the defendant has invested trust funds in bonds and mortgages, or converted them into land without specifying the location of the real estate, or giving some ear-mark by which the personalty may be recognized; *Griffith v. Griffith*, 1 Hoffman, 153; 9 Paige, 317; *Lewis v. Mew*, 1 Strobbart's Eq. 180. In like manner, a creditor's bill, which is not sufficiently definite in the description of the estate which it seeks to charge with the debt, will not operate as notice to a purchaser under a bill filed subsequently by another creditor pending the first; *Miller v. Shurz*, 2 Wallace, 257. In this case, Swayne, J., said, that to create a *lis pendens*, operating as notice, a bill "must be so definite, that any one reading it can learn what property is intended to be made the subject of litigation.

In *Griffith v. Griffith*, 9 Paige, 317, it is said: "To have made such a bill constructive notice to a purchaser from the defendant therein, it would have been necessary to allege that these particular lots, or that all the real estate of the defendant in the city of New York, had been purchased and paid for, either wholly or in part, with the funds of the infant complainant. Or some other charge of a similar nature should have been inserted in the bill, to enable purchasers, by an examination of the bill itself, to see that the complainant claimed the right to, or some equitable interest in, or lien on the premises." It is evident that the premises in controversy were not in the mind of the pleader when this bill was drawn."

Certainty to a common intent is, nevertheless, all that a chancellor should require; *Green v. Slayter*, 4 Johnson, Ch. 68; see *Lodge v. Simonton*, 3 Penna. R. 439, 447, 449; and in *Green v. Slayter*, an averment that the defendant held divers lands in Cosby manor, in trust for the complainant, was held sufficient as putting the purchaser on inquiry, and enabling him to ascertain the truth.

In general, the operation of a *lis pendens* as notice does not extend beyond the prayer for relief, or to property not embraced in the bill. But a suit for specific performance by a purchaser of part of a tract of land covered by a mortgage, may be notice of his equity to have the premises charged in the inverse order of alienation, to a subsequent pur-

chase of the residue of the tract from the same vendor, because the existence of the mortgage renders it incumbent on the latter to inquire whether any act has been done by the mortgagor rendering it inequitable to throw the burden on part of the premises in exoneration of the rest; *Chapman v. West*, 17 New York, 124.

The operation of a *lis pendens* only extends to those who acquire title after the filing of the bill, and from a party or privy. Hence the pendency of a bill is not notice to a purchaser from a stranger to the suit, although the land be the same as that charged by the bill, and affected with the same equity; *French v. The Loyal Co.*, 5 Leigh, 627; *Stuyvesant v. Hone*, 1 Sandford's Ch. 419; *Harrington v. Harrington*, 27 Missouri, 560; *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Scarlet v. Gorham*, 28 Illinois, 319; *Parsons v. Hoyt*, 24 Iowa, 154; *Miller v. Shurz*, 2 Wallace, 237. A foreclosure suit is not notice to a prior incumbrancer who is not a party to the bill; *Stuyvesant v. Howe*; nor will the service of a subpoena on A., operate as notice to a purchaser from B.; *Clarkson v. Morgan*, 6 B. Monroe, 441. There is, said Swayne, J., in *Miller v. Shurz*, "another reason why the bill could not operate as constructive notice. Williams, who held the legal title, was not a party. We apprehend that to affect a party as a purchaser *pendente lite*, it is necessary to show that the holder of the legal title was impleaded before the purchase, which is to be set aside; *Carr v.*

Callaghan, 3 Littell, 371. The principle applies only to those who acquire an interest from a defendant *pendente lite*; *Stuyvesant v. Hall*, 2 Barbour's Chancery Rep. 151; *Fenwick's Adm'r v. Macey*, 2 B. Monroe, 1470; *Parks v. Jackson*, 11 Wendell, 442; see *Norton v. Berge*, 35 Conn. 250.

For a like reason, filing a bill will not invalidate an act, which, though subsequent, is done by virtue of an anterior right. A mortgagee may consequently release a part of the land, although the effect is to throw the whole burden on another part which has been mortgaged to a subsequent incumbrancer who instituted proceedings for foreclosure before the execution of the release; *Stuyvesant v. Hone*, 1 Sandford's Ch. 419; 2 Barb. Ch. 151. So filing a bill against the vendor is not notice to a purchaser who has gone into possession and improved the land, and will not preclude him from completing his title, by paying the purchase-money, and taking a deed; *Clarkson v. Morgan*, 6 B. Monroe, 441; see *Parks v. Jackson*, 11 Wend. 442; *Tremble v. Boothby*, 14 Ohio, 909; *Gibler v. Tremble*, Ib. 323. And it is well settled under the English decisions that a first mortgage may be tacked to a third, to the exclusion of an intervening incumbrancer during a bill filed by the latter to foreclose, *ante*.

It is essential to the operation of a *lis pendens* as notice, that it should be diligently prosecuted, and a complainant who suffers the proceeding to lie dormant for an

unreasonable length of time, will not be aided by the chancellor against a purchaser whom he has contributed to mislead by his laches; *Gibler v. Trimble*, 14 Ohio, 323; *Trimble v. Boothby*, Ib. 109; *Price v. M'Donald*, 1 Maryland, 403, 412; see *Watson v. Wilson*, 2 Dana, 406; *Clarkson v. Morgan*, 6 B. Monroe, 441, 448. In *Petree v. Bristow*, 2 Bush, 58, an unexplained delay of two years, without any step taken or motion made to prosecute the suit, was held to be gross negligence, which postponed the complainant to one who gave value for the property during the interval without actual notice.

A *lis pendens* does not necessarily cease to be such on the abatement of the suit by death; and the question depends on whether it is revived with due diligence, and before sufficient time has elapsed to justify third persons in believing that the proceeding is at an end; *Watson v. Wilson*, 2 Dana, 406; *Clary v. Marshall*, 4 Id. 95; *Debell v. Foxworthy*, 9 B. Monroe, 228. In *Watson v. Wilson*, a bill was filed to set aside a conveyance as a fraud on creditors. The suit abated through the respondent's death, and was not revived for more than two years. The premises were sold during the interval by his heirs, and bought by the defendant, and it was held that he could not be charged as a purchaser *pendente lite*.

Nicholas, J., observed: "It is said by several writers, that in order to affect a purchaser, there must be a close and continued prosecution of the *lis pendens*.

This has been said, as is presumed, mainly upon the authority of *Preston v. Tubbin*, 1 Vern. 286, as no other case is found cited in support of the doctrine, or in which it has been distinctly acted upon. In that case there is an observation, that there ought to be a close and continued prosecution of the *lis pendens*; but it seems to be the observation of the reporter merely, made for the purpose of indicating what the case decides. But the case decides nothing more than that the pendency of a suit at the time of the purchase, does not affect the purchaser with notice in any new suit, the first having been dismissed or discontinued. Lord Bacon's rule, which probably was the fountain of all this doctrine, by requiring that the suit should be in full prosecution at the time of the purchase, would seem to intimate, that there is a degree of intermission in such prosecution, which will deprive the complainant of the protection of the rule. All the writers concur in this idea; but what degree of intermission will have this effect, it is impossible to ascertain from them, with any distinctness. In a case decided by Lord Clarendon, and cited with approbation by Lord Nottingham, the bill was filed in 1640, abated by a death in 1648, the purchase made in 1661, and the bill of revivor not filed till 1662; still the purchaser was held bound. But this case, when subsequently cited, has been accompanied with the indication of decided disapprobation; and Mr. Sugden says, it was attended with

circumstances, that strip it of all character as an authority upon the point in question. The case was cited by Sir William Grant, in *Winchester v. Paine*, 11 Ves. 200, to show Lord Nottingham's opinion, that it made no difference, though the purchase was during an abatement of the suit, if afterwards revived and prosecuted to a degree, but at the same time he gave it as his own opinion, that in such case, there would be great difficulty in holding the purchaser bound; without, however, suggesting any reason for such difficulty, Mr. Sugden, after noticing this intimation of opinion, suggests, 'that if ever the point should call for a decision, it will probably turn upon the question whether the plaintiff was guilty of *laches* in reviving the suit.' "

"It was held by Lord Redesdale, that a purchase made after the dismissal of a bill, was subject to the final disposition of the cause in the House of Lords, provided an appeal was afterwards taken, and such is the received doctrine in England. We perceive no satisfactory reason, why a purchaser during the temporary abatement of a suit, should not be affected in the same way. A suit like this, can, with equal, if not greater propriety, be said to be pending, after an abatement by death, than after decree and before appeal in England, or writ of error in this country. The question seems properly resolvable, as suggested by Sugden, into an inquiry whether, the complainant was guilty of culpable negligence in reviving his suit."

"As to the negligence objected to in this case, we are not prepared to say, nor does our experience of the ordinary progress of a chancery suit in this state authorize us in saying, that from May, 1825, when the subpoena was served, till April, 1828, when Watson obtained his deed, there was that lapse of time, which unexplained, would, of itself, amount to such *laches*, as to deprive the complainant of the benefit of the rule."

But the delay in reviving the suit of nearly two years, to the time when Watson completed his purchase, and of more than two years to the time of revivor, without any step taken towards a revivor, and without any explanation or excuse shown for the delay, is of a different character. If such a delay for two years does not need explanation, we should have much difficulty in saying what length of delay would require it. No satisfactory reason suggests itself, for saving it from the inculpation of gross and wilful negligence. We are, therefore, bound to say that there was not such a prosecution of Wilson's suit, as entitles him to the protection of the rule, and that his decree and purchase under it, cannot be permitted to overreach and avoid the conveyance to Watson. The rule, though necessary and indispensable, has ever been deemed harsh and rigorous in its operation against *bona fide* purchasers, and it is said, that, in England, if the complainant make a slip on his proceedings, the court will not assist him to rectify the mistake. We deem it strictly

proper, that he should be held to something like reasonable diligence in the prosecution of his suit, to entitle himself to the protection of the rule."

It results from what is here said, that a purchase from the defendant, after the abatement of the suit by death, will not confer a valid title, if the proceeding is revived within a reasonable time, and conducted to a successful termination; *Ashley v. Cunningham*, 16 Arkansas, 168; *Debell v. Foxworthy*.

In like manner, the entry of a decree for the defendant will not put an end to the operation of a suit as notice, until a sufficient time has elapsed for an appeal; and one who buys in the meantime will be subject to the complainant's equity as finally established; *Debell v. Foxworthy*; *Talbot v. Ball*, 5 B. Monroe, 323; *Gilman v. Hamilton*, 16 Illinois, 225. When, however, a bill is dismissed, although without prejudice, the proceeding is at an end unless the decision is reversed; and another bill for the same cause, will not relate back to the exclusion of an intervening purchaser; *Newman v. Chapman*, 2 Randolph, 102; *French v. The Loyal Co.*, 1 Leigh, 627, 681.

The operation of a suit as notice ceases when it is brought to an end by a decree or judgment; *Price v. White*, 1 Bailey's Eq. 234; *Blake v. Heyward*, Ib. 208; *Turner v. Crebill*, 1 Ohio, 574; although a decree, which may be reviewed by a higher tribunal is not final in this sense, until a sufficient time has elapsed for an appeal; *Debell v. Foxworthy*, 9 B. Monroe,

228. It has been said to follow, that a decree for the complainant, and that the defendants shall convey the premises, will not bind a subsequent purchaser from the latter, unless the deed is executed and recorded; *Winborn v. Gorrell*, 3 Iredell's Eq. 117. But in *Jackson v. Warner*, 32 Illinois, 331, the court held that a Chancellor does not become *functus officio* on rendering such a decree, nor until it is carried into effect by the execution of a conveyance and the delivery of possession under it to the grantee; and a purchase from a defendant who has not complied with the order of the Court, is *prima facie* in bad faith.

A bill was filed enjoining a county from issuing bonds, and an injunction granted. Subsequently the proceedings under which the bonds were issued were declared valid by an act of the legislature. A year after, a bill was brought to declare the bonds issued in the meantime void; but they were declared valid. Two years after, a bill of review was filed, and the decree reversed. The court held that the suits were distinct, and that the bonds could not be regarded as having been issued *pendente lite*; *Lee County v. Rogers*, 7 Wallace 181.

Nevertheless, where an attachment issued at the suit of a creditor against land which had been fraudulently conveyed by the debtor, was, on the institution of proceedings on behalf of all the creditors, discontinued, and an

assignee in bankruptcy appointed by the appropriate tribunal, the court held that the whole was virtually one proceeding, and that a purchaser who had bought during the pendency of the attachment, was concluded by a decree in favor of the assignee; *Norton v. Birge*, 35 Conn. 250.

A *bona fide* purchase of personal property in one state will not be invalidated by the pendency of a suit against the vendor in another, even when the goods were within the latter State at the filing of the bill, and removed before the sale, with an intent to evade the jurisdiction; *Shelton v. Johnson*, 4 Sneed. 472.

It has been held that if a creditor files a bill in his own name, and for his sole benefit, to set aside a fraudulent conveyance, and to have the property applied, by the aid of a court of equity, to the payment of his judgment, and no lien has been or can be acquired at law, "he acquires a specific lien by filing the bill," and is entitled to priority over other creditors; and that any party purchasing the property sought to be subjected to the claim, is a purchaser "*pendente lite*." See *M'Cutchen v. Miller*, 31 Mississippi, 89; *Norton v. Birge*, 35 Conn. 250; *Miller v. Shurz*, 2 Wallace, 237; *Watson v. Wilson*, 2 Dana, 406; *M'Dermott v. Strong*, 4 John. C. R. 687; *Edmiston v. Lyde*, 1 Paige, 637; *Corning v. White*, 2 Ib. 567; *Farnham v. Campbell*, 10 Ib. 598; *Weed v. Pierce*, 9 Cowen, 722; *U. S. Bank v. Burke*, 4 Blackford, 141; *Hadden v. Spader*, 20 Johns. R.

554; *Blake v. Bigelow*, 5 Georgia, 437. The question was, however, regarded in a different aspect in *M'Cutchen v. Miller*, by the majority of the court.

REGISTRATION AS NOTICE. The statutes of the various States provide that unregistered grants and mortgages shall be invalid as against subsequent purchasers. There is nothing in the letter of such a law to make registration notice. A provision that a deed shall be recorded, is not in terms or by necessary implication, a provision that compliance with the statute shall render the instrument more efficacious than it would have been at common law; *Wiseman v. Westland*, 1 Y. & J. 117; *Underwood v. Lord Courtown*, 2 Sch. & Lefroy, 40; *ante*; see *Hodgson v. Dean*, 2 Simons & Stuart, 221; *Bushnell v. Bushnell*, 1 Scho. & Lefroy, 103. The registry acts are so interpreted in England, and by the Irish courts, although a purchaser may be charged with notice on proof that he examined the registry; *ante*, 144. "The plain meaning of the statute," said Lord Redesdale, in *Underwood v. Lord Courtown*, "is to give priority to instruments, whether they convey a legal or equitable estate according to the priority of their registry, but still, according to the rights, titles, and interests of the persons conveying." The same view prevailed in the first instance, in some of the States of this country; *Doswell v. Buchanan*, 3 Leigh, 365.

In *Grimstone v. Carter*, 3 Paige, 421, 437, an absolute grant was

made as a security with a parol agreement on the part of the grantee to reconvey on payment, and it was held to be immaterial as it regarded a subsequent purchaser from the grantee, that the agreement had not been recorded. Whether it was or was not, he would be bound by notice, and not without it.

In the case last cited, Chancellor Walworth said, the object of the recording act "was to protect a *bona fide* purchaser against a previous conveyance of the legal estate or of some part thereof, which would be valid against him, if the recording act had not been passed. But a purchaser did not need the aid of the legislature to protect him against a prior equity or a mere agreement to convey. Having the legal title under his conveyance, he would be able to defend his title at law, and a plea that he was a *bona fide* purchaser for a valuable consideration would afford him a full protection against an equitable claim, of which he had no previous notice." It is an inevitable inference from this language, that a conveyance of an equity is not within the recording acts, and will not operate as notice if registered. See *Walker v. Gilbert*, 1 Freeman Ch. 25; *Morecock v. Dickens*, Ambler, 678.

It was held in like manner, in *Doswell v. Buchanan*, 3 Leigh, 377, that the registering of a mortgage of an equitable estate was not notice to one who bought subsequently from the mortgagor after he had acquired the legal title. Carr, J., said, "the registry acts

declare that all deeds, mortgages, &c., shall be void as to subsequent purchasers, unless duly recorded; but they nowhere declare, that such recording shall charge the subsequent purchaser with notice of the deed. If not recorded, the deed is void as to him; if recorded, it is only so far valid, that it passes to the bargainee the title it purports to convey, provided the bargainor had that title; if he had it not, the deed cannot pass it, though recorded; nor will the putting it on record affect the conscience of a subsequent purchaser of the legal title, nor, of course, charge that title with the equity which the deed raised between the bargainor and the bargainee."

A more liberal doctrine now prevails in the United States, founded on the duty of a purchaser to use every available means of information. The object of the Legislature in passing the registry acts, was to enable every one who received a conveyance to place it on record for the benefit of those who might come after him. A purchaser should not, therefore, be allowed to profess ignorance of a deed which has been duly registered. Whether he does or does not examine the registry, the presumption against his good faith is equally strong. It is well settled, that one who wilfully omits to inform himself, is not less chargeable with notice than if he knew. The inference is the same, whether the prior right is an equity, or depends on an unregistered deed; see *Wild v. Brooks*, 10 Minnesota, 50; *Digman v.*

M'Cullum, 47 Missouri, 372. The rule was established judicially on this basis in some of the States, and has been introduced into others by statute; see *Stevenson v. Morse*, 17 New Hampshire, 532; *Brown v. Simpson*, 4 Kansas, 76; *Van Rensselaer v. Clark*, 17 Wend. 25; *Thomas v. Kennedy*, 24 Iowa, 397; *Shore v. Lascar*, 22 Wisconsin, 142; *Johnson v. Stagg*, 2 Johnson, 510; *Wardell v. Wadsworth*, 20 Id. 663; *Parkist v. Alexander*, 1 Johnson, Ch. 394; *Berry v. The Mutual Ins. Co.*, 2 Id. 603; *Jackson v. Dubois*, 4 Johnson, 216; *James v. Morey*, 2 Cowen, 216; *Shutt v. Large*, 6 Barbour's S. C. R. 373; *Knouff v. Thompson*, 4 Harris, 357; *M'Mechan v. Griffing*, 3 Pick. 11; *Shaw v. Poor*, 6 Id. 86; *Cushing v. Ayer*, 25 Maine, 383; *Irvin v. Smith*, 17 Ohio, 226; *Martin v. Sale*, 1 Bailey's Equity, 1; *Mann v. Martin*, 4 Maryland, 124; *Farquharson v. Gechelberger*, 15 Id. 73; *The Mayor v. Williams*, 6 Id. 235; *Williams v. The Bank*, 11 Id. 198; *Keiser v. Heuston*, 38 Illinois, 252; *Tod v. Benedict*. In *Brotherton v. Livingston*, 3 W. & S. 334, the principle was held broad enough to embrace an agreement, which though not under seal, had been reduced to writing, and was valid under the statute of frauds; *Schutt v. Large*, 6 Barb. 373; *Keiser v. Heuston*, 38 Illinois, 252. It follows, that registering a grant of an equitable state, or of a covenant to convey, is notice to a subsequent purchaser from the grantor or covenantor; *The U. S. Ins. Co. v. Shriver*, 3 Maryland, Ch. 381; *Hunt v. John-*

son, 19 New York, 279; *Alderson v. Ayres*, 6 Maryland, 342; *The General Ins. Co. v. The M. Ins. Co.*, 10 Maryland, 517; *Alexander v. Ames*, 6 Id. 52; *Doyle v. Teas*, 4 Scammon, 202; *Wilder v. Brooks*, 10 Minnesota, 50; *Siter v. M'Clenachan*, 3 Leigh, 362; *Russell's Appeal*, 3 Harris, 319; *Bellas v. M'Carty*, 10 Watts, 13. In *The U. S. Ins. Co. v. Shriver*, the design of the Legislature was said to be that "all rights, incumbrances, or conveyances, touching, connected with, or in anywise concerning land, should appear upon the public records. It followed, that conveyances of equitable interests in land were within the Registry Acts; and that a conveyance of such an interest, which though subsequent in date, is first recorded, must be preferred, unless the grantee had actual notice of the prior unregistered deed."

It results from the same doctrine, that the registration of a voluntary deed rebuts the presumption of unfair dealing, which would otherwise arise from a subsequent sale of the property, and renders it incumbent on the purchaser to prove actual fraud if he would set aside the conveyance; *The Mayor v. Williams*, 6 Maryland, 235; *Williams v. The Bank*, 11 Id. 198; *Cooke's Lessee v. Bell*, 13 Maryland, 469, 493; *Beal v. Warren*, 2 Gray, 450; 1 Am. Lead. Cases, 57, 5 ed.

The registration of a deed or mortgage will not operate as notice, unless the premises are described with sufficient accuracy to

put a subsequent purchaser on his guard; *Rogers v. Kavanaugh*, 25 Illinois, 583; *Martindale v. Price*, 14 Indiana, 115; *Lally v. Holland*, 1 Swan, 396; *Singer v. Craigie*, 10 Vermont, 555; *Nelson v. Wade*, 21 Iowa, 49; *Banks v. Ammon*, 3 Casey, 172; *Mundy v. Vawter*, 3 Grattan, 518; *Lally v. Holland*, 1 Swan, 396. The premises must be defined by metes and bounds, or there must be some other sufficient means of identification; *Banks v. Ammon*, 3 Casey, 172. In *Mundy v. Vawter*, 3 Grattan, 518, a conveyance of all the grantor's real and personal estate was held not to be notice to a subsequent purchaser; but in the determination of such questions much may depend on the knowledge of the purchaser, and whether enough was disclosed to enable him to ascertain the situation and boundaries of the land by inquiry; *Brotherton v. Livingston*, 3 W. & S. 334; *Jones v. Banford*, 21 Iowa, 217; *Partridge v. Smith*, 2 Bissell, 183.

The principle is the same where the wording of a mortgage is so vague or inaccurate as to mislead creditors and purchasers; although it will not be enforced, unless the instrument is so drawn as to convey a false impression on some point material to their interests, vol. 1, 873; see *Hart v. Chalker*, 14 Conn. 771; *Pettibone v. Griswold*, 4 Id. 58; *Babcock v. Bridge*, 29 Barb. 427; *Young v. Wilson*, 24 Id. 510; 27 New York, 351; *Bell v. Fleming*, 1 Beasley, 13, 494.

As this mode of notice is the creature of legislation, it will not

arise from the voluntary registration of an instrument which the law does not require to be recorded; *Burnham v. Chandler*, 15 Texas, 441; *The Commonwealth v. Rodes*, 6 B. Monroe, 171, 181; *James v. Morey*, 2 Cowen, 246; *Lewis v. Baird*, 3 M'Lean, 56; *Villard v. Roberts*, 1 Strobhart's Equity, 393; *Brown v. Budd*, 2 Carter, 442; *Reed v. Cole*, 4 Indiana, 293; *Parrott v. Schaubhart*, 5 Minnesota, 323; *Bossard v. White*, 9 Richardson's Eq. 483; *Galpin v. Abbott*, 6 Michigan, 17; *Graves v. Graves*, 6 Gray, 393. It is the obligation of one party to register the grant which renders it incumbent on the other not to pass by an obvious source of information; and a purchaser will not be deemed negligent for omitting to look for that which he cannot reasonably expect to find. The law was so held in *James v. Morey*, with regard to the assignment of a mortgage, on the ground that the debt is the principal and the mortgage itself a mere accessory; see *Mott v. Clark*, 9 Barr, 400.

Registration does not operate as notice unless it is made in the way and with the forms prescribed by law. Where a statute or established usage requires that deeds and mortgages shall be registered in separate books, the registry of a mortgage in the deed book is invalid, and *vice versa*, *ante Grimston v. Carter*, 3 Paige, 421; *Colomer v. Morgan*, 13 Louis. Ann. 202; *Luch's Appeal*, 8 Wright, 519; *Calder v. Chapman*, 2 P. F. Smith, 539. See *M' Lanahan v. Reeside*,

9 Watts, 511. In *Luch's Appeal*, a certificate under seal, setting forth that the person signing it had deposited deeds for certain lots designated by their number in the town plot in which they were situated, "as collateral security for a note," coupled with a contract to convey the lots on failure to pay the note "within a reasonable time," was held to be a mortgage, and invalid as such, because not recorded in the mortgage book. Read, J., said: "Mortgages must be recorded in 'mortgage books,' and are not properly recorded in any other species of book where they cannot be found by means of the mortgage index."

It has also been held, that instruments which form parts of the same transaction must be registered together, and that a deed and defeasance entered in the same book, but with several pages intervening, is virtually an unregistered mortgage, and therefore invalid against subsequent judgments and attachments, because a creditor who consulted the registry for information, would presumably not look beyond the absolute conveyance; *M'Lanahan v. Reeside*.

In like manner a deed of land situate in one county cannot be effectually registered in another; *Perrin v. Reed*, 35 Vermont, 2; *Stewart v. M'Sweeny*, 14 Wisconsin, 68; *Kerns v. Swope*, 2 Watts, 15; *Astor v. Wells*, 4 Wheaton, 406; *St. John v. Conger*, 40 Illinois, 535; *Stevens v. Brown*, 3 Vermont, 420; nor can the registry of a copy be substituted for that of the original. See *Ladley v. Creigh-*

ton, 20 P. F. Smith, 490. So a purchaser need not take notice of an instrument which does not appear to have been proved or acknowledged in accordance with the statute; *White v. Dinman*, 1 Ohio, N. S. 112; *Shults v. Moore*, 1 M'Lean, 521; *Heister v. Fortner*, 2 Binney, 40; *Strong v. Smith*, 3 Id. 362; *Cockey v. Milne*, 16 Maryland, 200; *Herndon v. Kimball*, 7 Georgia, 432; *Reynolds v. Kingsbury*, 15 Iowa, 238; *Brinton v. Seevres*, 12 Id. 589; *Brown v. Lunt*, 37 Maine, 423; *Harper v. Reno*, 1 Freeman, Ch. 323; *Duphey v. Frenaye*, 5 Stewart & Porter, 215; *Carter v. Champion*, 8 Conn. 548; *Sumner v. Rhodes*, 14 Id. 135; *Galt v. Dobrell*, 10 Yerger, 146; *Hodgson v. Butts*, 3 Cranch, 540; *De Witt v. Moulton*, 17 Maine, 418; *Halstead v. The Bank of Kentucky*, 4 J. J. Marshall, 534; *Chateau v. Jones*, 11 Illinois, 300; *Sumner v. Rhodes*, 14 Conn. 135; *Carter v. Champion*, 8 Conn. 549; *Work v. Harper*, 24 Mississippi, 424; *Johns v. Reardons*, 3 Maryland, Ch. 57; 5 Maryland, 81; *Cockey v. Milne*, 16 Maryland, 200; *Blood v. Blood*, 23 Pick. 80; *Harper v. Reno*, 1 Freeman Ch. 523; *Chateau v. Jones*, 16 Illinois, 300; *Burney v. Little*, 15 Iowa, 572. The question depends on the intention of the Legislature, who may provide that a formal defect of acknowledgment shall not invalidate the registry of a deed or mortgage; *Gillespie v. Budd*, 3 M'Lean, 377; *Beed v. Kemp*, 1b. 16 Illinois, 445; *Brown v. Simpson*, 4 Kansas, 76; *Allen v. Moss*, 27 Missouri, 54; *Watson v. Mer-*

cer, 8 Peters, 88; *Barnet v. Barnet*, 15 S. & R. 72; *Tate v. Shalfros*, 16 Id. 35; *Wallace v. Moody*, 26 California, 387; *Hughes v. Cannon*, 2 Humphreys, 589; or may cure such a defect retroactively as between the parties, though not against an antecedent *bona fide* purchaser.

The registry of a deed is necessarily inoperative as notice to the holder of an antecedent right, and hence notwithstanding the rule that a paramount encumbrance on land which is sold successively in parcels is to be borne in the inverse order of alienation, a mortgagee need not search the record for conveyances by the mortgagor, before executing a release or covenant by which the lien is discharged as to a part of the premises, and the whole burden thrown on the residue; *Stuyvesant v. Hone*, 1 Sandford, 419; *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Taylor v. Maris*, *Err's*, 5 Rawle, 51; *post*, notes to *Aldrich v. Cooper*.

To make the registry of an instrument effectual, it must be transcribed, if not literally, at least with substantial accuracy. See *Wyatt v. Barwell*, 19 Vesey, 439; *Hughes v. Debnam*, 8 Jones, 127; and a material variance or omission will render it invalid as against subsequent purchasers and encumbrancers; *Miller v. Bradford*, 12 Iowa, 14. The purchaser is not chargeable with constructive notice where the record, if consulted, would not be actual notice; and a mistake in the name of the grantor, or the location of the premises,

is consequently fatal, unless the error is patent from the instrument as a whole; *Jenning v. Wood*, 20 Ohio, 261. For a like reason, unless the entire instrument is recorded, no part of it is recorded within the meaning of the statute; and hence where several writings are parts of the same transaction, a failure to register one will be a failure as to all. It follows that when an absolute deed is accompanied with a defeasance, both must be registered, and if they are not, the deed will be virtually an unregistered mortgage, and invalid as such against a subsequent judgment creditor of the grantor, or a purchaser from the latter; *Freedly v. Hamilton*, 17 S. & R. 70; *Edwards v. Turnbull*, 4 Wright, 509; *Dey v. Dunham*, 2 Johnson, Ch. 112; *Hendrickson's Appeal*, 12 Harris, 363; *Jacques v. Weeks*, 7 Watts, 261; *Brown v. Dean*, 3 Wend. 208; *James v. Morey*, 2 Cowen, 246. "A mortgage," said Black, J., in *Hendrickson's Appeal*, "when in the shape of an absolute conveyance, with a separate defeasance, the former being recorded the latter not, gives the holder no rights against a subsequent encumbrancer. It is good for nothing as a conveyance, because it is, in fact, not a conveyance; and it is equally worthless as a mortgage, because it does not appear by the record to be a mortgage." It is not a sufficient excuse for not complying with this requisition that the equity of redemption results from circumstances which do not appear in writing, or from an oral agreement to reconvey on receiving back the

purchase-money, because the policy of the law requires that the whole transaction should appear for the information of third persons; and withholding part of it may operate as a fraud on creditors, by leading them to suppose that the grantor had parted with his whole estate in the premises, and has no interest that can be made available as a means of payment; *The Manufacturers' and Mechanics' Bank v. The Bank of Penna.* 7 W. & S. 335. It has been contended, said C. J. Gibson, "that a verbal defeasance could not be recorded. What then? This defeasance was not a verbal one; and, if it were, let those who chose to lend on a form of security which is incapable of being made record notice take the consequences. Better they should suffer than the creditors should be kept at bay by a deceptive appearance given to the ownership of their debtor's property. It might bear an argument, whether a mortgage exhibited to the world as an absolute deed would not be fraudulent even by the 13 Elizabeth. Be that as it may, a mortgage thus imperfectly recorded is void as an unrecorded mortgage against subsequent liens."

The dissenting opinion of Kennedy, Justice, in *Jaques v. Weeks*, 7 Watts, 287; is a strenuous protest against this doctrine, on the ground that a failure to register a defeasance under seal, ought not to put the grantee in a worse position than if the equity of redemption arose from a parol contract, when the case would clearly in his judgment not be within the recording

acts, or that of an unregistered mortgage.

The registry of a deed is not notice to a subsequent purchaser, unless the parties claim under the same grantor; or to speak more accurately, through some one who is a common source of title; *Keller v. Nutz*, 5 S. & R. 246; *Blake v. Graham*, 6 Ohio, N. S. 586; *Hethrington v. Clark*, 6 Casey, 393, 395; *Raynor v. Wilson*, 6 Hale; *Brock v. Headen*, 13 Alabama, 370; *Dohie v. Gardner*, 15 Id. 758; *Long v. Dallorhid*, 24 California, 218, 453; *St. John v. Conger*, 40 Illinois, 473; *Stuyvesant v. Hall*, 2 Barbour's Ch. 151; *Murray v. Ballou*, 1 Johnson, Ch. 556; *Keller v. Nutz*, 5 S. & R. 246; *Lightner v. Mooney*, 10 Watts, 412; *Bates v. Norcross*, 14 Pick. 224; *Tilton v. Hunter*, 24 Maine, 29; *Crockett v. Maguire*, 10 Missouri, 34; *Lieby v. Wolf*, 10 Ohio, 83; *Whettington v. Wright*, 9 Georgia, 23; *Embury v. Conner*, 2 Sandford, 98. If the titles are distinct, the question is not which was first recorded, but which is best. They must not only be the same, but it must so appear of record. If A. conveys to B., who does not register the deed, the registration of a conveyance from B. to C. will not be notice to a subsequent purchaser from A.; *Hetherington v. Wright*; *Cook v. Travis*, 22 Barbour, 338; *Roberts v. Bourne*, 23 Maine, 165; *Harris v. Arnold*, 1 Rhode Island, 125; *Lightner v. Mooney*, 10 Watts, 407; *Fenno v. Seger*, 3 Alabama, 478; *Losey v. Simpson*, 3 Stockton, 246. In like manner, when the conveyance is

not registered, the registration of a mortgage given by the grantee for the purchase-money, will not operate as notice either of the mortgage or the deed; *Veazie v. Parker*, 23 Maine, 170; *Pierce v. Taylor*, Ib. 246; *Felton v. Pitman*, 14 Georgia, 530. Under these circumstances, the thread of title is broken, and the purchaser has no clue in making the search. A descent cast is not within this rule, and the registration of a deed by an ancestor is notice to a purchaser from the heir: *Hill v. Meeker*, 24 Conn. 211; *Kennedy v. Northrop*, 15 Illinois, 148; *Rupert v. Mark*, Ib. 540; though such a purchaser will not be charged with notice, by the registry of an unauthorized deed from the executor of the person from whom the title descended to the vendor; *Blake v. Graham*, 6 Ohio, N. S. 580. And the decisions in some of the states are that when an ancestor conveys, although by an unregistered deed, no title will descend to the heir and therefore, none can pass from him to a subsequent *bona fide* purchaser. See *Webb v. Wilcher*, 33 Georgia, 565; *Harlan v. Seaton*, 18 B. Monroe, 312; *M' Cullough v. Eudaly*, 3 Yerger, 346.

The rule that a *bona fide* purchase will discharge a latent equity or secret trust, applies in favor of one who buys from the grantee in an absolute deed without notice of an unregistered equity of redemption; *Jacques v. Weeks*, 7 Watts, 261, 271. But it would seem that a purchaser with notice, should stand in the shoes of his vendor, and be postponed

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as the assignee of an unregistered mortgage, to the judgment creditors of the original grantor. The point was, nevertheless, determined the other way in *Jacques v. Weeks*. There Knapp conveyed absolutely to Crocheron by a deed which was duly registered, and Crocheron gave Knapp an unregistered defeasance. The premises were subsequently sold under a judgment against Knapp, and purchased by the defendant, who also received a deed from Knapp for a valuable consideration. Crocheron had previously and before the judgment sold and conveyed the land to the plaintiff Jaques. It appeared in evidence that Knapp was in the actual and exclusive possession of the premises at and after the date of his conveyance to Crocheron, and when the latter sold to Jaques. The court were of opinion that Knapp's possession was notice to Jaques of his equity of redemption under the defeasance, but not that the defeasance was not duly registered. Rogers, J., said that possession by another than the grantor, implied that such possessor had some claim or title to the land. Jaques might consequently be considered as having notice of Knapp's claim as mortgagor by virtue of the defeasance. It did not follow that he thereby also had notice that the defeasance was not recorded. This would be to heap presumption on presumption; to infer that there existed a defeasance, and also that such defeasance was not recorded. In the absence of any actual notice, the presumption would rather

be, that as such instruments were invalid if not recorded, Knapp had done what the law required to give validity to the title which he held. The fact that it was not recorded was not notice of that fact to Jaques, because, as he did not know of its existence, he could not be expected to search for it. The result was that while the defendant's title as a purchaser under the judgment against Knapp, would have been valid against Crocheron as the holder of an unregistered mortgage, it was not valid against Jaques, who took the fee simple subject to the equity of redemption, and might consequently hold the premises until the amount advanced by Crocheron to Knapp was repaid with interest.

All that can be reasonably required of a purchaser is to follow up the stream of title as it appears of record, and ascertain that it descends in an unbroken line. If such an examination shows that the vendor acquired a good right to convey, which he has done nothing to impair, no anterior act on his part should be allowed to affect the purchaser. What those under whom he claims did before they severally acquired the title, is irrelevant, and need not be made a subject of inquiry. And in determining when the interest of each one of them accrued, and when he parted with it, the purchaser may rely on the record, unless he has express or implied notice that it is not a safe guide. The weight of authority accordingly is that the search for deeds and encumbrances need not be car-

ried further back as against the vendor, than the period in which the title vested in him, as disclosed of record; *The Farmers' Loan Co. v. Maltby*, 8 Paige, 361; *Calder v. Chapman*, 2 P. F. Smith, 359; see *Buckingham v. Hanna*, 2 Ohio, N. S. 561. In *The Loan Co. v. Maltby*, an equitable interest arising under an unregistered contract of sale was mortgaged by an instrument which was forthwith recorded. The mortgagor afterwards acquired the legal estate by a duly registered deed, and conveyed it to the defendants for a valuable consideration. It was held, that the registry of the mortgage being anterior to the period at which the recorded title vested in the mortgagor, was invalid.

The chancellor said that it appeared from the answer that the mortgagor had not the legal title to the premises, but that he had a contract to purchase from Squires, which he consummated by obtaining a deed previous to the conveyance to the defendants. It followed that the defendants were not chargeable with constructive notice of the mortgage. In taking the conveyance, they would not search for mortgages by the grantor prior to the date of his deed from Squires.

Nearly the same ground was taken in *Doswell v. Buchanan*, 3 Leigh, 381. There, Hopkins having an equitable estate under an unrecorded agreement, which was not registered, executed a deed of trust to Buchanan, which was duly registered. He subsequently obtained a conveyance of the legal

title, and conveyed it to the plaintiff, Doswell. It was held not to be incumbent on the plaintiff to examine the record for deeds or mortgages by Hopkins before the title vested in him of record, and that the deed of trust was invalid against the plaintiff. Conceding that it was his duty to search the record show far ought that search to be carried? Assuredly, not beyond the period at which the legal title vested in the vendor. Suppose him to take the advice of counsel; he would call for the chain of title; he would examine the decree of September, 1808, directing the title to be made to Hopkins, and the deed made in virtue of this decree of the 2d December, 1810; and seeing that the title of Nelson was by this deed conveyed to Hopkins, he would look from this date down to the time of consultation, to see whether there were any encumbrances. This is all that could, with any show of reason, be required of him; but this would never lead him to the deed of trust of May, 1808, made by Hopkins to Buchanan, and purporting to convey the legal estate, when Hopkins had no such estate in him, and to impute to him a notice of this because it was put on record, would be wholly inconsistent with equitable principles generally, or the particular ground of favor on which a fair purchase stands in that forum.

A similar decision was made in *Calder v. Chapman*. There, Calder mortgaged land which he did not own. The mortgage was reg-

istered, and he subsequently purchased the land from Chapman. A judgment was then entered against Calder, under which the premises were sold by the sheriff. The court held the registry of mortgage to be invalid, and that it did not operate as notice to the purchaser. Read, J., said: "That the search for deeds or mortgages against Calder, would begin with his title from Chapman, and the search beyond would be against Calder. It would be futile to cover the same period with a double search, when the title could only be in one person at a time. There was no hardship on the mortgagees, because an examination of the title must have shown them that Calder had no estate in the premises; and it would be unjust that the plaintiff should suffer for their negligence in trusting to a security which did not exist."

It has, nevertheless, been held in Vermont, Massachusetts, and some of the other States, that where one conveys land which he does not own, with warranty, and afterwards acquires the title, it passes *eo instanti* by estoppel; 2 Smith's Lead. Cases, 701, 7 Am.ed. There is consequently nothing on which a subsequent grant can operate; and it will not confer a title on the grantee, although he may have given value without notice of the prior deed; *Jarvis v. Aikens*, 25 Vermont, 635; *White v. Patten*, 25 Pick. 324.

This course of decision seems to be at variance with the policy of the registry acts, and the well es-

established rule, *nemo plus juris ad alium transferre potest quare ipse habet*. A purchase from one who has no right to convey, is invalid, and should not be set up on technical grounds against a grantee who gives value after the vendor has acquired a title; *Calder v. Chapman*, 2 P. F. Smith, 359; *Bivins v. Vanzant*, 15 Georgia, 521; *Way v. Arnold*, 18 Id. 181; *Fairchild v. Jordan*, Ib. 352; *Rawle on Covenants for Title*, 434, 4 ed.; 2 Smith's Lead. Cases, 709, 7 Am. ed. And there is a manifest inconvenience in requiring a purchaser to search the record indefinitely against every one, who has at any time held the estate for a period however brief. The utmost effect which can be given to a grant by one who has no title, is that of a contract to convey, and it is therefore necessarily inoperative as against a subsequent *bona fide* purchaser; *Lloyd v. Lloyd*, 4 Drury & Warren, 369; 2 Connor & Lawson, 598.

It has been held in Pennsylvania, that a judgment against one who has an equitable interest under an agreement to convey, is binding on a purchaser from the defendant in the judgment after he has acquired the legal estate, although the agreement is not registered, and there is nothing to inform the purchaser that it is material to search for deeds or encumbrances against the vendor before the title was conveyed to him of record; *Lynch v. Dearth*, 2 Penna. 101; *Foster's Appeal*, 3 Barr, 79, *ante*, 44. These cases are hardly reconcilable with the prin-

ciple advanced in *Calder v. Chapman*.

Agreeably to the authorities in New York, where a grantor conveys the same land successively to different persons, and the second grant is first recorded, the subsequent registration of the first deed is not notice to the grantee in the second, but is notice to a subsequent purchaser from him, who consequently takes the risk of his vendor's having bought with notice of the prior grant; *Jackson v. Post*, 9 Cowen, 120; 15 Wend. 588; *Van Rensselaer v. Clark*, 17 Id. 25.

These decisions countervene the rule that it is not requisite to search for conveyances from two persons during the same period. A purchaser who finds a duly executed and recorded deed from the person to whom the property originally belonged, need look no further as it regards him, and may confine the search exclusively to the grantee until a similar grant is found from him, and so through the successive holders of the title down to the immediate vendor. The better opinion therefore, is, that as the registration of a prior deed does not relate back to its date as against an intermediate grantee whose deed has been duly registered, so it will not operate as notice to those claiming under him subsequently as creditors and purchasers, *ante*, 41, *Connecticut v. Bradish*, 14 Mass. 296; *Ely v. Wilcox*, 20 Wisconsin, 530. In *Ely v. Wilcox*, the court said, it is held "in Massachusetts that in searching the title it is not neces-

sary to search the record as against an antecedent grantor of the land, further than the registry of a deed duly executed by him, and that when such a deed has been registered, a purchaser under the grantee will not be affected with notice of a prior deed recorded subsequently, but before the period of his purchase; *Trull v. Bigelow*, 16 Mass. 418; *Somes v. Brewer*, 2 Pick. 184; and the reason given is, that when a purchaser is examining his title in the registry of deeds, and finds a good conveyance to his grantor, he is not expected to look further. . . . The case of *Day v. Clark*, 25 Vt. 402, lays down what seems to us the more reasonable rule, that the record of the prior deed after the second, is notice to a purchaser from the vendee in the second that there is such prior deed, but the record thereof is no notice that the vendee in the second deed at the time he received it, had notice of the first deed, and without such notice the title of the purchaser from the vendee in the second, but first recorded deed, would not be affected by the fraud or knowledge of his vendor. *Ante*, 41.

It is an established rule, that notice of an existing equity is binding on a purchaser, however good his right may be in other respects. A deed which from a defective execution does not pass the legal title, is, nevertheless written evidence of a contract to convey; see *Davis v. Earl of Strathmore*, 16 Vesey, 419, 428; and gives rise to an equity which a purchaser with notice is not at liberty to dis-

regard. See *Jacques v. Weeks*, 7 Watts; *Harper v. Reno*, 1 Freeman Ch. 323. It were, said Lord Hardwicke, a mischievous thing, if a person taking advantage of the legal form appointed by an act of Parliament, might, under that, protect himself against a person who had a prior equity of which he had notice, *ante*, 114. Whether the statute speaks of *bona fide* purchasers, or simply of purchasers, the construction is the same, and good faith an indispensable requisite; *Benton v. Burgott*, 10 Johnson; *Van Rensselaer v. Clark*, 17 Wend. 25. It follows, that an unregistered deed or mortgage is invalid against a purchaser with notice; *Jackson v. Sharp*, 9 Johnson, 163; *Jackson v. Leek*, 19 Wend. 339; *Farnsworth v. Childs*, 4 Mass. 637; *Warnock v. Wightman*, 1 Brevard, 331; *Van Meter v. M'Fadden*, 8 B. Monroe, 442; *Schutt v. Large*, 6 Barbour's S. C. R. 373; *Porter v. Cole*, 4 Maine, 20; *Doe v. Reed*, 4 Scammon, 117; *Rupert v. Mark*, 15 Illinois, 542; *Ross v. Hole*, 27 Id. 108; *The Ohio Life Ins. Co. v. Ledyard*, 8 Alabama, 866; *Martin v. Sale*, 1 Bailey's Equity, 1; *Jackson v. Paige*, 4 Wend. 385; *Tuttle v. Jackson*, 6 Id. 213; *Parker v. Jackson*, 11 Id. 442; *Jackson v. Sharp*, 1 Johnson, 466; *M'Raven v. M'Guire*, 9 S. & M. 34; *Pike v. Armstead*, 1 Dev. Equity, 110; *Ingrem v. Phillips*, 3 Strobhart, 565; *Knott v. Guyger*, 4 Richardson, 32; *Copeland v. Copeland*, 28 Maine, 255; *Newman v. Chapman*, 2 Randolph, 93; *Fowke v. Woodward*, 1 Speer's Ch. 233; *Bailey v. Wilson*, 1 Dev.

& Bat. Ch. 32; *Ten Eyck v. Simpson*, 1 Sandford, Chancery, 242; *Warren v. Scott*, 11 Foster, 332; *Parker v. Kane*, 4 Wisconsin, 1; *Draper v. Bryson*, 17 Missouri, 71; *Smith v. Hall*, 28 Vermont, 364; *Corless v. Corless*, 8 Id. 473; *Vendal v. Malone*, 25 Alabama, 272; *Woodworth v. Guzman*, 1 California, 203; *Warburton v. Lauman*, 2 Iowa, 420; *Gilbert v. Burgott*, 10 Johnson, 457; *Van Rensselaer v. Clark*, 17 Wend. 25; *Correy v. Caxton*, 4 Binney, 140, 146; *Stroud v. Lockhart*, 4 Dallas, 153; *Jacques v. Weeks*, 7 Watts, 261; *The Manufac. and Mechanics' Bank v. The Bank of Pennsylvania*, 7 W. & S. 335; *Solms v. M'Cullough*, 5 Barr, 473; *M'Calmont v. Patterson*, 39 Missouri, 100; *Caldwell v. Head*, 17 Id. 561; *Gulland v. Jackman*, 26 California, 79; *Stewart v. Hall*, 3 B. Monroe, 218; *Warren v. Swett*, 31 New Hampshire, 332; *Nute v. Nute*, 41 Id. 60. The doctrine is confined in England to the court of chancery; *Doe v. Alsop*, 3 B. & Ald. 25; but it is administered in this country in the ordinary course of legal procedure, on the ground that either jurisdiction may relieve against fraud; *Tuttle v. Jackson*, 6 Wend. 213, 227; *Britton's Appeal*, 9 Wright, 172. In *Blades v. Blades*, 1 Eq. Ca. Abr. 358, pl. 12, ante, 115, Lord Chancellor King observed, that a subsequent purchaser with notice, "getting his own purchase first registered, was a fraud, and that the court would never suffer any act of parliament made to prevent fraud to be a protection

to fraud." "This, said Lord Hardwick in *Le Neve v. Le Neve*, "is a species of fraud, and *dolus malus*, for he knew that the first purchaser had the clear right of the estate, and after knowing that, he takes away the right of another person by getting the legal estate."

The rule results in some of the states as one of law from the language of the registry acts, which in Massachusetts withhold the right to set aside unregistered deeds and mortgages from persons having notice, and in New York and Virginia, confer it exclusively on *bona fide* purchasers. See *Grimstone v. Carter*, 3 Paige, 421; *Lawrence v. Stratton*, 6 Cushing, 163; *Knotts v. Geiger*, 4 Richardson, 32; *Draper v. Bryson*, 17 Missouri, 71; *Tuttle v. Jackson*, 6 Wend. 213. But it is deduced in others, where the statutes avoid unregistered deeds without any qualification, from the principle laid down by Lord Hardwick, that the Legislature will not be supposed to have intended that title should be acquired through a wilful disregard of good faith and fair dealing. In Pennsylvania, by the act of May 28th, 1715, "no deed or mortgage, or defeasible deed, of the nature of a mortgage, shall be good or sufficient to grant or pass any freehold or inheritance, or any estate therein for life or years, unless such deed be acknowledged or proved, and recorded within six months after the date thereof;" while it was enacted in March, 1775, that "every deed and conveyance which shall not be proved

and recorded as aforesaid, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration." Yet it has been invariably adjudged by the courts of that State, that purchasers without notice are alone entitled to the benefit of these statutes; *Britton's Appeal*, 9 Wright, 172, 175; and the same course is pursued in Maryland and Rhode Island, under Acts which, like those in Pennsylvania, are modelled on the statute of 27 Henry 8, for the enrolment of bargains and sales or that of the 7 Anne, c. 20; *ante*, 112.

The subject is, nevertheless, within the control of the legislature, who may enact that the equity arising from notice shall not be a substitute for registration; and when such a rule is laid down in terms, or by a necessary implication, it must be observed by the courts; *White v. Denman*, 1 Ohio, N. S. 110; *Bloom v. Noggle*, 4 Id. 45. See *Fleming v. Burgan*, 2 Iredell, Eq. 584. This interpretation is given in Ohio to the statutes of that state, which provide that mortgages shall take effect from the time they are recorded; *Stansell v. Roberts*, 13 Ohio, 148; *Mayham v. Coombs*, 14 Id. 428; *Jackson v. Luce*, *Ib.* 514; *Holliday v. The Franklin Bank*, 16 Id. 533. In *Mayham v. Coombs*, the court endeavored to strengthen this conclusion by an appeal to general principles. It was said that, as between creditors priority depends on diligence; each having an equal right to be first in the race. If one who had obtained an advantage,

lost it by not taking the requisite steps to perfect the lien, another might conscientiously take advantage of the slip. Hitchcock, J., observed, "The contention is, that a subsequent mortgagee with notice, defrauds the prior mortgagee, by putting his mortgage first upon record. In one sense of the word, perhaps he does, but there is no actual fraud. Take an instance: A. and B. are creditors of C.; the debts are equal, and sufficient to sweep away the entire property of the debtor; A. seeks his opportunity, and for the security of his debt, procures a mortgage upon the entire property of C.; when he does it, he knows of the debt of B., and knows, further, that his mortgage will entirely defeat the collection of that debt. Now, in the common acceptation of the term, and according to the ideas of the profession, here is no fraud. True, B. is deprived of the collection of his debt, but there is no fraud. A. is the vigilant creditor; he only took the mortgage to secure what was honestly his due. But change the case. A., after having procured his mortgage, becomes negligent; he does not place it upon record; B., knowing the existence of that mortgage, but equally anxious to secure his debt, procures a mortgage, and places it upon record. All cry out, here is a fraud. Now, my perceptions are so obtuse, that I can perceive no difference, in a moral point of view, in the actions of these two men. They are both creditors, and both equally anxious to secure their debts. They pursue the

course pointed out by law to effect their object. The one is the most vigilant to get his recorded. The course of neither is in accordance with the principles of abstract justice. Such justice would require, that, inasmuch as the property was not sufficient to pay both, it should be equally divided between them."

This reasoning, at best, only applies where the second mortgage is given for an antecedent debt. Where a loss must fall on one of two innocent persons, each may take any fair means to secure himself. The doctrine of tacking depends on this principle, and is not, when rightly considered, repugnant to natural equity; vol. 1, 857. But the case is widely different where money is lent on a mortgage, with notice that the premises are subject to a prior incumbrance. Here the creditor voluntarily causes a result, which must be prejudicial to the prior encumbrancer or to himself, and should, on every rule of equity, be the one to suffer from a dilemma which it was in his power to avoid. See *Swigert v. The Bank of Kentucky*, 17 B. Monroe, 268, 289. And it may be observed that even when such a security is taken for an antecedent debt, it is a fraud in the debtor to mortgage property which he has already pledged, unless it is expressly or impliedly understood that the second incumbrance shall be subject to the first. If such an understanding exists, the creditor is bound; if it does not, he is an accomplice in the wrongful act of the debtor. The case of *Mayham*

v. Coombs must, therefore, be regarded as standing on the terms of the statute, and would otherwise be at variance with well established principles. See *White v. Denman*, 16 Ohio, 59; 1 Ohio, N. S. 110; *Bloom v. Noggle*, 4 Id. 45.

It is held that where the same estate or interest is conveyed or pledged successively to different persons, and the second purchaser has notice of the first grant or mortgage, and the third of the second, but not of the first, the first purchaser will have priority over the third to the extent of the right or interest conveyed to the second, because the third purchaser cannot hold his ground against the second, and he in his turn must yield to the first. See *Pomfret v. Lord Windsor*, 2 Vesey, 472, 486; *Wilcox v. Waln*, 10 S. & R. 380. In *The Manufacturers' Bank v. The Bank of Pennsylvania*, 7 W. & S. 335, land which had been mortgaged with notice of a prior unregistered mortgage, was sold under a subsequent judgment, and the proceeds paid in by the sheriff, and it was decided that as the fund did not exceed the amount due on the second mortgage, it should be awarded to the first mortgagee. The court cited and relied on *Waln v. Wilcox*. There, a judgment, which would otherwise have been postponed to a subsequent judgment in favor of the United States, was held to be protected by an intervening mortgage. Tilghman, C. J., said that the United States could not take the fund from the mortgagee, nor

could he withhold it from the judgment creditor. It must, therefore, be awarded to the latter.

The rule that notice of an unregistered deed binds the conscience of the purchaser, is founded on the injury done to the prior grantee, and does not apply where he is not prejudiced. It follows that a mortgage may be substituted after notice for the lien of a paramount judgment, because such an exchange benefits the parties to it without impairing the right conferred by the unrecorded grant. It is merely formal, and leaves the prior grantee exactly where he stood in the first instance; *Wheaton v. Dyer*, 15 Conn. 307. Waite, J., said: "Wherever the imputation of fraud is removed, the rule does not apply. Thus, if a person were induced to loan his money, upon an agreement that he should be secured by a mortgage of certain lands, he would not be deprived of his security, by notice of an outstanding unrecorded deed, given him after he had parted with his money, and before he had obtained his mortgage deed. Under such circumstances, he would not be chargeable with fraud in perfecting the security. The case would be different, if he had the notice before parting with his money, or in time to reclaim it."

A mortgage for an antecedent debt is valid in Ohio as against an unregistered deed; *Anketel v. Converse*, 17 Ohio, N. S. 11. But this is contrary to the general rule, under which the purchaser must have given value, or changed

his position for the worse in some other way; *ante*, 75.

It was held at one period in England, that nothing but the actual notice which is equivalent to knowledge, and justifies an inference of fraud, can postpone a purchaser for value to one claiming under an unregistered deed. "Apparent fraud, or clear and undoubted notice, is a proper ground of relief," said Lord Hardwicke, in *Hine v. Dodd*, 2 Atk. 275, "but suspicion of notice, though a strong suspicion, is not sufficient to justify this court in breaking in upon an act of Parliament." So in *Jelland v. Stainbridge*, 3 Vesey, 478, the Master of the Rolls regretted that the statute had been broken in upon by parol evidence, and thought with Lord Hardwicke in *Hine v. Dodd*, that the provisions of the registry act could not be set aside on any ground short of actual fraud. "The registry is not conclusive evidence; but it is equally clear, and must be satisfactorily proved, that the person who registered the subsequent deed must have known of the person having the prior deed, and knowing that, registered, in order to deprive him of that title he knew at the time was in him."

It was held in like manner in *Wyatt v. Barwell*, 19 Vesey, 435, that the constructive notice arising from a *lis pendens* will not charge a purchaser with notice of an unregistered deed, or preclude him from insisting on the letter of the statute; and Sir William Grant observed,

that it was only where the notice is actual and so clearly proved as to make it fraudulent to take and register the subsequent conveyance, that the court will suffer it to be postponed. But the border line between actual and constructive notice is so fine, that it is not always easy to apply this distinction, and it seems to have been lost sight of in the later English decisions, which apply the same rule with regard to notice in cases under the recording acts as in other cases; See *Whitehead v. Boulnois*, 1 Young & Collier, 303; *Williamson v. Brown*, 15 New York, 354, 357; and a similar diversity exists in the United States, where the courts have fluctuated between the refinements of constructive notice, and the down right rule that a purchaser shall not be denied the benefit of the registry acts, short of fraud. Thus in *Norcross v. Wedgery*, 2 Mass. 505, Chief Justice Parson said "that when the second purchaser has notice of the first conveyance, the intent of the statute is answered, and his purchasing afterwards is a fraudulent act. This notice may be expressed, or it may be implied from the first purchaser being in the open and exclusive possession of the estate," and yet went on to hold that "when an unrecorded conveyance is to be supported on the ground of fraud in the second purchaser, the fraud must be very clearly proved." The dicta in *M' Meehan v. Griffing*, 3 Pick. 148, are to the same effect. In *Dey v. Dunham*, Chancellor Kent, was of opinion that the notice must

be such as to convict the subsequent purchaser of fraud, and the same view was taken in *Jackson v. Van Valkenburgh*, 8 Cowen, 260, and again vindicated in *Fleming v. Burgen*, 2 Iredell Eq. 584.

It is well settled in like manner in Maryland, in accordance with *Wyatt v. Barwell*, and under a statute which enacts that "no estate of freehold or inheritance shall pass, unless the deed conveying the same shall be acknowledged and recorded," that the notice must be so clear and express as to render it fraudulent to "take and register a conveyance in prejudice of the known title of the person holding the prior unregistered conveyance;" *The U. S. Ins. Co. v. Shriver*, 3 Maryland Ch. 385; *The General Life Ins. Co. v. The U. S. Ins. Co.*, 13 Maryland, 517, 525. The language held by Story in *Flagg v. Mann*, 2 Sumner, 486, 587, favors the same view.

So where the terms of the statute were, that no deed of trust or mortgage shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration, but from the registry of such deed, the court were clear that if notice could supply the place of registration, it must be actual, and so distinctly proved as to leave no doubt that the purchaser was chargeable with fraud; *Fleming v. Burgen*, 2 Iredell Eq. 84.

"In *Le Neve v. Le Neve*, 3 Atkins, 646," said Ruffin, C. J., "Lord Hardwicke laid down the rule, which has since been followed, that notice of an existing unregis-

tered deed bound one who took a subsequent one, and first registered it. That, certainly, tended to subvert the register acts, as allowing parol evidence to show that knowledge of the deed *in pais* which could be derived from the registration, and it would effectually subvert them, if, as in ordinary cases of notice of a prior equity, a notice of anything that would lead to inquiry, were held to be sufficient notice. Fortunately, a case came before the same great judge which called for his opinion on that point; *Hine v. Dodd*, 2 Atkins, 275. In it he informs us, that as the act of parliament was positive, and made to prevent perjury from contrariety of evidence, he could not overturn the act upon suspicion, but only for apparent fraud. He says, the only cases that had been decided, were cases of fraud, though he adds, that possibly there may have been others upon notice divested of fraud, but then the proof must be extremely clear. He, therefore, qualifies the rule that fraud is necessary, by the expression, 'or clear and undoubted notice,' which can mean no less than a full knowledge of the contents of the deed, and that the person omitted to register it merely from inattention or inability, and not because he has abandoned it, and does not mean to register it at all. For, in that case, though his Lordship declared 'the answer loose,' and that there were strong circumstances of notice, he yet dismissed the bill upon that part of the case. That the doctrine of that case is correctly understood as here repre-

sented, is, we think, clearly to be collected from what has been said in subsequent cases, after the subject had been long and thoroughly considered. In *Wyatt v. Barwell*, 19 Vesey, 435, the Master of the Rolls, after mentioning the doubts entertained of the propriety of having suffered the question of notice to be agitated against one who had registered his deed, proceeds to state what he considered the rule, thus:—The courts have said, we cannot permit fraud to prevail, and it shall only be in cases where the notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance in prejudice of the known title of another, that we will suffer the registered deed to be affected. Even with that limitation, he thought the efficacy of the register acts considerably lessened, as no one can tell what may truly or falsely be given in evidence, or what may be the effect of the evidence in the mind of the judge. But finally, he concludes by saying that 'it is only by actual notice, clearly proved, that a registered conveyance can be postponed, and that even a *lis pendens* will not amount to notice for that purpose. Again, in the previous case of *Jelland v. Stainbridge*, 3 Vesey, jun. 478, regret is expressed that the statute had been broken in upon by parol evidence, and the satisfaction of the judge, that Lord Hardwicke, as he understood him, had in *Hine v. Dodd*, said, that 'nothing short of actual fraud would do.' And what the Master of the Rolls deemed fraud in this

case, we cannot misunderstand, when we find him saying, 'it is clear that it must be satisfactorily proved, that the person who registers the subsequent deed must have known the situation of the persons having the prior deed, and knowing that, registered, in order to defraud them of that title he knew at the time was in him.' These cases leave no doubt of the kind of notice, or fraud on the prior encumbrance which will reinstate him in his preference. It is called sometimes 'actual notice' to be clearly proved, and sometimes 'exact knowledge' of the situation of the parties. From which it would seem to follow, that such notice of the contents of the instrument, as to the subject and purposes of the conveyance, and of the intention to rely on it as a conveyance, must substantially reach the party in *pais*, as would be derived upon these points from the registry itself. We do not mean that information precisely correct as to everything conveyed, or as to the amount of each debt secured, would be necessary to give any effect to the deed, but that, at most, it could only be set up against the subsequent purchaser for such purposes as it was distinctly represented to him as intended to effect.

It was said in like manner, in *Siter v. M'Clanachan*, 2 Grattan, 313, by Baldwin, J., that "the notice must be such as to affect the conscience of the subsequent purchaser or incumbrancer. It may be either actual, in other words, direct and positive, or it may be

circumstantial or presumptive. But it is not sufficient if it merely puts the party upon inquiry. It must be so strong and clear as to fix upon him the imputation of "*mala fides*."

In *Dey v. Dunham*, 2 Johnson, 168, Chancellor Kent relied on the dicta of Lord Hardwicke in the principal case, as establishing that the notice under the registry acts must be such as to convict the subsequent purchaser of fraud; and the same rule was laid down in *Jackson v. Van Valkenburg*, 8 Cowen, 260. When, however, the question was brought before the Court of Appeals, in *Jackson v. Tuttle*, 6 Wend., these decisions were overruled, and constructive notice of an unregistered deed held to be not less binding than actual. The law is now established on this basis in New York, Pennsylvania, Kentucky, Illinois, Vermont, and some of the other states; *Williamson v. Brown*, 15 New York. In the language of Chancellor Walworth, in *Grimstone v. Carter*, 3 Paige, there is no distinction in this regard between a purchaser in good faith, under the recording act, and that of a *bona fide* purchaser, within the decisions of courts of equity in other cases; and the same view was taken in *Williamson v. Brown*.

Agreeably to this course of decision, the failure to register a deed or mortgage may be supplied by the constructive notice arising from possession; *Watkins v. Edwards*, 23 Texas, 443; *Ponton v. Ballard*, 24 Id. 19; *ante*; *Krider v. Lafferty*, 1 Wharton, 303;

Randall v. Silverthorn, 4 Barr, 173; *Rupert v. Mark*, 15 Illinois, 540; *Griswold v. Smith*, 10 Vermont, 452; *Landis v. Brant*, 10 Howard, 348; from a recital in an instrument forming a link in the chain of title, *ante*, 190; from a *lis pendens*, *ante*, 193; or by proof of any fact or circumstance putting the subsequent purchaser on inquiry, and affording him the means of information. See *Williamson v. Brown*, 15 New York, 354; *Sigourney v. Munn*, 7 Conn. 324, *ante*, 162.

Much of this seeming conflict of opinion is apparent rather than real. The registry acts, although in *pari materia*, are not the same. The act of Parliament, under consideration in the principal case, was absolute, that "every deed or conveyance shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee, unless such memorial thereof be registered." The statutes of Rhode Island, Maryland, and North Carolina are substantially to the same effect, and so was the colonial statute of William III., considered in *M'Mechan v. Griffing*.

The decisions on these acts are not in point, where as in New York and Virginia, it is expressly or impliedly provided that only *bona fide* purchasers shall take advantage of the want of registration; *Hawkinson v. Barbour*, 29 Illinois, 80; *Dickinson v. Braden*, 30 Id. 279; *Colby v. Kinniston*, 4 New Hampshire, 262; *Brown v. Anderson*, 1 Monroe, 198; *Buck v. Holloway's Devisee*, 2 J. J. Marshall, 180; *Hopkins v. Garrard*, 7 B.

Monroe, 312; *Colby v. Kenniston*, 4 New Hampshire, 262; *Troulp v. Hurlbut*, 10 Barbour, 354; *Krider v. Lafferty*, 1 Wharton, 303; *Webster v. Maddox*, 6 Maine, 256; *Knox v. Plummer*, 7 Id. 464; *Griswold v. Smith*, 10 Vermont, 452; *Walker v. Gilbert*, 1 Freeman, 85; *Rupert v. Mark*, 15 Illinois, 540; *Morrison v. Kelly*, 22 Illinois, 610; *Doyle v. Teas*, 4 Scammon, 202; *Baynard v. Norris*, 5 Gill, 483; *Price v. M'Donald*, 1 Maryland, 403; *Wyatt v. Elam*, 19 Georgia, 335; *Burkhalter v. Ector*, 259; Id. 55.

"One of the earliest, if not the first, of the English recording acts," said Comstock, J., in *Williamson v. Brown*, "was that of 7 Anne, Ch. 20. That act differed from our general registry act in one important respect. It did not, in terms, require that the party to be protected by the act should be a *bona fide* purchaser. Its language was: "And that every such deed or conveyance that shall at any time after, &c., be made and executed, shall be adjudged fraudulent and void, against any subsequent purchaser or mortgagee for valuable consideration, unless," &c. He went on to observe, that the English judges had at first some difficulty in allowing any equity, however strong, to control an act of Parliament, and their scruples had influenced the earlier decisions in New York, where the statute was differently worded.

These remarks do not apply in Pennsylvania, where the provincial statute of 1715 was framed after the statute of 32 Henry VIII., for

the enrolment of bargains and sales, while that of 1775 is substantially a transcript of the 7 Anne, 20, *ante*, 112. These acts do not require the subsequent purchase to be made in good faith or without notice, but that it shall be for value. So the act of March 25th, 1820, provides explicitly and without qualification, that mortgages shall have priority from the time of registering the same, and yet the Pennsylvania decisions agree with the recent course of English decision, that constructive notice of an unregistered deed or mortgage is binding on a purchaser, although he is not chargeable with conscious fraud.

Actual notice is now requisite by statute, or under the course of judicial decision in Massachusetts, Maryland, Rhode Island, North and South Carolina, Missouri, and Iowa, and the rule has been legislatively established in Maine, although the courts originally inclined the other way; *Moore v. Jordan*, 14 Louisiana Ann. 414; *Curtis v. Murphy*, 3 Metcalf, 405; *Hennessy v. Andrews*, 6 Cushing, 170; *Pomery v. Stevens*, 11 Metcalf, 244; *Lawrence v. Stratton*, 6 Cushing, 163; *Parker v. Osgood*, 3 Allen, 437; *The City Council v. Paige*, 1 Speer's Equity, 159, 212; *Martin v. Sale*, 1 Bailey's Eq. 24; *Wallace v. Craps*, 3 Strobhart, 266; *Fleming v. Burgin*, 2 Iredell's Equity, 584; *Hopping v. Burnam*, 2 Iowa, 39; *Vaughn v. Tracy*, 22 Missouri, 415; *Frothingham v. Stocker*, 11 Id. 71; *Harrison v. Cochelen*, 23 Id. 117; *The General Ins. Co. v. The U. S.*

Ins. Co., 10 Maryland, 517, 525; *The Ohio Life Ins. Co. v. Ross*, 2 Maryland Ch. 38; *The U. S. Ins. Co. v. Shriver*, 3 Id. 381; *Butler v. Stevens*, 26 Maine, 484; *Spafford v. Weston*, 29 Id. 140; *Rich v. Roberts*, 48 Id. 548; *Porter v. Seisey*, 43 Id. 519. Such would also seem to be the rule in California (*Stafford v. Lick*, 7 California, 479), although actual possession by the grantee in an unregistered deed is notice in that state, to a subsequent purchaser from the grantor; *Sanders v. Bolton*, 26 California, 393; *Fair v. Stewart*, 29 Id. 486. And it is clear that actual notice or the knowledge which is equivalent to it, need not be established by direct proof, and may be inferred from facts and circumstances, *ante*, 39, 147; *Smith v. Lambeth*, 15 Louisiana, Ann. 566. But a purchaser will not be denied the benefit of the recording acts, unless it appears from the evidence as a whole, that he knowingly concurred in the fraud practised by the vendor on the prior grantee or mortgagee; *Porter v. Seisey*, 43 Maine, 513; *Spafford v. Weston*, 29 Id. 140; *Parker v. Osgood*, 3 Allen, 487; *Wallace v. Craps*, 3 Strobhart, 266. The law is thus brought back to the point where it stood in the time of Lord Hardwicke.

It is, accordingly, well settled under the revised statutes of Massachusetts, which provide that an unrecorded conveyance shall not be valid except against the grantor, "and persons having actual notice thereof;" that the entry of one claiming under such a convey-

ance, followed by the occupation, enclosure, and cultivation of land, will not justify an inference of notice as against a subsequent purchaser or judgment creditor; *Pomeroy v. Stevens*, 11 Metc. 244; *Mara v. Pierce*, 9 Gray, 406; *Dooley v. Wolcott*, 4 Allen, 406. Such, also, is the rule in Missouri and Rhode Island (*Vaughn v. Tracy*, 22 Missouri, 415; *Harrison v. Cohelen*, 23 Id. 117; *Harris v. Arnold*, 1 Rhode Island, 125), although possession may be one of several circumstances tending to establish the existence of actual notice. In *Landis v. Brant*, 10 Howard, 348, it was, nevertheless, held, on a writ of error to the circuit court for the district of Missouri, that open and notorious possession, under a sheriff's deed was evidence from which a jury might presume that a subsequent purchaser had notice not only of the fact of possession, but of the conveyance under which it was held.

In Pennsylvania, notice of a judgment, which has been erroneously entered against a firm, without giving the Christian names of the partners, will render it valid against a subsequent purchaser or incumbrancer; *The York Bank's Appeal*, 12 Casey, 460. But it seems from the language held in *Smith's Appeal*, 11 Wright, 128, that the notice must be actual, as distinguished from constructive notice. A similar inference may be drawn as to the kind of notice requisite to make an unregistered mortgage effectual against a subsequent judgment; see *Britton's Ap-*

peal, 9 Wright, 172; *Nice's Appeal*, 4 P. F. Smith, 200; but the point can hardly be regarded as having been before the court.

Whatever the rule may be as to constructive notice, it is clear that nothing should be allowed to go to the jury as evidence of actual notice of an unregistered deed or mortgage, which is not sufficiently clear and authentic to render it the duty of the purchaser to inquire, and enable him to ascertain the truth; *ante*, 146; *Fort v. Burch*, 6 Barb. 60; *Jaques v. Weeks*, 7 Watts, 261, 274; *Boggs v. Varner*, 6 W. & S. 469, 474; *Rogers v. Wiley*, 14 Illinois, 65. This is the more requisite, because constructive notice being a legal inference, is susceptible of being reduced to certainty, while no one can be sure of the uncertain testimony of witnesses. In *Boggs v. Varner*, Rogers, J., observed: "The recording acts are specially intended for the protection of purchasers, and they would be of problematical benefit, if a jury were allowed to act, or draw inferences to his prejudice, on such loose, unsatisfactory testimony. The provisions of the act may be easily complied with, and at but little expense, so that owners are left without excuse, and if they will neglect their duty in this particular, it is but just that the consequences be visited on their heads. A court of equity acts on the conscience, and as it is impossible to make any demand on the conscience of a man who has purchased for valuable consideration, *bona fide* and without notice of any claim on the estate, such a

man is entitled to the peculiar favor of a court of equity. As every presumption is in favor of the subsequent purchaser, when the former owner is guilty of neglect, his title cannot be postponed except by evidence which taints his conduct with fraud. And this, it is obvious, ought not to be done by testimony in its nature vague and indefinite, and leading to no certain results, such as that he ought to have known of the prior title, because he lived near the owner, in the same town, perhaps, or on the next lot; that he was well acquainted with him, or because the title was well known to others. This may well be true, and yet, at the time he pays his money, he may be ignorant of any other title than his own. It is not just, that inferences should be strained in favor of the person, by whose default the mischief has been done."

In some of the states, unregistered deeds are valid against judgment and attaching creditors; *Rixby v. Higgins*, 15 California, 127; *Orth v. Jennings*, 8 Blackford, 420; *Bell v. Evans*, 10 Iowa, 353; *Evans v. M'Glasson*, 18 Id. 150; *Greenleaf v. Edes*, 2 Minnesota, 264; *Kelly v. Mills*, 41 Mississippi, 267; in others void; *Moore v. Watson*, 1 Conn. 388; *Bissell v. Nooney*, 33, 411; *Delano v. Moore*, 14 Howard, 253; *Mallory v. Stoddart*, 6 Alabama, 801; *The Ohio Life Ins. Co. v. Ledyard*, 8 Id. 866; *Pollard v. Cocke*, 19 Id. 188; *Reichert v. McClure*, 23 Illinois, 516; *Ring v. Gray*, 6 B. Monroe, 368; and the

registry acts in general provide that the lien of mortgages and deeds of trust intended as a security, shall commence from the time of, and not before registration; *Taylor v. Doe*, 13 Howard, 287; *Jaques v. Weeks*, 7 Watts, 471; *Hulings v. Guthrie*, 4 Barr, 123; *Edwards v. Trimbell*, 14 Wright, 369. Where this rule prevails it is held with few exceptions, that notice is not less binding on a creditor than on a purchaser, and will preclude him from acquiring a lien subsequently by a judgment or attachment; *Cox v. Milner*, 23 Illinois, 476; *Ogden v. Haven*, 24 Id. 57; *Ayres v. Dapree*, 27 Texas, 293; *Goddard v. Prentice*, 17 Conn. 546; *Dixon v. Doe*, 1 Smedes & Marshall, 70; *Priest v. Rice*, 1 Pick. 46; *Lawrence v. Stratton*, 6 Cushing, 163, 167; *Burt v. Caferty*, 12 Alabama, 731; *Dixon v. Doe*, 1 Smedes & Marshall, 70; *Hut v. The Bank*, 33 Vermont, 252; *Mellon's Appeal*, 8 Casey, 121; *Britton's Appeal*, 9 Wright, 192. It has, nevertheless, been decided in some of the states, that notice to a creditor raises no equity that will preclude him from taking advantage of the failure to record a deed or mortgage; *ante*, 97; *Butler v. Maury*, 10 Humphreys, 420; *Dewey v. Littlejohn*, 2 Iredell, Eq. 493; *Mayhew v. Coombs*, 14 Ohio, 428; *Lillard v. Ruckers*, 9 Yerger, 64; *Guerrant v. Anderson*, 4 Randolph, 208.

No rule of right or policy forbids anyone to purchase that which another may lawfully sell, *ante*. It follows that where a deed or mortgage is invalid for want of

registration as against a judgment, a purchase under the judgment will confer a valid title, notwithstanding any notice that may be given at or before the sale; *ante*, 95; *Runyan v. M'Clellan*, 24 Ind. 165; *Guerrant v. Anderson*, 4 Randolph, 208; *Jaques v. Weeks*, 7 Watts, 261. These cases are akin to those which establish that a purchaser with notice may buy with a safe conscience from a purchaser without notice, *ante*, 33, because the latter might otherwise be unable to dispose of property which had become rightfully his own, *ante*, 119. In Mississippi a deed of trust or mortgage does not take effect as a lien against creditors and purchasers until it is recorded, while judgments are liens from the time of their rendition. Hence, where a judgment is entered in that State during the interval between the execution and registering of a mortgage, one who buys after the mortgage has been registered, at a sheriff's sale under the judgment, will acquire a valid title as against the mortgagee. *Taylor v. Doe*, 13 Howard, 287. In like manner, an attachment by a creditor without notice is valid, although the defendant in the attachment is a purchaser with notice; *Coffin v. Ray*, 1 Metcalf, 212; *Cushing v. Hurd*, 4 Pick. 252.

It results from the same principles that to render an unregistered mortgage valid as against a purchaser under a subsequent judgment, notice must not only be given to the judgment creditor and the purchaser; but the purchaser must know, or be informed

that the creditor had such notice, and could not conscientiously enforce the judgment. See *Mott v. Clark*, 9 Barr, 399, 485.

Where an unregistered conveyance is valid against a judgment, it will also be valid against a purchaser with notice under an execution issued on the judgment; *Stilwell v. M'Donald*, 39 Missouri, 282; *Patton v. M'Donald*, 43 Id. 93; *Davis v. Ownsby*, 14 Id. 170; *Kelly v. Mills*, 41 Mississippi, 273; *Greenleaf v. Edes*, 2 Minnesota, 264. And as registration operates as notice, it will not be too late if it takes place at any time before the sheriff's sale; *Davis v. Ownsby*; *Stilwell v. M'Donald*; *The Ohio Life Ins. Co. v. Ledyard*, 8 Alabama, 866, *ante*, 65.

The weight of authority is that a purchase at sheriff's sale is as effectual in clearing the title from latent rights and equities as if it was made directly from the defendant in execution; *Scribner v. Lockwood*, 9 Ohio, 184; *Wilson v. Shoenberger*, 10 Casey, 121; *Derr v. Richman*, 1 Green, 43; *Garwood v. Garwood*, 4 Halstead, 193; *Jackson v. Chamberlain*, 8 Wend. 620; *Runyan v. M'Clellan*, 24 Indiana, 165; *Draper v. Bryson*, 26 Missouri, 108; *Stewart v. Freeman*, 10 Harris, 120. It follows, that even where an unregistered conveyance or incumbrance is valid as against a subsequent judgment creditor, it may be avoided by a sale under the judgment to a purchaser without notice. A purchase by a judgment creditor under his own execution is within this principle; *ante*, 33, 94;

Fords v. Vance, 17 Iowa, 94; *Savory v. Browning*, 18 Iowa, 246.

It is well settled, that where land held in trust, is sold under a judgment which binds the legal title, to a *bona fide* purchaser, the proceeds of the sale will be awarded to the *cestui que trust*, and not to the judgment creditor whose right does rise above that of the defendant in the judgment; *ante*, 90; and the principle is the same as between a judgment creditor with notice of an unregistered mortgage, and the mortgagee; *Britton's Appeal*, 9 Wright, 72.

It remains to inquire whether equitable estates and interests are within the registry acts; or to state the point somewhat differently, do these acts afford protection against latent equities, as well as unregistered deeds? The question was answered in the negative in *Doswell v. Buchanan*, 3 Leigh, 362. See *Gouverneur v. Lynch*, 2 Paige, 300; *De Rayter v. The Trustees*, 2 Barb. Ch. 556; *Jaques v. Weeks*, 7 Watts, 261, 268, 272; *Swigert v. The Bank*, 17 B. Monroe, 268, 290; *Corn v. Sims*, 3 Metcalf, Ky. 348, *ante*; *Kelley v. Mills*, 41 Mississippi, 267; *Ludlow v. Van Niss*, 8 Bosworth, 178; *Walker v. Gilbert*, 1 Freeman Ch. 25, *ante*. So Chancellor Walworth held, in *Grimstone v. Carter*, 3 Paige, 421, that it is neither practicable nor requisite to apply the policy of the registry acts to equitable interests in real estate; not practicable, because interests of this description frequently arise from acts *in pais*, or from writings not formally exe-

cuted, or under seal; not requisite, because the established rule of equity jurisprudence guards a purchaser against equities of which he has no notice, and the registry acts can do no more.

The weight of authority, nevertheless, is, that the registry is intended to be a chart as well as a transcript of the title to real estate, and that nothing which it does not disclose or afford the means of ascertaining will affect a *bona fide* purchaser; *Harrison v. Cochelin*, 23 Missouri, 117, 127; *Mesick v. Sunderland*, 6 California, 297; *Orvis v. Newell*, 17 Conn. 97; *Bush v. Golden*, Ib. 594. In the case last cited, it was agreed orally between Bush and Golden, that a mill-dam which they held in common, should be widened and enlarged at their joint expense; and that each should have a right of way across the breast of the dam, to the land on either side which belonged to them in severalty. This agreement was carried into effect, and the right of way used in conformity with it, for many years. The question finally arose, whether Bush was entitled to the way as against a mortgagee from Golden. The court held, that as the use of the way was consistent with the title of the occupants as tenants in common, it did not operate as notice that either of them had a further right. If Bush had obtained a grant of the alleged easement under seal, and executed in due form, it would not have been valid against the mortgage without registration, and he was

not in a better position in this regard, because he had seen fit to rely on an oral agreement. The failure to take a legal and customary precaution, did not excuse the non-observance of another of equal moment.

In was held in like manner, in *Harrison v. Cochelin*, that a mistake in conveying one lot of land instead of another, could not be rectified after the premises had passed into the hands of a *bona fide* purchaser, who gave value on the faith of the title as registered, although the complainant was in actual possession. The court held, that this was not notice within the meaning of the registry acts.

Where a purchaser can be charged constructively with notice of an unregistered conveyance, the question is, as Chancellor Walworth observed in *Grimstone v. Carter*, to a great degree speculative. Agreeably to this rule, the proof of constructive notice may be the same, whether the case is or is not within the recording acts. But where actual notice is requisite to supply the want of registration, an exception should not be made in

favor of equitable estates or interests, on the ground that there is no written evidence of their existence, or none that can be recorded. A complainant who sees fit to accept and act under a parol agreement, instead of the formal grant which the law requires, cannot complain of being postponed, because he might have avoided this result by a little care; *Orvis v. Newell*, 17 Conn. 97; *Bush v. Golden*, Ib. 594. The case is somewhat different where a trust arises *ex maleficio*; and it may be then thought harsh to put the injured party to proof of actual notice against one who obtains and registers a conveyance from the trustee. It should, nevertheless, be remembered, that the registry acts were made in aid of purchasers, and to afford greater certainty than could readily be obtained under the previous system of conveyancing. A purchaser should not, therefore, be denied the benefit which the legislature presumably meant to confer, unless the evidence goes far enough to establish the *scienter*, which is essential to the proof of actual fraud.

[*78]

*ALDRICH v. COOPER.
DURHAM v. LANCASTER.
DURHAM v. ARMSTRONG.

NOV. 24, DEC. 7, 8, 10, 1802; APRIL 26, 1803.

REPORTED 8 VES. 308.

MARSHALLING.]—*Mortgagee of freehold and copyhold estates, also a specialty creditor, having exhausted the personal assets, simple contract creditors are entitled to stand in his place against both the freehold and the copyhold estates, so far as the personal estate has been taken away from them by such specialty creditor.*

Mortgage of freehold estate, with a covenant for better securing the payment, to procure admission and to surrender a copyhold estate, and in the meantime to stand seised in trust for the mortgagee. A primary mortgage of both estates; and the freehold not first applicable.

IN these causes the usual decree was made for an account of what was due to the plaintiff Aldrich, a simple contract creditor of the intestate John Cooper, and all other the creditors; and, in case the creditors by specialty should exhaust any part of the personal estate, it was declared, that the simple contract creditors were entitled to stand in their place, &c.

The Master's report stated, that the testator died seised of freehold estates of inheritance, subject to a mortgage made by the intestate, by indentures dated the 6th of October, 1791, for 1300*l.*; by which indentures also, for better securing the payment, he covenanted with the mortgagee to procure himself to be admitted to copyhold estates, and that he would surrender them to the [*79] mortgagee; and that *until such surrender, he would stand seised of the premises in trust for the mortgagee.

The intestate died in June, 1792, not having been admitted to the copyhold estates, leaving five sisters his coheirresses-at-law, who, in September, 1792, were admitted to the copyhold estates as coheirresses of the intestate, and immediately afterwards surrendered to the mortgagee for securing what was due upon the mortgage and two bonds by the intestate to the mortgagee. The widow of the intestate took out administration, and paid out of the personal estate 767*l.*, in part of the mortgage and bonds. The personal estate being exhausted, when the cause came on for further directions, a question arose, *whether the creditors by simple contract were entitled to stand in the place of the specialty creditors in respect of what they had drawn from the personal estate, against the copyhold as well as the freehold estates.*

Mr. Romilly, for the plaintiff, said, that, if the question as

against the copyhold estate could be considered open, the principle is, that where a creditor, who has two funds, chooses to resort to the only fund upon which other creditors can go, they shall stand in his place for so much, against the fund to which they otherwise could not have access; but he admitted this case could not be distinguished from *Robinson v. Tonge*.¹

Mr. *Pigott*, for the coheiresses, relied upon the circumstance, that the only act as to the copyhold estate was the covenant for farther security to be admitted, and to surrender to the mortgagee, and in the meantime to stand seised in trust for him; showing the intention, that the freehold estate should be first applied as the primary fund—the copyhold being only a subsidiary security.

LORD CHANCELLOR ELDON.—The words, “for better securing the payment,” are not thrown in for the purpose of making the freehold estate applicable first; but the common form of a mortgage of freehold and copyhold estates is to make the freehold liable, with a *covenant to surrender the copyhold, in [*80] order to save the fine.

It is necessary to look into the case that has been cited. Freehold estates are not assets for simple contract debts;² and I should have thought the same reasoning that governs that case would have applied to this.

Mr. *Romilly* and Mr. *Stratford* for the plaintiffs.—The case before Lord Hardwicke certainly cannot be distinguished from this; but it is impossible to support that case upon the principles upon which the Court has always acted as to marshalling assets. That case is not reported upon this point, except in Mr. Cox's note, though it is in several books upon others; nor has the point been before the Court in any other case, nor the ground taken by Lord Hardwicke ever acted upon in any other instance. The principle as to marshalling assets is stated in *Lanoy v. The Duke of Athol*,³ viz., that if a creditor has two funds, he shall take his satisfaction out of that fund upon which another creditor has no lien. If it is sufficient to say, the creditor disappointed had no claim in law or equity upon the fund, that would be an answer in every case. In the instance of a simple contract creditor, disappointed by the specialty creditors taking payment out of the personal estate, he has no claim in law or equity upon the real estate. So a legatee, where the creditors exhaust the personal estate, has no claim but what the testator gives him. In *Lanoy v. The Duke of Athol*, the case is put of a mortgagee of two estates, and a subsequent mortgage of one of them to another person; if

¹ Stated in Mr. Cox's note, 1 P. Wms. 680, edit. 5.

² But see now 3 & 4 Will. 4, c. 104.

³ 2 Atk. 446.

that estate is insufficient to pay both, the first mortgagee shall be compelled to take satisfaction out of the other estate, in order to leave to the second mortgagee that upon which alone he can go. The same argument would occur, that the second mortgagee had contracted only for a security upon the one estate, and had no claim upon the other. So a widow is entitled to her paraphernalia, though not against creditors; but if a mortgagee chooses [*81] to take them in satisfaction of his debt by bond or covenant, a Court of equity will ascertain the value, and make her a creditor for that upon the mortgaged estate: *Tipping v. Tipping*.¹ Upon what ground, if *Robinson v. Tonge* is right, can she stand as a mortgagee upon the real estate? The distinction is clear, upon *Lutkins v. Leigh*,² and *Forrester v. Lord Leigh*,³ that, though the Court will marshal for legatees against a descended estate, they will not against a devised estate; but they shall stand in the place of a mortgagee for what he takes out of the personal estate. It would be very extraordinary if the Court would marshal by placing a legatee in the situation of a mortgagee against the copyhold estate, and would not do that for creditors.

Mr. Pigott and Mr. Fonblanque for the defendants.—These are the copyhold estates of an intestate: no intention is demonstrated to subject them to debts by any testamentary disposition. They are not assets, either at law or in equity: not liable to debts farther than by express contract. *Robinson v. Tonge*, is not inconsistent with the cases, considering the subjects to which they apply. Marshalling is confined to assets, and goes no further than the jurisdiction over them. Copyhold estate is not a subject of that jurisdiction, specialty creditors having no claim upon that, as they have upon freehold estate,⁴ which therefore is marshalled. The distinction is, that the specialty creditors have resort to the one fund, and not to the other. To the effect of making the copyhold estate bear its proportion of the mortgage, the heir is bound by *Robinson v. Tonge*; but the Court will not go farther than to prevent an election to the prejudice of other claims upon the freehold estate. It is safer to adhere to a case so precisely in point, than to unsettle this question after such a length of time, because in other cases there is an apparent contrariety of principle. There is no case in which that has been brought again before the Court, much less has that authority been impugned. In all the cases that have been put, the Court was applying the principle of marshalling assets. That phrase implies an equitable arrangement of two funds of the description [*82] of assets. *This sort of case must have arisen repeatedly; and yet there is no instance of a determination the other way, which is evidence of the general understanding.

¹ 1 P. Wms. 729.² Ca. t. Talb. 54.³ Amb. 171.⁴ Copyhold as well as freehold estates are now liable to the payment of debts both by specialty and simple contract. See 3 & 4 Will. 4, c. 104.

Mr. Romilly, in reply.—*Robinson v. Tonge* is certainly a very great authority; but it is to be observed, that it was decided soon after Lord Hardwicke got the Great Seal; and as to the length of time, and the acquiescence under it for seventy years, during sixty years of that time it was utterly unknown. Mr. Cox, when he published his first edition of Peere Williams, had not found that case, and it was not published till 1793. There is no instance of its having been admitted or cited as an authority. No case corresponding with it can be found; neither can I show one overruling it. There is complete silence on both sides; but that is in favour of the plaintiff, as it is not probable that a note would be taken of a decision establishing no new doctrine, but merely following an established rule. So, it must be supposed there have been many instances of marshalling against copyhold estate. It is objected, that marshalling is merely a distribution of the different assets by such an arrangement as will satisfy all the creditors, and that copyhold estate is not assets. But that which is called *marshalling* is merely that rule with respect to the two funds, stated by Lord Hardwicke in *Lanoy v. The Duke of Athol*, and is called *marshalling assets*, merely as being generally applied to a case of assets. But the doctrine is applied to other cases, where the parties are living, as the case mentioned in *Lanoy v. The Duke of Athol*, of the two mortgages. So, where the Crown, by an extent, has taken a mortgaged estate, and deprived the mortgagee of his security, the Court of Exchequer has marshalled in his favour by letting him stand in the place of the Crown upon other funds not comprised in his mortgage. Another instance is the case of a surety, who is put in the place of the creditor against the other securities, though he has no charge against them. That is the common equity: *Tynt v. Tynt*,¹ and *Deering v. Lord Winchelsea*,² in which each surety had given a *distinct security. The same principle is applied [*83] in all these cases.

But can these copyhold estates be said, in any just sense, not to be assets? In other cases, the Court does not proceed against assets. Real estate is not assets for payment of simple contract debts. It must be contended, that even if the debtor makes the copyhold estate assets, the Court cannot marshal. Suppose he surrendered to the use of his will, and devised it for payment of specialty debts, can there be a doubt that, if the specialty creditors chose to take satisfaction out of the personal estate, the simple contract creditors would be put in their place? Why should they not, then, where he has made the copyhold estate a fund for the payment of this debt by his deed?

LORD CHANCELLOR ELDON.—I cannot yet find this case among Lord Hardwicke's notes. I feel it to be my duty to understand the principle of the case before I confirm it, or to decide against

¹ 2 P. Wms. 542.

² 1 Cox, 318; ante, vol. 1, p. 89.

it upon a principle stated from this place so clear, that there can be no doubt upon it. I was surprised at the case when it was stated. Suppose there was no freehold estate, but there was a copyhold estate, which the owner had subjected to a mortgage, and died, it is clear the mortgagee, having two funds, might, if he pleased, resort to the copyhold estate. But would this Court compel him to resort to it? If so, the Court marshals by the necessary consequences of its act. If the Court would not compel him, is it not clear that it is purely matter of his will whether the simple contract creditors shall be paid or not? That, at least, contradicts all the authorities, that if a party has two funds (not applying now to assets particularly), a person having an interest in one only has a right in equity to compel the former to resort to the other, if that is necessary for the satisfaction of both. I never understood, that if A. has two mortgages, and B. has one, the right of B. to throw A. upon the security which B. cannot touch, depends upon the circumstance whether it is a [*84] freehold or a copyhold *mortgage. It does not depend upon assets only: a species of marshalling being applied in other cases, though technically we do not apply that term except to assets. So, where in bankruptcy the Crown, by extent, laying hold of all the property, even against creditors, the Crown has been confined to such property as would leave the securities of incumbrancers effectual.¹ So, in the case of the surety,² it is not by force of the contract; but that equity, upon which it is considered against conscience that the holder of the securities should use them to the prejudice of the surety; and therefore there is nothing hard in the act of the Court placing the surety exactly in the situation of the creditor. So, a surety may have the benefit of a mortgage of a copyhold estate exactly as of freehold. It is very difficult to reconcile this with the principle of all those cases between living persons.

So, also, in a case which this court calls a just distribution of the effects of a deceased person, a simple contract creditor has no manner of hold upon the freehold estate. How, then, is he allowed in this court effectually to apply it for his satisfaction? Not upon the ground that it is assets, either by will or by contract inter vivos; but upon the ground, that the specialty or mortgage creditor, having two funds, shall not, by his will, resort to that, by going to which he will disappoint as just a creditor, who cannot resort to any other. *The principle in some degree is, that it shall not depend upon the will of one creditor to disappoint another.* Then, what is the distinction as to the copyhold estate? The question is, whether the debtor has not subjected the copyhold estate to the extent of the mortgage imposed upon it; whether he has not decided that his property, to that extent, shall be liable to some debt? And the Court will extract

¹ And see *Sagitary v. Hyde*, 1 Vern. 455.

² See *Dering v. Earl of Winchelsea*, ante, Vol. 1, p. 100, and note.

this further principle, *that a creditor who can make it liable to that extent, shall not, by his will, defeat another; the former having two funds, the latter only one.* The principle is farther demonstrated by the cases of contracts by specialty that do not affect the real estate; as a bond, not mentioning heirs: there, according to Lord Hardwicke, *there is no marshalling, as there are not [*85] two funds, and therefore no one is disappointed by the option of another; the act of the creditor's will necessarily originating out of the security he has. *Robinson v. Tonge*, to a certain degree, relieves simple contract creditors. The estate is charged expressly with the payment of that debt: and therefore, if the freehold and copyhold estates go to different heirs, that charge is the foundation for this Court's applying the principle of contribution; not because it is assets, but because it is charged, not being assets. The effect of that, as to simple contract creditors, is, that resort may be given to them upon the unexhausted part of the freehold estate, as the specialty creditors are, to a certain degree, thrown upon the copyhold.

LORD CHANCELLOR ELDON.—I have looked into every book, and can find nothing material upon this point either in print or manuscript. No book notices that there was any such point in *Robinson v. Tonge*: but it is clear, from the Registrar's book, by the arrangement of the decree, that the point must have occurred. The specialty creditors insisted that they had a right to have the whole copyhold estate applied to the mortgage, in order to leave the freehold estate as assets for debts. Upon that case, if that decision had not been made, I should have thought they would have had that right. I cannot conceive the principle upon which that decision stands. Mr. Cox had it from a book of Lord Redesdale's, a note-book of Sir Thomas Sewell, who, I have no doubt, took the note himself, and preserved it as a special case. No case, therefore, can be entitled to more respect. The difficulty is this:—Suppose the personal estate to be 1500*l.* and simple contract debts to that value, and a mortgage of that amount upon freehold and copyhold estates; the mortgagee, if he pleases, may call for payment out of the estate pledged. It is clear, *if no third persons are concerned*,¹ the Court would arrange *between the two estates, if they went to different persons. [*86] In that case, *if no third persons were concerned*, and the estates were of equal value, that sum would be divided between them, and the simple contract creditors would receive the whole personal estate. If the mortgagee chose to exhaust the whole personal estate, the consequence, if that doctrine is right, is, that the simple contract creditors would stand in his place against the freehold estate at least, for the proportion of the mortgage that

¹ As to third parties being concerned see *Averall v. Wade*, L. & G. t. Sugd. 252; *Barnes v. Racster*, 1 Y. & C. C. C. 401.

estate ought to bear. Why? That is not the act of the testator, nor of the law. There is no more a lien for them upon the freehold estate than upon the copyhold. But the Court has said, and the principle is repeated very distinctly in *The Attorney General v. Tyndall*,¹ that if a creditor has two funds, the interest of the debtor shall not be regarded, but the creditor having two funds, shall take to that which, paying him, will leave another fund for another creditor. If that is so as to simple contract creditors, having no connection with the freehold estate, except that principle of equity, why is not the same principle to apply to copyhold estate? Copyhold estate is not chargeable² with debts; neither is freehold estate chargeable with simple contract debts;³ but this copyhold estate is expressly charged with a debt: and if freehold estate is applied to simple contract debts, because charged with another debt, why is not copyhold estate?

LORD CHANCELLOR ELDON.—This instrument, as far as it respects the copyhold estate, is certainly an inaccurate security: for the mortgagor, covenanting to procure himself to be admitted and to surrender, and in the meantime to stand seised to the use of the mortgagee, not being himself admitted, could not with propriety be said in the meantime to stand seised, as, after admission, in a sense he might. The effect of the deed is an agreement in equity, pledging the copyhold estate for the payment of that [*87] sum together with the freehold estate; and I state *it in these terms, as I do not understand it to be an instrument of mortgage of the freehold estate, with no more than a covenant, that if the freehold estate should be deficient, the copyhold should be a security in aid; but I look upon it as giving the mortgagee a legal estate in the freehold and an equitable estate in the copyhold; thereby giving him recourse to two funds for the payment of his debt.

The question is, whether, for the sake (if it is necessary) of discharging the debts, and particularly the simple contract debts of the mortgagor, the Court will go farther than it appears to have done in a case which I found, I confess very much to my surprise, in Mr. Cox's note. I never had heard of it before. I do not find, either in print or manuscript, that it has found its way to the notice of the public, except through the channel from which Mr. Cox derived his information. There is no other note of it. Yet there is no doubt of the authenticity of that note; for Mr. Cox has, in this, as in all other cases (which makes his work of so much value in the library of a lawyer) examined the Registrar's

¹ Amb. 614.

² The word "Charged" in the report is evidently used by mistake.

³ But see now 3 & 4 Will. 4, c. 104, rendering freeholds and copyholds liable to all debts.

book, which corresponds with the note. At the same time, no notice is taken of that case, or any other of that date, in Lord Hardwicke's notes. In fact, however, the records of the Court prove that there was such a case. I understand, by the note, that there being no fund but the freehold and copyhold estates, and the mortgage creditor having both those estates in his mortgage, it was desired that equity, in order to satisfy the specialty creditors, would require him to take his satisfaction out of the copyhold estate alone. The principle stated by the Court, in answer, that copyhold estates are not liable, either in law or equity, to the testator's debts, farther than he subjected them thereto, is undeniably true. But the question is, how it is to be applied, when the testator has, by contract, subjected his copyhold estate to the whole of the debt; though at the same time subjecting an estate of another species also to the whole debt. I understand the opinion of the Court to have been, considering it a *due application of the principle stated by Mr. Cox, that none of the rules subject any fund to a [*88] claim to which it was not before subject; but they only take care that the election of one claimant shall not prejudice the claims of others; that there were a freehold and copyhold estate both liable to the whole mortgage by the contract and act of the testator in his life; that though the specialty creditors could not be wholly paid, unless the mortgage was thrown upon the copyhold estate, to the intent that the freehold might be open to the specialty creditors, yet the copyhold should only bear its proportion; that is, that a value should be set upon each estate; and if that distribution of the two funds left any specialty creditor unpaid, they must abide by the loss. It is quite clear this case is by no means a due application of that principle stated by Mr. Cox. *Both the copyhold and the freehold estates were before subject to the claim;* and the converse of that proposition seems in some degree to follow from making the election of the mortgagee determine how far the specialty creditors shall or shall not be paid.

I have had an opportunity of communicating with Lord Redesdale upon this case, and have his Lordship's authority to say, that he can reconcile it with no principle; that it was as great a surprise upon him as it was upon me; and he considers it as a case standing altogether by itself, and not reconcilable to the principles which govern the Court in a great variety of other instances. I have also the full concurrence of Lord Redesdale's opinion, that he would not determine according to that authority. In the consideration of this subject, the word "assets" has been very frequently used. But when you come to look at the case of *marshalling*, though that term so frequently occurs, *the operation is upon the principle that the party has a double fund*. It is said copyhold estate is not assets. Clearly it is not assets for specialty debts, not even for the debts of the Crown. But is freehold estate assets for simple contract debts? It is not,

neither in law nor equity.¹ Upon what ground, then, does the Court say, in given cases, simple contract debts shall be paid out of *the real estate? Not upon the ground of assets; [*89] but upon this, that, not every creditor has a pledge of land, but a specialty creditor has a double fund to resort to. There may be a mortgage, for instance, where the instrument in none of its parts or obligations would affect the heir. Though he has a pledge of the land, it is not as assets, or as a specialty creditor. But if he has a bond or covenant in the deed, he is a specialty creditor, whose demand after the death of the mortgagor would affect the heir. In that case, then, the Court says, as that specialty creditor, by his specialty contract, can affect the land, he has two funds: the freehold and the personal estate: and he shall not by his election disappoint the natural and moral equity of the creditor by simple contract to be paid out of the single fund, which his debt affects. The simple contract creditor, therefore, has no more in law any claim against the freehold estate than the specialty creditor in *Robinson v. Tonge* had upon the copyhold estate. But, in the former case, the Court has said, the caprice or election of a bond creditor shall not operate to the prejudice of the simple contract creditor; and how can a due application of that principle be made, if it is not applied where the specialty creditor has a claim against the freehold estate, but not against copyhold estate as any creditor of any sort, but both estates being pledged and made a double fund by the act and deed and contract of the mortgagor?

Suppose another case: two estates mortgaged to A., and one of them mortgaged to B. He has no claim under the deed upon the other estate. It may be so constructed that he could not affect that estate after the death of the mortgagor. But it is the ordinary case to say, a person having two funds shall not, by his election, disappoint the party having only one fund; and equity, to satisfy both, will throw him who has two funds upon that which can be affected by him only, to the intent that the only fund to which the other has access may remain clear to him. This has been carried to a great extent in bankruptcy; for a [*90] mortgagee, whose interest in the estate was *affected by an extent of the Crown, has found his way, even in a question with the general creditors, to this relief; that he was held entitled to stand in the place of the Crown as to those securities, which he could not affect per directum, because the Crown affected those in pledge to him.² Another case may be put: that a man died, having no fund but a freehold and a copyhold estate; that they were both comprehended in a mortgage to A., and the freehold estate only was mortgaged to B.; and that B. was not only a mortgagee of the freehold estate, but also a

¹ Both freehold and copyhold estates are now assets for the payment of all debts. See 3 & 4 Will 4, c. 104.

² And see *Sagitary v. Hyde*, 1 Vern. 455.

specialty creditor by a covenant or a bond. In that case, as well as in this, it might be said the mortgagee of both estates might, if he thought proper, apply to the freehold estate, and exhaust the whole value of it. The other would then stand as a naked specialty creditor, the fund being taken out of his reach; and there is no doubt that, being both a specialty creditor and a mortgagee of the freehold estate, but not having any claim as mortgagee upon the copyhold estate, the same arrangement would take place, that he in equity should throw the prior incumbrancer upon the estate to which the other has no resort.¹

The cases with respect to creditors and other classes of claimants go exactly the same length. In the cases of legatees against assets descended, a legatee has not so strong a claim to this species of equity as a creditor. But the mere bounty of the testator enables the legatee to call for this species of marshalling: that, if those creditors, having a right to go to the real estate descended, will go to the personal estate, the choice of the creditors shall not determine whether the legatees shall be paid or not. That in some measure is upon the doctrine of assets; but with relation to the fact of a double fund. Both are in law liable to the creditors, and therefore by making the option to go against the one, they shall not disappoint another person, who the testator intended should be satisfied. That is not so strong as where it is not bounty, but the party has, by his own act in his life, made liable to the whole of the debt a copyhold estate, not in law liable, *and who, having also a freehold estate, [*91] must be understood to mean, that the freehold estate shall be liable according to law to his specialty debts.

The case is exactly the same with reference to the distinction taken, that where lands are specifically devised, the legatees shall not stand in the place of the creditors against the devisees, for that is upon the supposition that there is in the will as strong an inclination of the testator in favour of a specific devisee as a pecuniary legatee, and therefore there shall be no marshalling. But if, though specifically devised, the land is made subject to all debts, that distinguishes the case; for there is a double fund; and as, by that denotation of intention, the creditor has a double fund,—the land devised, and the personal estate,—he shall not disappoint the legatee.² The case is also the same, where, instead of the case of a mere specialty creditor, the land specifically devised is subject to a mortgage by the testator; as in *Lutkins v. Leigh*,³ there he shall not disappoint the legatee. So the case of *paraphernalia* is very strong for this proposition, that, wherever there is a double fund, though this Court will not restrain the party, yet he shall not so operate his payment as to disappoint another claim, whether arising by the law or by the act of the testator.

¹ See *Gwynne v. Edwards*, 2 Russ 289, n.

² See *Paterson v. Scott*, 1 De G. Mac. & G. 531.

³ Ca. t. Talb. 54.

The conclusion therefore is, that the case of *Robinson v. Tonge* is not reconcilable with the general classes of cases ; and therefore, if it is necessary for the payment of the creditors, that the mortgagee should be compelled to take his satisfaction out of the copyhold estate, if he takes it out of the freehold, those who are thereby disappointed must stand in his place as to the copyhold estate.

Aldrich v. Cooper is generally cited as the leading case upon the doctrine of marshalling, which, although, in consequence of legislative enactments, not so frequently called into exercise as in former years, is still of considerable importance, and forms one of the most useful branches of equitable jurisdiction : *Hanby v. Roberts*, *Amb. 127 ; [*92] *Tombs v. Roch*, 2 Coll. 497 ; *Tidd v. Lister*, 10 Hare, 157 ; *Patterson v. Scott*, 1 De G. Mac. & G. 531. It depends upon this principle, as laid down in the principal case, that a person having two funds to satisfy his demands, shall not, by his election, disappoint a party who has only one fund. If, therefore, a person, having a claim upon two funds, chooses to resort to the only fund upon which another has a claim, that other person shall stand in his place for so much against the fund, to which otherwise he could not have access ; the object of the Court being, that every claimant shall be satisfied, as far as, by an arrangement consistent with the nature of the several claims, the property which they seek to affect can be applied in satisfaction of such claims. See *Ex parte Kendall*, 17 Ves. 520.

The doctrine of marshalling is not applicable, unless there are two funds already in existence, before the question relating to it is raised. Thus, in the case of *In re Professional Life Assurance Company*, 3 L. R. Eq. 668, by the deed of settlement of an insurance company, and by the terms of the policies issued by the company, it was provided that the capital stock and funds of the company should alone be liable to claims in respect of the policies, and that no shareholder should be liable to such claims beyond the amount of the unpaid part of his share in the capital of the company. The company was wound up, and calls to the full amount of the unpaid capital were made, and the proceeds of such calls, together with the other assets of the company, were applied in paying part of the costs of the winding up, and in paying dividends on the debts due to the policy holders and general creditors of the company *pari passu*. It was argued on behalf of the policy-holders, that although they had no charge upon the capital of the company, entitling them to priority over the creditors ; yet, inasmuch as the creditors had not only the rights to be paid *pari passu* with policy-holders out of the capital of the company, but also a right to call upon the shareholders personally to pay the full amount of their debts, and they had resorted to the capital, which was the only fund available for the claims of the policy-

holders, the doctrine of marshalling applied, and the policy-holders were entitled to stand in the place of the creditors, and to have a call made upon the shareholders, for the purpose of recouping the amount by which the capital had been diminished by the payments made to the creditors. It was held, however, by Lord Romilly, M. R., that the doctrine of marshalling did not apply, and that no further call could be made upon the shareholders for the purpose of recouping to the policy-holders the amount of capital *which had been paid to the general creditors; but, that the costs of the winding up ought to [*93] be borne by the shareholders, and not to be paid out of the capital of the company, and, consequently, a further call ought to be made, not only to pay the balance of the debts of the general creditors, but also to replace the capital which had been applied to the payment of costs. "It is a settled principle of law," said his Lordship, "that were there are two classes of creditors and two funds, and one class of creditors can only go against one fund, while the other class can go against both, the Court will marshal the assets, and restrict the creditors who have a double security from touching the fund applicable to payment of the first class of creditors, until they are paid in full. . . . The contest here is, whether that principle has any application to this case. The contributories deny that there are two funds; they argue, that the contention of the policy-holders, if successful, would be to create two funds, in order to raise the question, or, as it was pointedly put by Mr. Mackeson in his argument, it is admitted that there cannot be any marshalling of assets until the two funds exist; but you raise the question of marshalling, and claim a right to marshal in order to create a fund for that purpose which does not now exist." See, also, *In re State Fire Insurance Company*, 1 H. & M. 457; 1 De G. J. & Sm. 634.

It is, moreover, essential to the application of the doctrine of marshalling, not only that there should be two creditors of the same person, but that one of them should have two funds *belonging* to the same person to which he can resort. Thus, it has been held that a legatee in a will of a tenant in tail of land has no right to throw judgment creditors of the testator, whose judgments attach on the land under the statute 3 & 4 Vict. c. 108, s. 22, exclusively on those lands, in exoneration of his general assets. In *Douglass v. Cooksey*, 2 I. R. Eq. 311, a testator seised in fee simple of lands, A., and in tail of lands, B., by his will, left an annuity charged on all his property. A judgment creditor of the testator's, whose judgment was a charge on the estate of which the testator died seised in fee, and also by the statute 3 & 4 Vict. c. 105, s. 22, on those of which he was seised in tail, sold first, estate A., which was insufficient to pay him, and afterwards the lands of B. It was held by the Master of the Rolls of Ireland (Walsh) that the annuitant had no right to marshal as against the remainderman in tail, so as to be recouped out of the produce of the sale of B. the amount paid to the

judgment creditor out of the produce of the sale of A. “To authorize marshalling,” *said his Honor, “it is obviously necessary not only that a claim should exist against a fund, subject in common with another fund to a paramount liability; but also that those interested in that other fund *should not have a right to throw the liability on the fund of the claimant*. A man’s own property—on which alone his legatees can claim—must be applicable to his debts in preference to the property of another, against which the statute merely gives a remedy. The case is much clearer than the instance of an estate made assets by the exercise of a power, as in *Fleming v. Buchanan*, 2 De G. Mac. & G. 976, or the instance of paraphernalia, to which it was compared in argument.

Marshalling will not, unless founded on some equity, be enforced between persons, unless they are creditors of the same person, and have demands against funds the property of the same person. “It was never said,” observed Lord Eldon, “that if I have a demand against A. and B., a creditor of B. shall compel me to go against A. without more; as if B. himself could insist that A. ought to pay in the first instance, as in the ordinary case of drawer and acceptor, or principal and surety, to the intent that all the obligations arising out of these complicated relations may be satisfied; but if I have a demand against both, the creditors of B. have no right to compel me to seek payment from A., if not founded on some equity giving B. the right, for his own sake, to compel me to seek payment from A.,” *Ex parte Kendall*, 17 Ves. 520.

It may here be mentioned that the Court will marshal assets, although the right to marshal may not be distinctly raised by the pleadings: *Gibbs v. Ougier*, (12 Ves. 413.)

The doctrine of marshalling is most frequently brought into exercise in administering the assets of a deceased person.

1st. *Between creditors*.—When under the old law creditors by simple contract had no claim upon real assets, unless charged with, or devised for, the payment of debts, a Court of equity would compel specialty creditors who might resort, in the first instance, to the personal estate, in priority of simple contract creditors, and to the real assets, in exclusion of them, to recover satisfaction, in the first place out of the real assets as far as they went; or, if the specialty creditors had already exhausted the personal assets in payment of their claims, the simple contract creditors would be put to stand in their place against the real assets, whether devised or descended, as far as the specialty creditors might have exhausted the personal assets (*Sagitary v. Hyde*, 1 Vern. 455; *Neave v. Alderton*, 1 Eq. Ca. Abr. 144; *Wilson v. Fielding*, 2 Vern. 763; *Galton v. Hancock*, 2 Atk. 436); so would a voluntary

[*95] *specialty creditor, though liable to be postponed to simple contract creditors: *Lomas v. Wright*, 2 Russ. & My. 769. And

a specialty creditor, to whose debt copyholds (previous to 3 & 4 Will. 3, c. 104) were not liable, might stand in the place of a mortgagee of the copyholds: *Gwynne v. Edwards*, 2 Russ. 289, n.

But simple contract creditors were not entitled to have a larger fund for payment of their debts than they had originally. Thus, in *Cradock v. Piper*, 15 Sim. 301, where specialty creditors had exhausted their debtor's personal estate, a decree was made for marshalling his assets. A considerable time elapsed before the real estate could be made available for the purposes of the decree: it was held, by Sir L. Shadwell, V. C., that the simple contract creditors were not entitled to have the interest which would have accrued on the specialty debts if they had remained unsatisfied, as well as the amount of the personal estate, raised out of the real estate and applied towards satisfaction of their debts.

Where, however, specialty debts of a deceased person had been paid out of his personal estate, and at the time of such payment the personal estate was sufficient also to pay his simple contract debts, and the executor *subsequently* committed a devastavit, which rendered the personal estate insufficient to pay simple contract creditors, it was held by Lord Chancellor Brady, that they were entitled to be paid out of the real estate of the debtor, to the extent to which the personal estate had been applied in payment of the specialty debts: *Ellard v. Cooper*, 1 Ir. Ch. Rep. 376; but see *Kearnan v. Fitzsimon*, 3 Ridg. P. C. 16.

The statutes 3 & 4 Will. 4, c. 104, rendering freehold and copyhold estates liable to simple contract debts, and 32 & 33 Vict. c. 46, making the debts by simple contract of persons dying on or after the 1st of Jan., 1872, payable *pari passu*, with their debts by specialty, have obviated the necessity of the Court resorting to the doctrine of marshalling, for enforcing their payment.

The question has been raised, whether, in the administration of the assets of a deceased mortgagor, the mortgagee may prove for the whole amount of the debt due to him, and also realise his security. In *Greenwood v. Taylor*, 1 Russ. & My. 185, a mortgagee petitioned for the sale of his security, and to be permitted to prove the full amount of his debt in a suit for the administration of the assets of the deceased mortgagor. It was held by Sir J. Leach, M. R., that he could prove only for so much of his debt as might remain unpaid by the produce of the mortgaged estate. "The rule in bankruptcy," observed his Honor, "must be applied here; and the mortgagee cannot be permitted to prove for the full amount of his debt, but *only for so much as the mortgaged estate will not extend to pay. This rule is not [*96] founded, as has been argued, upon the peculiar jurisdiction in bankruptcy, but rests upon the general principles of a Court of Equity in the administration of assets. The mortgagee who has two funds, as against the other specialty creditors who have but one fund, must resort first

to the mortgage security, and can claim against the common fund only what the mortgaged estate is deficient to pay." The case, however (*Greenwood v. Taylor*), has been disapproved of by Lord Cottenham, who, in commenting upon it, remarks that, "with respect to the principle of that case, it is to be observed, that a mortgagee has a double security: he has a right to proceed against both, and to make the best he can of both; why he should be deprived of this right because the debtor dies, and dies insolvent, it is not very easy to see." *Mason v. Bogg*, 2 My. & Cr. 448, by which it is established that in an administration suit a mortgagee may prove his whole debt and afterwards realise his security for the difference; and see *Rome v. Young*, 3 Y. & C. Exch. Ca. 194; 4 Y. & C. Exch. Ca. 204; *Tipping v. Power*, 1 Hare, 410; *King v. Smith*, 2 Hare, 239; *Wickenden v. Rayson*, 6 De G. Mac. & G. 210; *Armstrong v. Storer*, 14 Beav. 535; *Tuckley v. Thompson*, 1 J. & Hem. 130.

The same rule is followed where a company is being wound up under the Companies Act, 1862, and a creditor holding security is entitled to prove for the whole amount that is due to him, and not merely, as in bankruptcy, for the balance remaining due, after realising or valuing his security; and he can prove for the amount due at the time his claim was sent in, without regard to securities which have been realised by him between the sending in his claim and its being adjudicated upon: *Kellock's case*, 3 L. R. Ch. App. 769; *In re Oriental Commercial Bank*, 6 L. R. Eq. 582.

2nd. *Between Legatees*.—The principle of marshalling is applicable between legatees; as where a testator has charged one or more legacies upon the real estate, and other legacies are not so charged; if the personal estate prove insufficient to pay them all, the legacies charged on the real estate shall be paid thereout; or if they have been paid out of the personal estate, the other legacies, as to so much, shall stand in their place as a charge upon the land: *Hanby v. Roberts*, Amb. 127; *Masters v. Masters*, 1 P. Wms. 421; *Bligh v. Earl of Darnley*, 2 P. Wms. 619; *Bonner v. Bonner*, 13 Ves. 379; *Scales v. Collins*, 9 Hare, 656.

But where the charge of a legacy upon real estate fails to affect it, in consequence of an event happening subsequent to the death of the testator, as the *death of the legatee before the time of payment, the [*97] Court will not marshal assets so as to turn such legacy upon the personal estate, in which case it would be vested and transmissible, whereas, as against the real estate, it would sink by the death of the legatee: *Prowse v. Abingdon*, 1 Atk. 482; and see *Pearce v. Loman*, 3 Ves. 135; there a legacy charged upon real estate, and payable at a future day, was held by Lord Rosslyn to sink as to the real estate by the death of the legatee, before the time of payment; and that the assets could not be marshalled. "There is a singularity," observes

his Lordship, "in the doctrine, as it now stands, that, as far as it affects one fund it is good ; as far as it affects the other, bad ; but it would be still more singular if it shall sink in one case and not in the other, but the land, making good the personal estate shall be charged. The point was of very little moment in *Reynish v. Martin* (3 Atk. 330 ; 1 Wils. 130). Therefore I would not follow that case to introduce a new point with regard to marshalling assets against established rules. The assets cannot be marshalled. It would be directly against *Prowse v. Abingdon* ; the contingency is the same ; and *I cannot charge the real estate indirectly.*" And see *Tombs v. Roch*, 2 Coll. 504.

The demand of a simple contract creditor, as against the real estate of a testator, which would otherwise be barred by the Statute of Limitations, will not be kept alive so as to preclude the operation of the statute, by the effect of any right which might exist, or might have existed among the parties, to have the assets of the testator marshalled. *Fordham v. Wallis*, 10 Hare, 217, 229, and the remarks there upon *Vickers v. Oliver*, 1 Y. & C. C. C. 211 ; *Gibbs v. Ougier*, 12 Ves. 413, and *Busby v. Seymour*, 1 J. & L. 527.

3rd. *Between creditors and legatees.*—"One rule of marshalling assets," observes Lord Hardwicke, "is clear, if there are debts by specialty and legacies, and no devise of the real estate, but it *descends* ; if the creditors exhaust the personal estate, the legatees may stand in their place, and come upon the real estate ; this is *against the heir-at-law.*" *Hanby v. Roberts*, Amb. 128 ; S. C., Dick. 105. "For although," as observed by Lord Eldon, in the principal case, "in the cases of legatees against assets descended, a legatee has not so strong a claim to this species of equity as a creditor, but the mere *bounty* of the testator enables the legatee to call for this species of marshalling ; that, if those creditors, having a right to go to the real estate descended, will go to the personal estate, the choice of the creditors shall not determine whether the legatees shall be paid or not." And see **Culpepper* [*98] *v. Ashton*, 2 Ch. Ca. 117 ; *Tipping v. Tipping*, 1 P. Wms. 730 ; *Lucy v. Gardener*, Bunb. 137 ; *Lutkins v. Leigh*, Ca. t. Talb. 54 ; *Bowman v. Reeve*, Prec. Ch. 577.

And it is as clear, "that if one *devises* his real estate, and gives general pecuniary legacies not charged on that real estate, and dies, leaving specialty debts, and the specialty creditors exhaust the personal estate, the legatees shall not stand in their place and come on the realty, *because it was the intention of the testator that the devisee should have the real estate, as well as the legatees be paid :*" *Hanby v. Roberts*, Amb. 128 : and see *Clifton v. Burt*, 1 P. Wms. 678 ; *Scott v. Scott*, Amb. 383 ; 1 Eden, 458 ; *Mirehouse v. Scaife*, 2 My. & Cr. 695 ; *Keeling v. Brown*, 5 Ves. 359 ; nor will a specific legatee be allowed to stand in the place of specialty creditors as against real estate devised (see *Haslewood v.*

Pope, 3 P. Wms. 324, 5th Resolution); although, since 3 & 4 Will. 4, c. 106, the devisee be the heir; *Strickland v. Strickland*, 10 Sim. 374.

However, it is now settled that a devisee and a specific legatee shall contribute pro ratâ to satisfy the specialty debts of the testator which his general personal estate is insufficient to pay. See *Long v. Short*, 1 P. Wms. 403; *Young v. Hassard*, 1 J. & L. 466; *Gervis v. Gervis*, 14 Sim. 654. In *Tombs v. Roch*, 2 Coll. 490, this subject is most elaborately discussed by the Vice-Chancellor Knight Bruce, who comes to this conclusion upon the principle, "that every will ought to be read as in effect embodying a declaration by the testator, that the payment of his debts shall be as far as possible so arranged as not to disappoint any of the gifts made by it, unless the instrument discloses a different intention."

In *Hensman v. Fryer*, 3 L. R. Ch. App. 420, Lord Chelmsford, C., seems by mistake to have made a pecuniary legatee and specific devisee contribute ratably towards payment of debts. See *Collins v. Lewis*, 8 L. R. Eq. 708.

It seems that previous to the Wills Act (1 Vict. c. 26), a pecuniary legatee was not entitled to stand in the place of a creditor who had exhausted the personal assets as against a *residuary* devisee, upon the ground that previous to the Wills Act, every residuary devise was in reality specific, as it only comprehended property of which the testator was seised at the time of making his will. See *Spong v. Spong*, 1 Y. & J. 300, 311; *Mirehouse v. Scaife*, 2 My. & Cr. 695.

It has been held by some learned judges, that inasmuch as a residuary devise, subsequent to the Wills Act, comprehends all the real property of which the testator is seised at his death, such devise is not specific, and that a pecuniary legatee whose fund has been exhausted by creditors, *had a right, under the doctrine of marshalling, to stand in [99] his place as against the residuary devisee (*Dady v. Hartridge*, 1 Dr. & Sm. 236; *Cogswell v. Armstrong*, 2 K. & J. 227; *Dyer v. Besonett*, 4 Ir. Ch. Rep. 382; *Barnwell v. Iremonger*, 1 Dr. & Sm. 242; *Rodbourn v. Mold*, 13 W. R. (V. C. K.) 854; 35 L. J. (Ch.) 67; *Rotheram v. Rotheram*, 26 Beav. 465; *Bethell v. Green*, 34 Beav. 302; *Hensman v. Fryer*, 2 L. R. Eq. 627). The opinion has, however, since prevailed that a residuary devise of real estate remains specific, notwithstanding the 24th section of the Wills Act makes it speak as if it had been executed immediately before the death of the testator, and that a pecuniary legatee has consequently no right to marshal assets as against residuary devisees: *Pearmain v. Twiss*, 2 Giff. 130; *Hensman v. Fryer*, 3 L. R. Ch. App. 420; *Gibbins v. Eyden*, 7 L. R. Eq. 371; *West v. Lawday*, 2 I. Rep. Eq. 517; *Collins v. Lewis*, 8 L. R. Eq. 708.

Although, as we have before observed, a legatee is not entitled to stand in the place of a specialty creditor, as against real assets devised, nevertheless, where a mortgagee of a devised, as well as of a descended

estate, has exhausted the personal assets by resorting to them in the first instance, a legatee may stand in his place, and be satisfied out of the mortgaged premises, to the extent of the personalty applied in their exoneration; for the application of the personal assets in exoneration of the real estate mortgaged, does not take place so as to defeat any legacy; (*Hoff's Appeal*, 12 Harris, 200.) See *Forrester v. Lord Leigh*, Amb. 171; *Lutkins v. Leigh*, Ca. t. Talb. 53; *Lucy v. Gardener*, Bunb. 137; *Howell v. Price*, 1 P. Wms. 294; *Oneal v. Mead*, 1 P. Wms. 693; *Davies v. Gardiner*, 2 P. Wms. 190; *Rider v. Wager*, 2 P. Wms. 335; ante, Vol. i., p. 673; *Middleton v. Middleton*, 15 Beav. 450; and see *Wythe v. Henniker*, 2 My. & K. 635, 644; where *Forrester v. Lord Leigh* was followed by Sir John Leach, although the principle upon which it was decided was justly questioned. The same view was taken by Sir James Wigram, V. C., who considered that the rule laid down in that case ought not to be extended. See *Johnson v. Child*, 4 Hare, 87; there the testator by his will bequeathed an annuity to his wife for her life, and made it a primary charge, in preference to all other legacies, on a leasehold estate, which was, together with certain policies of insurance on the life of the testator, subject to two mortgages; and he directed that, if the rents and profits of such leasehold estate should be insufficient to pay the wife's annuity, then the same should be paid out of his other personal estate. The mortgages were paid off by the executors out of the produce of the policies and the general personal estate. It was *held, by Sir J. Wigram, V. C., that a wife's an- [*100] nuity, so far as it fell upon the personal estate, other than the leasehold estate specifically charged, was not entitled to priority over the other legacies; that the mortgage debts, to which the leasehold estate specifically charged with the annuity was subject, should be apportioned rateably upon the leasehold estate and the policies of insurance, according to their respective value and amount; and that the legatees (other than the wife) were entitled to have the assets marshalled, and to stand in the place of the mortgagees of the leasehold estate, to the extent of that part of the mortgage debts which should be apportioned thereupon. "It is not very easy," observed his Honor, "to understand the principle upon which the Court has proceeded in some of the cases referred to. The rule of law is clear, that a testator, by devising lands expressly 'subject to a mortgage,' does not thereby declare any intention that the devisee shall take cum onere as against the testator's personal estate. It is equally well settled, that the amount of a testator's general personal estate is not a circumstance from which any inference can be legitimately drawn as to the construction of his will. Yet, if the amount of a testator's personal estate be insufficient for the payment of his debts and legacies, the Court discovers an intention on the part of the testator, that the devisee of his real estate, subject to a mortgage, should take it cum onere. If the Court, in that state of circumstances,

had decided upon apportioning the deficiency between the pecuniary legatees and the devisee of the land, a reason might have been found for the determination, in the consideration that the Court was dividing a burthen which the caprice of the creditor might otherwise have thrown wholly upon either. But that is not the determination of the Court. The Court is active in throwing the burthen wholly upon the devisee of the land, upon the party apparently, and upon the ordinary principles of the Court, entitled to be exonerated; and it is remarkable, that in *Forrester v. Lord Leigh* (Amb. 171), the possibility of this very circumstance is stated as the reason why the Court will not, in favour of a pecuniary legatee, marshal the assets, by compelling a bond creditor to proceed against devised estates.

"I am, however, bound by authority, and upon the authorities I think the specific legatee of the leasehold must take the legacy cum onere, so far as the pecuniary legatees may be entitled, under the rule referred to, to have their legacies protected.

"The question then remains, what is the onus with which he must be charged? If the policies, as well as the leaseholds, had been specifically given, there must have been an apportionment of the mortgage [*101] *debts between the leaseholds and policies; and by reasoning analogous to that by which I suppose the Court to be governed in holding the pecuniary legatees entitled to come upon the property charged with the debts in the place of the mortgagee, I think the apportionment must still take place. The Court compels the creditor to take payment of his debt out of his security, or places the legatees in the same situation as if he had done so, not because the security is specifically bequeathed, but in spite of that circumstance. A rule which, in a specific case, marshals the assets in favour of pecuniary legatees at the expense of specific legatees, is not to be extended beyond the letter of authority, which only confines the creditor to his entire security."

A pecuniary legatee may stand in the place of a vendor, who, having a lien upon land descended for unpaid purchase-money, has resorted to his personalty in the first instance (see *Spoule v. Prior*, 8 Sim. 189); and notwithstanding the case of *Wythe v. Henniker*, 2 My. & K. 635, the more recent opinion seems to be that a pecuniary legatee will have the same right as against a person entitled to a lien on land that has been devised. See *Birds v. Askey*, 24 Beav. 618. There a trustee advanced to A. B., one of his cestuis que trust, a part of the trust funds, to enable him to purchase a real estate. A. B. died without having repaid the money, having devised the estate, and his personal estate was insufficient to pay his debts and legacies. It was held by Sir John Romilly, M. R., first, that there was a lien on the estate for the trust funds; and, secondly, that the pecuniary legatees had, as against the devisees, a right of marshalling so as to have the lien satisfied prima-

rily, out of the purchased estate. See also *Lord Lilford v. Powys Keck*, 1 L. R. Eq. 347.

As to marshalling for vendor's lien, see ante, vol. i., p. 321.

So, if land be *devised for*, or *made subject to, the payment of debts*, assets will be marshalled in favour of legatees, or annuitants, who will stand in the place of the creditors who may have been satisfied out of the personal assets: *Foster v. Cook*, 3 Bro. C. C. 347; *Bradford v. Foley*, 3 Bro. C. C. 351, n.; *Webster v. Alsop*, 3 Bro. C. C. 352, n.; *Arnold v. Chapman*, 1 Ves. 110; *Norman v. Morrell*, 4 Ves. 769; *Patterson v. Scott*, 1 De G. Mac. & G. 531; *Surtees v. Parkin*, 19 Beav. 406; *Rickard v. Barrett*, 3 K. & J. 289.

As simple contract creditors have now, under 3 & 4 Will. 4, c. 104, a right to demand payment of their debts out of the real estate of the deceased debtor, and have therefore a double fund out of which they may receive satisfaction, it seems on principle to follow, that if they exhaust the *personal assets, the legatees may stand in their [*102] place, as to the real estate descended. This has, indeed, been questioned by a late learned author, who observes, that "the statute merely declares the land assets to be administered in equity, and does not therefore give the creditors an election between the funds, but compels them to exhaust the personalty before they can have recourse to the land:" Adams, 276. However, where, in a case before the Vice-Chancellor Knight Bruce, it was argued that the stats. 3 Will. & M. c. 14, and 3 & 4 Will. 4, c. 104, were intended for the relief of creditors, and not of legatees, his Honor was clearly in favour of marshalling for the legatees in such a case. "The equity of marshalling," he observes, "arises from a creditor's power to resort, not from the mode in which he acquired the power of resorting, to each or either of two funds belonging to the debtor, whose rights, subject to the debt, have become divided; and though I do not forget the passages found in the reports of *Galton v. Hancock* (2 Atk. 424), and *Forrester v. Lord Leigh* (Amb. 171), it seems to me impossible, consistently with the principles of decisions of the highest authority, or consistently with any legal principle, to take the view of the effect and consequences of a liability to creditors, created merely by statute, that the devisees take in this case. Certainly, the liability, in general, of personal estate in the first instance to the debts of a deceased debtor, the intent of the Statute of Fraudulent Devises, and the intent of the statute of 1833, do not, in my judgment, establish this proposition. I have dwelt the more upon this argument, grounded on the nature and effect of statutory liability to debts, because, if it is well founded, it seems in substance not to stop short of asserting that, inasmuch as it is by statute that copyholds are assets for creditors, and freeholds for simple contract creditors, therefore there cannot be marshalling for legatees against descended copyholds, or in respect of simple contract debts

against descended freeholds ; it will surprise me exceedingly to hear of such a doctrine having met, or meeting with support or acceptance :'' *Tombs v. Roch*, 2 Coll. 499.

Paraphernalia.—Although with the exception of necessary wearing apparel (2 Ves. 7), a widow's paraphernalia are liable to her deceased husband's debts, she will be preferred to a general legatee, and be entitled, therefore, to marshal assets in all those cases in which a general legatee would be entitled to do so ; for instance, as against real assets descended (*Tipping v. Tipping*, 1 P. Wms. 730 ; *Probert v. Clifford*, 1 Atk. 440. Amb. 6 ; 2 P. Wms. *544, note by Cox) ; [*103] or real assets devised, if subjected by will to the payment of debts (*Inclendon v. Northcote*, 3 Atk. 438 ; *Boynton v. Parkhurst*, 1 Bro. C. C. 576 ; 1 Cox, 106) ; and if a devised estate be subject to a mortgage or other specific incumbrance, she will be entitled to marshal the assets as against the devisee, by throwing the charge upon the estate, as the legatee would have that right (*Oneal v. Mead*, 1 P. Wms. 693 ; *Lutkins v. Leigh*, Ca. t. Talb. 53) ; but not, it seems, if the estate devised be neither subjected by will to payment of debts, nor subject to a mortgage or specific incumbrance ; *Ridout v. Plymouth*, 2 Atk. 104 ; *Probert v. Clifford*, 2 P. Wms. 545, n. ; *Forrester v. Leigh*, Amb. 171. But the same claims on the part of the widow would, it appears, prevail against specific legatees : *Graham v. Londonderry*, 3 Atk. 395 ; 1 P. Wms. 731 ; 2 Atk. 78 ; 3 Atk. 369 ; sed vide, contra, *Burton v. Pierpont*, 2 P. Wms. 79.

As to Paraphernalia, see ante, vol. i. p. 538.

Assets not marshalled for a Charity.—An exception occurs to the equitable doctrine of marshalling, with respect to charities ; for it may be stated, as a general rule, that assets are never marshalled in favour of legacies given to charities, upon the ground as stated by Lord Hardwicke, in *Mogg v. Hodges*, 2 Ves. 53, that a Court of equity is not warranted in setting up a rule of equity contrary to the common rules of the Court, merely to support a bequest which is contrary to law. Thus, if a testator gave his real estate and personal estate, consisting of personalty savouring of realty, as leaseholds and mortgage securities, and also pure personalty, to trustees, upon trust to sell, and pay his debts and legacies, and bequeathed the residue to a charity, equity will not marshal the assets by throwing the debts and ordinary legacies upon the proceeds of the real estate, and the personalty savouring of the realty, in order to leave the pure personalty for the charity : *Mogg v. Hodges*, 2 Ves. 52 ; *Attorney-General v. Tyndal*, 2 Eden, 207 ; S. C., Amb. 614 ; *Foster v. Blagden*, Amb. 704 ; *Middleton v. Spicer*, 1 Bro. C. C. 201 ; *Attorney-General v. Earl of Winchelsea*, 3 Bro. C. C. 373 ; *Makeham v. Hooper*, 4 Bro. C. C. 153 ; *Crosbie v. Mayor of Liverpool*, 1 Russ. & My. 761, n. ; *Fowdrin v. Gowdey*, 3 My. & K. 397 ; *Johnson v. Woods*, 2 Beav. 409.

There has, however, been a question whether there could not be a marshalling of assets where a particular legacy was given to a charity; and Lord Hardwicke, in several cases, was of opinion that it ought to be done: (*Attorney-General v. Lord Weymouth*, Amb. 25; *Attorney-General v. Graves*, Id. 155; *Attorney-General v. Tomkins*, *Id. 216); but it has now been decided beyond all doubt, that if a [*104] simple pecuniary legacy is given out of two sorts of personalty, there must be an abatement in the proportion of the mixed to the pure personalty (*Ridges v. Morrison*, 1 Cox, 180; *Walker v. Childs*, Amb. 524; *Attorney-General v. Tyndal*, Id. 614; S. C., 2 Eden, 207; *Foster v. Blagden*, Amb. 704; *Makeham v. Hooper*, 4 Bro. C. C. 153; *Hobson v. Blackburn*, 1 Kee. 273; see also *Williams v. Kershaw*, 1 Kee. 274, n.; *Philanthropic Society v. Kemp*, 4 Beav. 581); or as Lord Cottenham has expressed himself, "The rule of the Court adopted in all such cases is, to appropriate the fund as if no legal objection existed as to applying any part of it to the charity legacies; then holding so much of the charity legacies to fail as would, in that way, be to be paid out of the prohibited fund:" *Williams v. Kershaw*, 1 Kee. 275, n.; see also *Waite v. Webb*, 6 Madd. 71; *Johnson v. Lord Harrowby*, Johns. 425; *Jauncey v. The Attorney-General*, 3 Giff. 308; *Scott v. Forristall*, 10 W. R. (V. C. S.) 37; and this apportionment should be made according to the respective values of the pure and impure personalty at the testator's death: *Calvert v. Armitage*, 2 N. R. (V. C. W.) 60, overruling on this point *Robinson v. The Governors of London Hospital*, 10 Hare, 19.

In a singular case, where executors were directed to purchase a presentation to Christ's Hospital, the result of the rule against marshalling assets for a charity was, that the bequests failed altogether, there not being sufficient money from the pure personalty alone to affect the purchase; *Cherry v. Mott*, 1 My. & Cr. 123.

Although a court of equity will not marshal assets for charitable legacies, a testator may in effect himself marshal or arrange his assets, by directing his charitable legacies to be paid exclusively out of his pure personalty, and the court will, as it is not illegal, give effect to his intention: *Robinson v. Gelhard*, 3 Mac. & G. 735; *Sturge v. Dimsdale*, 6 Beav. 462. See however, *The Philanthropic Society v. Kemp*, 4 Beav. 581; *Nickisson v. Cockill*, 32 L. J. (N. S.) Ch. 753; *Wigg v. Nicholl*, 20 W. R. (M. R.) 738; 14 L. R. Eq. 92.

And it seems that where a testator has charged his real estate with payment of his debts and has directed his charity legacies to be paid out of his pure personalty, the charity legatees will have a right to stand in the place of creditors who may have exhausted the pure personalty, inasmuch as it is not the Court, but the testator who in such cases marshals the assets: *Attorney-General v. Lord Mountmorris*, 1 Dick. 379.

Although the testator may have directed his charitable legacies to be

[*105] paid out of his pure personalty *in priority of other legacies, if he has given no direction as to the funds out of which his debts and funeral and testamentary expenses are to be paid, the pure personal estate must contribute with the other personal estate to their payment, before it can be applied in satisfaction of the charitable legacies. See *Tempest v. Tempest*, 7 De G. Mac. & G. 470, where Lord Cranworth, C., overruled the decision of Sir W. Page Wood, V. C., reported 2 K. & J. 635.

It seems that the rule of the Courts of equity in England, which will not allow marshalling in favour of legacies given to charities, is not applicable to India: *Macdonald v. Macdonald*, 20 W. R. (V. C. B.) 739; 14 L. R. Eq. 60.

Marshalling Securities.—The doctrine of *marshalling* is not confined to the administration of assets; but it is applied to other cases, where the parties are living. Thus, it has been laid down, that “if a person, who has two real estates, mortgages both to one person, and afterwards only one estate to a second mortgagee, who had no notice of the first, the Court, in order to relieve the second mortgagee, has directed the first to take his satisfaction out of that estate only which is not in mortgage of the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgagee, even though the estates descended to two different persons:” per Lord Hardwicke, C., in *Lanoy v. Duke of Athol*, 2 Atk. 446. This seems to be a correct exposition of the law, with this exception, that it seems to be immaterial whether the second mortgagee has notice of the first mortgage or not: see also *Baldwin v. Belcher*, 3 D. & War. 176; *Hughes v. Williams*, 3 Mac. & G. 690; *In re Cornwall*, 2 C. & L. 131; 3 D. & War. 173; *Tidd v. Lister*, 10 Hare, 157; 3 De G. Mac. & G. 857; *In re Fox*, 5 Ir. Ch. Rep. 541; *Gibson v. Seagrim*, 20 Beav. 614; and see and consider *In re Jones, a Minor*, 2 Ir. Ch. Rep. 544; *Heyman v. Dubois*, 13 L. R. Eq. 158.

And if one of two estates in mortgage is subject to a portion, the person entitled to the portion may, if it be necessary, compel the mortgagee to resort to the other estate, so that the payment of the portion as well as the mortgage may be worked out: *Lord Rancliffe v. Parkyns*, 6 Dow, 216.

And estates comprised in one mortgage will be marshalled in favour of a voluntary settlement, so as to throw the debt on the unsettled estates. Thus, in *Hales v. Cox*, 32 Beav. 118, A. B. executed a voluntary settlement of real estate to uses in favour of his four children, and he covenanted that the estate should remain to those uses and for quiet enjoyment. A. B. afterwards mortgaged the *settled estate* [*106] *his own unsettled estates*, and died. It was held by Sir John Romilly, M. R., that the children were entitled to throw the mortgages on the unsettled estate, and as against the legatees to prove under the

covenants against the settlor's assets for the damage they had sustained by the mortgage. "It is clear," said his Honor, "that the persons who take under the voluntary settlement would, as regards the subsequent mortgages, not only take the property subject to these mortgages, but the mortgages ought, by marshalling, to be thrown as much as possible on the unsettled property, so as to liberate the settled property from the mortgage. If, by these means, the settled property will not be altogether freed from the mortgages, then I think that the persons who are entitled to the benefit of the covenants for quiet enjoyment contained in the settlement have a right to prove against the assets of the settlor for the amount to which they have been damaged, by reason of his subsequently mortgaging the settled property; that is, after providing for the testator's debts, they are entitled to priority over the legatees." See the remarks, on this case, by Christian, L. J., in *Ker v. Ker*, 4 I. R. Eq. 15, reversing *S. C.*, 3 I. R. Eq. 489.

The right to marshal securities is applicable as against a surety to whom, on payment of the debt, they have been assigned. Thus, in *South v. Bloxam*, 2 Hem. & Mill. 457, there was a mortgage of two funds to A. with a covenant by a surety. This was followed by a second mortgage of one of the funds to B. B.'s fund having been exhausted in part payment of A.'s debt, and A.'s mortgage having been transferred to the surety on payment by him of the balance, it was held by Sir W. Page Wood, V. C., that B. had a right to marshal the securities against the surety.

In the case of *The Solicitors and General Life Assurance Society v. Lamb*, 2 De G. Jo. & Sm. 251, a policy of life assurance contained a provision that, if the assured should die by his own hand, the policy should be void, except to the extent of interest acquired therein by actual assignment by deed for valuable consideration, or as security or indemnity, or by virtue of any legal or equitable lien as security for money. The assured assigned this policy by deed, by way of mortgage to secure an amount far exceeding the sum assured, the security including also real estates of considerable value. The assured afterwards died by his own hand. The office paid to the mortgagee the sum assured, and then filed a bill claiming to have the mortgage debt thrown primarily on the real estate comprised in the security, or at least to have it apportioned between the policy money and the estates according to their values, and to have the whole or the apportioned part of the policy moneys raised out of those estates [*107] and repaid. It was held by the Lords Justices of the Court of Appeal, affirming the decision of Sir W. Page Wood, V. C., (reported 1 Hem. & Mill. 716), that (apart from the question as to the effect of the payment by the office) the office had no equity against the real estates comprised in the mortgage.

Marshalling not enforced to the prejudice of third parties.—But marshalling will not be enforced to the prejudice of a third party. Thus, in *Averall v. Wade*, L. & G. t. Sugd. 252, where a person, being seised of several estates, and indebted by judgments, settled one of the estates for valuable consideration, with a covenant against incumbrances, and subsequently acknowledged other judgments, it was contended, by the subsequent judgment-creditors, that, as they only affected the unsettled estates, on the principle in *Aldrich v. Cooper*, as they had only one fund, they had a right to compel the prior judgment-creditors, who had two funds,—the settled and unsettled estates,—to resort to the settled estates; or, at any rate, that the settled estates ought to contribute to the payment of the prior judgments. Lord Chancellor Sugden, however, held that the subsequent judgment creditors had no equity to compel the prior judgment-creditors to resort to the settled estates: on the contrary, that the prior judgments should be thrown altogether on the unsettled estates, and that the subsequent judgment-creditors had no right to make the settled estates contribute; observing, after a close examination of *Aldrich v. Cooper*, that, upon the whole of the case, you will find Lord Eldon, in the application of the principle, “*carefully avoids dealing with the rights of third persons intervening.*” So, in *Barnes v. Racster*, 1 Y. & C. C. C. 401, Racster being seised of Foxhall Coppice, and a piece of land marked in a plan of the estate No. 32, mortgaged, in 1792, Foxhall to Barnes; in 1795, Foxhall to Hartwright; in 1800, Foxhall and No. 32 to Barnes; and in 1804, Foxhall and No. 32 to Williams; the subsequent incumbrancers took with notice. It was held, by Sir J. L. Knight Bruce, V. C., that the Court ought not, as against Williams, to marshal the securities. His Honor said, that, circumstanced as the case was, Hartwright and Williams stood, with regard to the matter in dispute, on an equal footing; that Barnes ought to be paid out of the respective proceeds of No. 32, and Foxhall, *pari passu* and rateably, according to their amounts; that the residue of the proceeds of Foxhall ought to be applied towards paying Hartwright, and that the residue of the produce of No. 32 ought to be applied towards paying Williams: [*108] a conclusion, as he *considered, entirely in accordance with the principles on which *Lanoy v. Duchess of Athol*; *Aldrich v. Cooper*, and *Averall v. Wade*, were decided. See also *Bugden v. Big-nold*, 2 Y. & C. C. C. 377; *Gibson v. Seagrim*, 20 Beav. 618; *Stronge v. Hawkes*, 4 De G. & Jo. 632; *In re Lawder's Estate*, 11 I. Ch. R. 346. *In re Rorke's Estate*, 15 Ir. Ch. Rep. 316; *Dolphin v. Aylward*, 4 L. R. Ho. Lo. 486; *In re Mower's Trusts*, 8 L. R. Eq. 110.

It has, however, been held in Ireland, that a first judgment mortgage creditor has a right to marshal, as against a second judgment mortgage creditor. See *In re Lynch's Estate*, 1 I. R. Eq. 396; in this case there was first a mortgage by deed, of lands A. and B.; secondly,

in 1856, two judgments registered as mortgages under the Judgment Mortgage Act, 1850, against the A. lands; and thirdly, in 1857, a judgment registered as a mortgage against the entirety of the lands A. and B. The mortgagees having sold applied in payment of their debt the whole of lands A., it was held by Dobbs, J., that the two judgment creditors of 1856 had a right to marshal as against the judgment creditor of 1857. "The judgment mortgage creditors of 1856," said his Lordship, "stand, with regard to the judgment mortgage creditor of 1857, in the same position as if they were mortgagees under a deed, whereas the latter is, as to them, in the position of an old judgment-creditor, and in no better position. Suppose there were, first, a charge affecting the whole of certain lands; next, a mortgage of a portion; next, a judgment affecting the whole; would the mortgagee have a right to marshal as against the judgment-creditor? I consider it a settled principle that he would, and that the judgment-creditor has no equity which he could set up to prevent him from doing so. I therefore rule that these judgment-creditors have a right to be paid in priority to the judgment mortgage creditor of 1857."

Marshalling in Bankruptcy.—The doctrine also has been carried to a great extent in bankruptcies; "for," as observed by Lord Eldon, in the principal case, "a mortgagee whose interest in the estate was affected by an extent of the Crown, has found his way, even in a question with the general creditors, to this relief, that he was held entitled to stand in the place of the Crown, as to those securities which he could not affect per directum, because the Crown affected those in pledge to him;" and see *Sagitary v. Hide*, 1 Vern. 455.

In *Ex parte Stephenson*, De Gex, 589, a tenant mortgaged some personal chattels, and being in possession of those and also other personal chattels, the landlord *distraigned for rent upon both sets of [*109] chattels. The person in possession under the distress was requested by the mortgagee, and consented, to hold possession of the goods, or at least of the mortgaged goods, for him as well as the landlord, without prejudice to the landlord's rights. The tenant then became bankrupt, and after the bankruptcy the landlord's demand was satisfied by means of a sale of goods, some if not all of which were subjected to the mortgagee's security, whilst some or all of the goods to which the security did not extend remained unsold. It was held by Sir J. L. Knight Bruce, V. C., that the mortgagee was entitled to stand in the place of the landlord, and to be paid the amount of his mortgage debt out of the proceeds of the goods taken under the distress which were not comprised in his security. "The disputed point," said his Honor, "is upon the mortgagee's claim to apply against the assignees the doctrine of marshalling; he asserting, and they denying, that, as between him and them, such of the goods seised as were not included in his security were the portion of them first applicable to pay the landlord's

demand; and that, consequently, the mortgagee is entitled, against the assignees, to be placed substantially in the same situation as if the landlord had regulated his proceedings in conformity with that title. I have considered the point, and my doubt has been removed. The doctrine and rules recognised by Lord Eldon in *Aldrich v. Cooper*, seem to me to reach this case, which, if new in specie, is not so, I think, generally. Fraud and reputed ownership being out of the question, the assignees and the bankrupt are here one, so that no fourth persons have right to intervene; and the ordinary course, where the first creditor has two funds of a debtor whose second creditor has but one, seems the right course on this occasion.

“The simple case of a person having lent or entrusted goods to a man whose landlord distrains for rent, both on those goods and also on the proper goods of the tenant, may be thought to exhibit, possibly, more strikingly than the present, a necessity in point of reason and justice for judicial interference, but does not, I suppose, in substance differ from it. The mortgagee being, I think, right in this contention, I must direct the principle of marshalling to be applied between him and the assignees accordingly.” See also *Broadbent v. Barlow*, 30 L. J. (N. S.) Ch. 569; 3 De G. F. & Jo. 570.

In *Ex parte Alston*, 4 L. R. Ch. App. 168, a firm in Ceylon employed a firm in England as their agents and factors, and the course of the business was that the Ceylon firm consigned cargoes of coffee to the English [*110] firm for sale on their account, and drew bills on the English firm against the consignments. Consignments of coffee having been made in this manner, and bills accepted by the English firm against them, the English firm pledged the coffee (which belonged to the Ceylon firm), together with certain securities of their own, with T., their broker, to secure a large debt due from them to him. The English firm became insolvent, and executed a creditors' deed under the Bankruptcy Act, 1861; and then T. sold the coffee (which produced more than sufficient to cover the bills drawn against it, and enough of the other securities to satisfy his debt, and still held securities of the English firm in his hands. It was held by the Court of Appeal in Chancery that the Ceylon firm were entitled, as against the creditors of the English firm, to have the securities marshalled, so as to have a lien on the securities of the English firm remaining in the hands of T., for the balance due to them in respect of the consignments of coffee. See, also, *In re Westzynthus*, 5 B. & Ad. 817; *Broadbent v. Barlow*, 3 De G. F. and Jo. 570.

Marshalling by the Court of Admiralty.—The equitable doctrine of marshalling is put in force by the Court of Admiralty. Thus, in a case where there are several bonds, and one is secured on the ship and freight, and another upon the ship, freight, and cargo, the bond-holders who have a charge on the cargo, will not be allowed to disappoint the

other bond-holders who have none thereon, but will be compelled to resort to the security against their ship and freight. The *Trident*, *Simson*, 1 W. Rob. 29, 35; *La Constancia*, 2 W. Rob. 404, 406; *The Arab*, 5 Jur. N. S. 417; *The Edward Oliver*, 1 L. R. Ad. 379; and the note to *The Gratitude*, L. C. Merc. L. 68, 69, 2nd ed.

The aim of a court of equity, as it regards the payment of debts, is equality—that the assets shall be so distributed as to satisfy all the creditors (*Torr's Estate*, 2 Rawle, 250, 252), and a creditor will not be allowed arbitrarily to defeat this rule, by throwing the whole burden on a particular fund. This results from the dictate of natural justice, that where there is enough for all, it shall be so distributed as to give each his due. A creditor who has two funds open to him, while another creditor has but one, obviously should not take the latter fund without placing the fund which is exclusively within his reach, at the disposal of the creditor whom he has deprived of the means of payment. And, if he neglects or refuses to fulfil this duty, it may be enforced by a decree of subrogation, “The principle on which a court of equity proceeds in marshalling assets,” said Marshall, C. J., in *Alston v. Mumford*, 1 Brockenborough, 266, “is that a creditor having his choice of two funds, ought to exercise his right of election in such a manner as not to injure other creditors, who can resort to only one of these funds. But if, contrary to equity, he should so exercise his legal rights as to exhaust the fund to which alone other creditors can resort, then those other creditors

will be placed by a court of equity in his situation, so far as he has applied their funds to the satisfaction of his claim.”

At common law, creditors by specialty have a right of recourse against the real estate of a deceased debtor, while simple contract creditors were confined to the personal estate. Hence if the specialty creditors exhaust the personal assets, the simple contract creditors will be substituted for them as against the land. *Tinsly v. Oliver*, 5 Munford, 419; *Chase v. Lockerman*, 11 Gill & Johnson, 185; *Gibson v. M'Cormick*, 10 Id. 65; *Haydon v. Goode*, 4 Heming & Munford, 461; *Cralle v. Meems*, 5, Grattan, 96; *M'Gaw v. Huffman* 12 Id. 628. In like manner, a mortgage given to secure a particular creditor, may, in the event of a deficiency of the personal estate, be enforced by the executor against the heir or devisee for the use of the other creditors, or to reimburse himself; *Torr's Estate*, 2 Rawle, 250, 254. The principle is the same where land which has been bought by the testator during his life, is paid for out of the assets of the estate, and the creditors will then be subrogated to every remedy that could have been enforced by the vendor; *Alston v. Mumford*.

The necessity for the application of the rule in the administration of assets after death, has ceased to exist in England and throughout the greater part of the United States; *Torr's Estate*, 2 Rawle, 250, 254; *ante*, 247; *Adams' Equity*, 275. For as lands are now assets for the payment of all debts, and the simple contract creditors can have recourse to both funds, there is no reason for confining the specialty creditors to one. In *Torr's Estate*, Gibson, C. J., said, that "where the personal estate is deficient, a court of equity compels a specialty or mortgage creditor to obtain satisfaction from the land; that the personal creditors may have all the benefit to be drawn from the personal assets consistently with entire satisfaction of the mortgage debt, *because at common law they are shut out from the land*. Now, it is obvious, that the foundation of their equity in England, fails here; the land being liable at law, as an auxiliary fund, to all sorts of debts, whether specifically charged on it or not; there is, therefore, no room for equitable interference on the ground of legal inequality. It is true, that the general creditors have not the same advantage in respect of priority as the mortgagee, who has a specific lien. Should he, however, elect to take satisfaction out of the personal assets, the land would be disencumbered *pro tanto*, and its capacity to afford satisfaction to the general creditors, proportionally increased."

In like manner, the assets may be marshalled for the purpose of throwing the burden of debts which have been specifically charged on land, where it must ultimately rest. "To avoid circuity of suit, a court of equity permits, and sometimes requires, a creditor who has two funds to resort to for payment of his debt, to proceed at once against the primary fund, without subjecting the owners of the secondary fund to useless litigation. Where the testator, therefore, has charged his real estate, or any part of it, with the payment of his debts, in exoneration of his personalty, the creditors may come at once into this court, to obtain satisfaction of such debts out of such primary fund; although they may have a perfect remedy at law, against the personal estate in the hands of the executors;" *Smith v. Wykoff*, 11 Paige, 5.

In Pennsylvania lands have been liable to be taken in execution, and sold as chattels from the earliest period of colonial history. It is one of many instances in which America has led the way in the path of legal reform. The change did not take place in England until the reign of William IV. When it occurred, the necessity of marshalling assets in aid of simple contract creditors passed away; *Adams' Eq.* 275, *ante*. But it may still be requisite to throw the burden of debts on the land, in order to leave the personal estate free for the discharge of pecuniary and specific

legacies; *Wilcox v. Wilcox*, 13 Allen, 252; *Mollan v. Griffith*, 3 Paige, 402.

The right to charge the land depends on the inadequacy of the personal assets. If these are sufficient, the personal property of the testator is the primary fund for the payment of debts and legacies; *Torr's Estate*, 2 Rawle, 250, 254. If a mortgage creditor proceeds against the land, the heir or devisee is *prima facie* entitled to reimbursement out of the personal estate; *Chase v. Lockerman*, 11 Gill & J. 185; *Walker's Estate*, 3 Rawle, 229, *post*.

A chancellor will not refuse to marshal the assets because the means are circuitous; *Neff v. Miller*, 8 Barr, 347. If the personal estate is inadequate, a creditor who has a direct or indirect right of recourse to the land, will be compelled to use it for his own benefit, or leave it open to the other creditors. In *Cralle v. Meems*, 8 Grattan, 496, the testator had given a bond to indemnify an endorser, and the holder of the note was allowed to stand in the place of the indorser, and be paid as a creditor by specialty out of the real assets, although the endorser had not been compelled to pay the note. The court relied on the principle that securities given for the protection of a surety may be enforced by the creditor, vol. 1, 174.

The principle is beneficially applied to promote equality in the distribution of assets, by refusing creditors who have a legal remedy the aid of a chancellor, until the creditors, whose only recourse is to

the equitable assets, have received a due proportion of their demands; *Purdy v. Doyle*, 1 Paige, 558; *Wilder v. Keeler*, Id. 168. "If there are both legal and equitable assets to be administered, although this court cannot deprive a creditor of his legal preference, over creditors of a different class, as to the legal assets; yet, if he has been partially paid out of such assets, he will not be permitted to receive any share of the equitable assets until the other creditors have received sufficient to put them upon an equality with him. And when that object has been accomplished, all the creditors will be entitled to come in upon the assets which remain, for the payment of the residue of their debts ratably; *Morrice v. The Bank of England*, Cases Temp. Talbot, 220;" *Wilder v. Keeler*.

It has been held in analogy to this principle, that where property has been assigned for the payment of debts, or is in the hands of a bankrupt or insolvent assignee for distribution, a creditor who has a mortgage or other collateral security, is not entitled to a dividend on the whole amount of his debt, but on so much only as is not covered by the security. Such is the established rule in bankruptcy in England, 1 Story Eq. 633, and it has been adopted in the bankrupt law of the United States. It is also followed in Massachusetts in the distribution of insolvent estates during the life of the debtor or after his decease; *Farnum v. Boutelle*, 13 Metcalf, 159, and the authorities in New Jersey and Iowa are

to the same effect; *Wurtz v. Hart*, 13 Iowa, 515; *Bell v. Fleming*, 1 Beasley, 13, 499.

This conclusion has been rejected in Pennsylvania, on the ground that as property, of whatever kind, may be taken in execution in the ordinary course of law, the distinction between legal and equitable assets does not exist; *Shunk's Appeal*, 2 Barr, 304; *Kittera's Estate*, 5 Harris, 416; *Morris v. Olwine*, 10 Id. 44. A creditor who is secured by bond and mortgage, may consequently prove the whole amount of the debt before an assignee for the benefit of the creditors, or in the distribution of an insolvent estate, unless the sums received from both funds will together exceed the amount due; *Kittera's Estate*; *Morris v. Olwine*. "Estates," said Krause, J., in *Shunk's Appeal*, "are held to be equitable assets in chancery, which are made subject to the payment of debts by the act of the debtor; and which, without his act, are not answerable for such purpose. The instrumentality of that court is necessary to their distribution; and this it always withholds from creditors who refuse to bring into hotchpot what they may have received out of legal assets, on the principle that equality is equity. But equity follows the law, and adopts the rules of the courts of law, wherever estates are made legal assets by statute; and then it enforces claims, charges, and antecedent liens *in rem*, according to their priorities, whether or not those claims, charges, &c., or the assets,

be legal or equitable; 1 Story, Eq. 520, 524. Now, all the debtor's property in Pennsylvania is a legal fund for the payment of demands upon him; his chattels are so at common law, and his lands are expressly made so by statute; in which case it is seen that equity follows the law. It is not conceived, therefore, that this principle in equity of enforcing equality in distributions is applicable here; nor that the other principle is applicable, which seems to result from the doctrine of marshalling securities. It is true that whenever it can justly be done in this State, creditors are so placed by the courts as to restrain those who have a claim on two funds from taking away all the chance another may have on one of them of obtaining satisfaction; but there is no principle which takes from a creditor any part of his security until he is completely satisfied; 19 Johns. Rep. 493; and, consequently, if the lien creditors here have a right at all to come on the personal property, they have it without going into hotchpot, or surrendering part of their real estate securities. As between them and the other creditors, the principle of either marshalling assets or securities is inoperative, and can only be applied in case of a contest for a surplus beyond the amount of encumbrances between the assignor and creditors, who are not secured by liens. Here, however, there is not a surplus, but a deficiency.

"That the lien creditors have a right *pari passu* with the

other creditors to come on the personal fund for a *pro rata* share, can scarcely be disputed. A mortgage is but a collateral security for the debt of the mortgagor on the original contract. The mortgagee is entitled to be paid out of the personal fund; *Ram. on Assets and Debts*, 356; and so of judgments, which, although they merge all minor securities, work no dissolution of the debt as a personal obligation."

It is held in like manner in some of the other States, that in the distribution of an insolvent estate by an administrator or assignee, no deduction or abatement is to be made for collateral securities, unless their value, or the amount realized from them, together with the dividend, exceeds the amount of the debt; *Findley v. Hosmer*, 2 Conn. 339; *West v. The Bank of Rutland*, 19 Vermont, 103; *Jarvis v. Smith*, 7 Abbott, 217; *Logan v. Anderson*, 18 B. Monroe, 114; *Moss v. Ranlet*, 2 New Hamp. 488.

The rule that a creditor who has a double remedy, shall not arbitrarily disappoint another creditor who has but a single means of obtaining payment, applies during the lifetime of the debtor, as well as in his administration of his estate after death, and is constantly invoked for the protection of an incumbrancer who has only one fund open to him, against a paramount incumbrancer who has the power of recourse to two; *The New York Steamboat Co. v. The New Jersey Co.*, 1 Hopkins, 460; *Hawley v. Mannus*, 7 Johnson,

Ch. 174, 184. "It is well settled, that where a party has two funds from which he can satisfy his debt, and another creditor has a lien posterior in point of time on one of the funds only, the first creditor will be compelled to resort to that fund which the junior creditor cannot touch, in order that the junior creditor may avail himself of his only security;" *Evertson v. Booth*, 19 Johnson, 486, 492; *Ziegler v. Long*, 2 Watts, 205.

The right of the paramount incumbrancer is so far absolute, as it regards both funds, that he should not be delayed or hindered in any step that may be requisite for the collection of the debt; *Ramsey's Appeal*, 2 Watts, 228, 232; *Briggs v. The Planters' Bank*, 1 Freeman, Ch. 574; *Westervelt v. Hass*, 2 Sandford, Ch. 98; *Brinkerhoff v. Marvin*, 5 Johnson, Ch. 328; *Woolcocks v. Hart*, 1 Paige, 185; *Evertson v. Booth*, 19 Johnson, 486, 493; *Herriman v. Skillman*, 33 Barb. 378. He will not, therefore, ordinarily be confined to the fund which is exclusively within his reach, nor shut out from that which is subject to the lien of the puisne incumbrance; *Herriman v. Skillman*, *Neff's Appeal*, 9 W. & S. 36. But his election to take the latter fund in execution, will render it incumbent on him to place so much of the former as he does not need, at the disposal of the party whom he has deprived of the means of payment; *Herri-man v. Skillman*.

Such a case may arise where two or more tracts of land are subject to the lien of a judgment, and one

of them is subsequently mortgaged to a third person.

Under these circumstances the judgment creditor is within the maxim *sic utere tuo ut alienum non lædas*; *Kyner v. Kyner*, 6 Watts, 224; *Ramsey's Appeal*, 2 Id. 228; *The Silver Lake Bank v. North*, 4 Johnson, Ch. 370; see *Morris' Appeal*, 6 P. F. Smith, 76; *Hastings' Case*, 10 Watts, 303, 305. He may resort at pleasure to either tract, or proceed simultaneously against both; *Chapman v. Hamilton*, 19 Alabama, 12; *Logan v. Anderson*, 18 B. Monroe, 118. But his right in this regard is subject to two restrictions; one that he shall not knowingly do any act that will enable the debtor to place his property beyond the reach of the mortgagee; the other, that on being paid in full, he will assign the judgment to the mortgagee, or allow it to be used for his benefit.

In like manner, a mortgagee will not be allowed arbitrarily to disappoint a judgment creditor. The doctrine was defined by Chancellor Kent, with his accustomed clearness, in *Cheesebrough v. Millard*, 1 John. Ch. 409. There Smith mortgaged a lot in Balston as security for a debt, and afterwards gave another mortgage on a lot in Waterford for the same debt. He sold the Balston lot, and a judgment was subsequently obtained against him which became a lien on the property in Waterford. The mortgagee entered into an arrangement with the purchaser of the lot in Balston, by which it was exonerated from the lien of the first mortgage. It was con-

tended that he had thereby disabled himself from enforcing the second mortgage to the detriment of the judgment creditor. The principle was fully recognized by the Chancellor, although he held that it did not apply to the case in hand, because there was no evidence that the mortgagee was aware of the existence of the judgment.

"I admit," said he, "as a principle of equity, that if a creditor has a lien on two different parcels of land, and another creditor has a lien of a younger date on one of these parcels only, and the prior creditor elects to take his whole demand out of the land on which the junior creditor has a lien, the latter will be entitled either to have the prior creditor thrown upon the other fund, or to have the prior lien assigned to him, and to receive all the aid it can afford him. This is a rule founded in natural justice, and I believe it is recognized in every cultivated system of jurisprudence. In the English law, it is an ordinary case, that if a party has two funds, he shall not, by his election, disappoint another who has one fund only, but the latter shall stand in the place of the former, or compel the former to resort to that fund which can be affected by him only; *Sagitary v. Hyde*, 1 Vern. 455; *Mills v. Eden*, 10 Mod. 488; *Attorney-General v. Tyndall*, Amb. 614; *Aldrich v. Cooper*, 8 Ves. 388, 391, 395; *Trimmer v. Baine*, 9 Id. 209. The party liable to be affected by this election, is usually protected by means of substi-

tution. Thus, for instance, if a creditor to a bond exacts his whole demand of one of the sureties, that surety is entitled to be substituted in his place, and to a cession of his rights and securities, as if he was a purchaser, either against the principal debtor or the co-sureties. The doctrine of substitution, which is familiar to the civil law, (Dig. 46, 1, 17 and 36; Volt. h. t. s. 27, 29, 30), and the law of those countries in which that system essentially prevails. (Pothier's *Traite des Oblig.* n. 275, 280, 427, 519, 520, 522; Kaim's *Equity*, vol. 1, 122, 125; Hub. *Prælec. Inst. lib.* 3 tit. 21, n. 8), is equally well known in the English chancery. In the case *Ex parte Crisp*, 1 Atk. 133, Lord Hardwicke said, that where the surety paid off a debt, he was entitled to have from the creditor an assignment of the security, to enable him to obtain satisfaction for what he had paid beyond his proportion; and in *Morgan v. Seymour*, 1 Ch. Rep. 64, the court decreed, that the creditor should assign over his bond to the two sureties, to enable them to help themselves against the principal debtor. To apply, then, the general principle to the present case, if the first mortgage had not been discharged, and the mortgagee had chosen to enforce the payment of the whole first instalment from the lands covered by the second mortgage, to the loss, perhaps, of the lien of the judgment creditor by the consumption of the subject, that creditor, and probably the purchaser under the judgment, would have been

entitled, either to have turned him from the path he had taken, or to the aid of the first mortgage, to recover a proportional indemnity from the other lands covered by that mortgage. But there is no evidence, or even ground for presumption, that either Marvin or Millard, the owners of the mortgages, knew of the existence of the judgment when the arrangement was made and carried into effect. They were not bound to search for the judgment, and the record was no constructive notice of them; and as this rule of substitution rests on the basis of mere equity and benevolence, the creditor who has thus disabled himself from making it, is not to be injured thereby, provided he acted without knowledge of the others' rights, and with good faith and just intention, which is all that equity in such a case requires. (Pothier's *Traite des Oblig.*, No. 520.) "The other debtors and sureties," to adopt the observations of Pothier, "might, as well as the creditor, have taken care of the right of hypothecation, which he has lost; they might summon him to interrupt, at their risk, the third purchasers, or to oppose the decree. It is only in the case where they have put the creditor in default, that they may complain that he has lost his hypothecation."

It is well settled, in accordance with these principles, that a lien creditor cannot capriciously defeat subsequent creditors whose liens are more restricted than his own; and that they will, on the

contrary, be protected by confining him before satisfaction, to the fund which is beyond their reach; *Warren v. Warren*, 30 Vermont, 533; *Goss v. Lester*, 1 Wisconsin, 43; *The United States Ins. Co. v. Shriver*, 3 Maryland, Ch. 82; or by substituting them in his place after he has been paid in full; *Besley v. Lawrence*, 11 Paige, 581; *Hunt v. Townsend*, 4 Sandford, Ch. 570; *Hawley v. Mancius*, 7 Johnson, Ch. 174; *Evertson v. Booth*, 19 Johnson, 486; *The N. Y. Ferry Co. v. The N. J. Co.*, 1 Hopkins, 460; *Besley v. Lawrence*, 11 Paige, 511; *Hunt v. Townsend*, 4 Sandford, Ch. 570; *Averill v. Loucks*, 6 Barb. 470; *Ingalls v. Morgan*, 10 New York, 178. The same doctrine prevails in Pennsylvania, and generally throughout the United States, although it is ordinarily administered through a decree of subrogation, unless both funds are so directly before the court or under its control, that an injunction will not result in delay, or inconvenience the creditor. See *The United States Ins. Co. v. Shriver*, 3 Maryland, Ch. 382; *Nelson v. Dunn*, 15 Alabama, 517; *Ramsey's Appeal*, 2 Watts, 228; *Hastings's case*, 10 Id. 303; *Bruner's Appeal*, 7 W. & S. 269; *Fassett v. Traber*, 20 Ohio, 540; *Hannegan v. Hannah*, 7 Blackford, 353; *House v. Thompson*, 3 Head. 512; *Pallen v. The Agricultural Bank*, 1 Freeman, Ch. 419; *Briggs v. The Planters' Bank*, Ib. 575; *Williams v. Washington*, 1 Dev. Ch. 137; *Goss v. Lester*, 1 Wisconsin, 43; *Kendall v. The New England Co.*, 13 Conn. 394;

Thompson v. Murray, 2 Hill, Ch. 10.

It results from the same rule, that where a judgment which has been entered in two counties, is enforced to the prejudice of a subsequent creditor, who has a lien in only one, the latter may be subrogated to the paramount judgment in the other county. *M'Devitt's Appeal*, 20 P. F. Smith, 373. See *M'Ginnis' Appeal*, 4 Harris, 445. So a creditor may, where the exigency of the case requires it, be compelled to proceed in the first instance on a mortgage without the State, in order to leave land within the State open for the payment of junior liens; *The Y. & J. Steamboat Co. v. The Jersey Co.*, 1 Hopkins, 461. But as it regards property beyond the State, the relief will generally not go beyond a decree of subrogation, on the payment of the debt; *Woolcocks v. Hart*, 1 Paige, 185. See *Hays v. Ward*, 4 Johnson, Ch. 123.

The nature of the property which constitutes the double fund, does not affect the operation of the principle; and it applies wherever a paramount creditor holds collateral security, or can resort collaterally to other real or personal estate for the satisfaction of the debt; *Depeyster v. Hildreth*, 2 Barb. Ch. 109; *Goss v. Lester*, 1 Wisconsin, 43; *Geller v. Hoit*, 7 Howard, Pr. R. 265; *Ingalls v. Morgan*, 12 Barb. 578; 6 Selden, 178; *Herbert v. The M. & L. Association*, 2 C. E. Green, 496. In *Depeyster v. Hildreth*, a creditor had a prior judgment lien on premises which were mortgaged to the com-

plainant. He subsequently levied on the personal property of the mortgagor, to an amount sufficient to pay the debt; and it was held, that the withdrawal of the levy gave the mortgage priority over the judgment. In like manner, where land, bound by the lien of a judgment, was sold, and the notes given for the price delivered to the judgment creditor, with an agreement that he should collect them and apply the proceeds to the payment of the judgment debt, the court held that he could not surrender the notes to the judgment debtor, without losing the right to proceed against the land in the hands of the purchaser; *Ingalls v. Morgan*.

The rule is sometimes said to rest on the natural equity and mere benevolence, which require every one to exercise his right in a way not to occasion a loss to others, which might be avoided without inconvenience to himself; *Kyner v. Kyner*, 6 Watts, 224; *Hastings' Case*, 10 Id. 303. This view is forcibly stated by Story, in the following passage: "The general principle is, that if one party has a lien on, or interest in two funds for a debt, and another party has a lien on, or interest in one only of the funds for another debt, the latter has a right in equity to compel the former to resort to the other fund in the first instance for satisfaction, if that course is necessary for the satisfaction of the claims of both parties, whenever it will not trench upon the rights or operate to the prejudice of the party entitled to

the double fund. Thus, a mortgagee who has two funds, as against the other specialty creditors, who have but one fund, will, in the case of the death of the mortgagor, and the administration of his assets, be compelled to resort first to the mortgage security, and will be allowed to claim against the common fund only what the mortgage on a sale, consented to by him, is deficient to pay; *Greenwood v. Taylor*, 1 Russ. & Mylne, 185, 187. So, if A. has a mortgage upon two different estates for the same debt, and B. has a mortgage upon one only of the estates for another debt, B. has a right to throw A. in the first instance for satisfaction upon the security, which he, B., cannot touch, at least where it will not prejudice A.'s rights, or improperly control his remedies. *The York & New Jersey Steam, &c., Company v. The Associates of the Jersey Company*, Hopkins, Ch. R. 460; *Conrad v. Harrison*, 3 Leigh, R. 532. The reason is obvious, and has been already stated; for by compelling A., under such circumstances, to take satisfaction out of one of the funds, no injustice is done to him in point of security or payment. But it is the only way by which B. can receive payment. And natural justice requires that one man should not be permitted from wantonness, caprice, or rashness, to do an injury to another. In short, we may here apply the common maxim, *sic utere tuo ut alienum non lædas*; and still more emphatically the Christian maxim,

"Do unto others as you would they should do unto you;" Story Eq, sect. 633, c. 13.

It is said on the other hand, by a writer of considerable authority, that "the equity is not binding on the paramount creditor, for no equity can be created against him by the fact that some one else has taken an imperfect security. But it is an equity against the debtor himself, that the accidental resort of the paramount creditor to the doubly charged estate, and the consequent exhaustion of that security, shall not enable him to get back the second estate, discharged of both debts. If, therefore, the paramount creditor resorts to the doubly charged estate, the puisne creditor will be substituted to his rights, and will be satisfied out of the other fund to the extent to which his own may be exhausted; and it seems that he may, on proposing just terms, require the paramount creditor to proceed against the estate on which he has himself no claim. His right, however, to do this is not an independent equity against the creditor, but a mere incident of his equity against their common debtor; and, therefore, if the paramount claim is not chargeable on two funds, both belonging to the same debtor, but is merely due from two persons, one of whom is also indebted to separate creditors, there is no equity to compel a resort to one rather than to another, or to alter the consequences of the election which may be made; *Greenwood v. Taylor*, 1 R. & M. 185; *Mason v. Bogg*, M. & C. 443; *Ex parte*

Kendall, 17 Ves. 514; *Ex parte Field*, 3 M. D. & D. 95."

In *Miller v. Jacobs*, 3 Watts, 477, it was held to follow from these premises, that a creditor who has a lien on two funds, may throw the whole burden on one of them, to the exclusion of a junior encumbrancer, if the other fund is subject to encumbrances, which though posterior in date, are sufficient to absorb the whole, because the effect of such a course is merely to postpone one creditor to another, and it does not enable the debtor to get back the estate discharged of the lien.

The maxim *sic utere tuo ut alienum non lædas*, is of general but not of universal application. See Broom's Legal Maxims, 161; *Renells v. Bullen*, 2 New Hampshire, 532, 535. A man cannot acquire a right against another by his own act, nor restrict that other in the exercise of an antecedent right. "To constitute a violation of the maxim, there must be *injuria*, as well as *damnum*. There are many cases in which a man may lawfully use his own property so as to cause damage to his neighbor, if it be not *damnum injuri osum*;" *Acton v. Blundell*, 12 M. & W. 324, 341. "It may be true, said Lord Tenterden, in *Wyatt v. Harrison*, 3 B. & Ad. 871," that if my land adjoins that of another, and I have not by building increased the weight upon my soil, and my neighbor digs in his land so as to occasion mine to fall in, he may be liable to an action. But if I have laid an additional weight upon my land, it does not follow

that he is to be deprived of the right of digging his own ground, because mine will then become incapable of supporting the artificial weight which I have laid upon it." Or as the rule was stated by Baron Alderson, in *Partridge v. Scott*, 3 M. & W. 220, "one has no right to load his own soil so as to make it require the support of that of his neighbor, unless he has some grant to that effect." Such, also, are the authorities in the United States; *Huston v. Hancock*, 12 Mass. 220; *Panton v. Holland*, 17 Johnson, 92; *Callender v. Marsh*, 1 Pick. 418, 434. A mortgage on land which is already incumbered, may be likened to the additional load spoken of by Alderson, and the comparison is so far just, that the mortgagee cannot require the paramount encumbrancer to refrain from enforcing his legal right, because the effect will be to sacrifice a security that might with time and nursing be adequate for the payment of both debts. But a right of action is not in all respects analogous to a right in possession, because the one requires the aid of the law, while the other is already perfect. The right of an encumbrancer is not one of absolute ownership; it is rather, as it regards subsequent liens, like that of a proprietor to take so much of the water of a stream that flows through his land, as may be requisite for his family and cattle, or the propulsion of a mill, suffering the residue to return to its natural channel. See *Wadsworth v. Tillotson*, 15 Conn. 366; *Parker v. Griswold*, 17 Id. 288. So a mortgagee

or judgment creditor is entitled to withdraw so much from the fund as may be requisite to satisfy the debt, but when that end is attained he has no further right. If he attempts to use his hold on the land as a means of obtaining a collateral or indirect advantage, he may be restrained by a chancellor, as in the common case of a forfeiture or penalty for non-payment. We may, therefore, infer that the right to marshal assets or securities in aid of a junior encumbrancer is not exclusively against the debtor. If it went no further, a paramount mortgagee of two estates, might stand neutral between a second mortgagee and a subsequent judgment creditor of the mortgagor. It is also an equity against the creditor, that he shall take no step whereby the debtor's obligation to his creditors may be impaired, or the lien of a junior encumbrancer arbitrarily postponed to one of later date; *Hasting's Case*, 10 Watts, 303; *M'Devitt's Appeal*, 20 P. F. Smith, 373. This view is measurably sustained by the opinion of Strong, J., in *The Delaware and Hudson Canal Company's Appeal*, 2 Wright, 512, 516. "It surely can no longer be doubted, that where a creditor has a lien upon two funds belonging to one creditor, and another debtor has a subsequent lien upon only one of them, the former is under obligation to exhaust first the fund upon which he has an exclusive lien before he can resort to the other. This obligation is founded upon the plainest principles of justice and equity. It is nothing

more than the obvious duty so to use one's own as not to injure another. It is an equally plain principle of equity, that if the paramount, creditor resorts to the doubly charged fund or property, the junior creditor will be substituted to his rights, and will be satisfied out of the other fund to the extent to which his own might be exhausted. This is an equity against the debtor himself, that the accidental resort of the paramount creditor to the fund doubly encumbered, shall not enable him to get back the other fund discharged of both debts. And being an equity against the debtor, it is of course equally such against his subsequent judgment creditors, who have no better rights than their debtor had at the time their judgments were entered. These principles are too familiar to justify any citation of authorities. Applying them to the case in hand, it is not doubted that the appellants are entitled to the subrogation for which they ask. When their mortgage was taken, they acquired against Thomas, the mortgagor, the right to have his other lands, not included in the mortgage, applied first to the payment of the four earlier judgments which were liens upon them. This right was not in the power of the mortgagor to defeat, by confessing judgments to other creditors, or by contracting subsequent debts, and when a portion of the mortgaged premises were sold, and the proceeds applied to the four paramount judgments, equity ceded those judgments to the mortgagees. True, they were discharged at law,

but payment does not of course discharge a judgment in equity. Indeed, there cannot be subrogation until the creditor is fully paid; for a right to subrogation is rather against the debtor than the creditor. The latter cannot be compelled to cede his claim while anything remains due upon it."

Where a lien creditor is entitled to marshal the assets as against the debtor, he will have the same right as against another creditor whose lien is subsequent in date to his own; *Herbert v. The M. & L. Association*, 2 C. E. Green, 296; *Ramsey's Appeal*, 2 Watts, 228, 232. It is a general if not an invariable rule, that a judgment creditor is subject to every equity that could have been enforced against the defendant in the judgment; *The N. Y. Life & Trust Co. v. Vanderbilt*, 12 Abbott, Pr. R. 458. The equity has its root in the obligation of the debtor, but is also an equity among the creditors that each shall, when it can be done without loss or inconvenience, so use his right that all may, as far as the circumstances admit, be satisfied in the order in which their liens severally accrued. A. has a paramount lien on two tracts of land, B. a lien on one of them, and C. a subsequent lien on both. If A. exhausts the tract which is the subject of B.'s lien, B. will be subrogated to A.'s lien on the other tract, although C. is thereby excluded from the fund; *The Delaware and Hudson Canal Company's Appeal*, 2 Wright, 512; *The New York Life & Trust Ins. Co. v. Vanderbilt*, 12 Abbott,

P. & R. 458. B. and C. are as creditors on the same footing, but as B.'s equity becomes fixed before C. acquires a lien, he is within the rule that as between equal rights that which is first in point of time shall prevail. See *Ingalls v. Morgan*, 6 Selden, 178; *De Peyster v. Hildreth*, 2 Barb. Ch. 109. Accordingly, where there are a paramount judgment creditor having a lien on two funds, a mortgagee having a subsequent lien on one of them, and a junior judgment creditor, whose lien took effect on both after the execution of the mortgage, the paramount judgment must be paid out of the fund which is not subject to the mortgage, the mortgagee is entitled to the surplus of the other fund, and the junior judgment creditor only to what remains after the prior judgment creditor and the mortgagee have both been satisfied; *The N. Y. Life & Trust Co. v. Vanderbilt*, 12 Abbott, P. & R. 458; *Herbert v. The M. & L. Association*, 2 C. E. Green, 495.

In *Ramsey's Appeal*, 2 Watts, 228, land which had been mortgaged was sold under a paramount judgment, which bound other land. The mortgagor died, and the claim of the mortgagee to be subrogated to the remedy of the administrator on the judgment, was resisted by the general creditors of the intestate. Gibson, C. J. said, "put it that the mortgagor had procured the paramount judgment creditor so to apply his lien as to exclude the mortgagee from the benefit of his security, would not common honesty have called on the court to

rescue their process from such abuse?" "The equity of the mortgagee is not less strong because the mortgagor acted of his own motion, and as it was valid against the mortgagor, so it is equally valid against those who have succeeded to his rights under the operation of the intestate law."

It is immaterial as regards the application of this principle, when the paramount lien creditor obtains the right of recourse to the fund which is beyond the reach of the second lien, if it be before the third lien creditor obtains a hold on either fund. A. has a lien on lot No. 1., B. a subsequent lien on the same lot, and A. subsequently obtains a lien on lot No. 2. A. should obviously proceed in the first instance against that lot, or cede his lien on it to B., and as B.'s equity is perfect in this regard, against the debtor, so it is not less valid against one who afterwards obtains judgment. See *De Peyster v. Hildreth*, 2 Barb. Ch., 109. Such at least is the inference from *Hasting's case*, 10 Watts, 303, although a different view seems to have been taken in *Miller v. Jacobs*, 3 Watts, 477.

In *Hasting's case*, Evans had a judgment lien on lot 68, belonging to the defendant in the judgment, (Hastings,) who subsequently mortgaged it to Humes. Evans then issued a *scire facias*, and revived the judgment which took effect as a lien on lot 30. Both lots were sold under a subsequent judgment in favor of Alexander, and the proceeds paid into court. It was contended on behalf of Alexander,

that he was entitled to the proceeds of lot 30, and that Evans should be thrown on that portion of the fund arising from the sale of lot 68, to the exclusion of the mortgagee. The court held, "that as between Humes and Evans there could be no doubt that Humes was entitled to any surplus that might remain after satisfying the judgment, and a Chancellor would not have permitted Evans to take the price for which lot No. 68 had been sold, and forego his lien on lot 30. This equity was not affected by the circumstance that the lien against that lot was not acquired until after the execution of the mortgage. It depended on the fact that Evans had two funds open to him, while Humes had only one, and should consequently resort to that which Humes could not reach; and as this equity existed on the part of Humes, before Alexander obtained judgment, so the entry of his judgment did not impair the equity. *Qui prior est in tempore potior est in jure.*"

In *Miller v. Jacobs*, 3 Watts, 477, Duncan and Mahon gave a mortgage on land in Perry county to Stocker with a warrant of attorney to confess judgment on the bond. They subsequently mortgaged the same land to Clark. Stocker entered a judgment on the warrant in Philadelphia, which took effect as a lien on Duncan's real estate in that city. Judgments were then obtained in Perry against Duncan and Mahon at the suit of other creditors. Clark gave notice to Stocker of his mortgage, and that he required him to

proceed in the first instance on the judgment in Philadelphia, but Stocker disregarded this request and released the judgment in favor of a purchaser from Duncan. The court below held that it was the common case of a creditor who, having two funds, was under an equitable obligation to keep that which was exclusively within his reach intact for the benefit of another creditor who had but one, and to transfer it to the latter if not needed for his own protection. The fund was consequently awarded to the defendant who claimed under Clark. The decree was reversed by the court above. Gibson, C. J., said, that Clark could not have compelled Stocker to enter judgment on the bond, and could not, therefore, complain that the judgment was vacated. A creditor with a right of recourse to two funds, could not adopt a course which would enable the debtor to withdraw any portion of his property from the reach of his creditors. This was the foundation of his obligation and the end of it. It was not incumbent on him to make room for the admission of one creditor by the exclusion of another who had an equal right. In that predicament it was at his option to stand still. Between successive lien creditors on distinct parts of the general fund, whose equities are balanced, the legal course of execution is not to be disturbed, and a chancellor suffers the paramount creditor to take satisfaction in the way most conducive to his convenience, or the gratification of his caprice. Such

was the case before the court. Clark had no equity which could not equally be urged by the subsequent creditors. They were alike claimants on separate parts of a general fund, bound by a paramount lien. It was said that his lien bound the estate in Perry county before their liens attached in Philadelphia; but his lien in Perry county had nothing to do with an estate which it did not bind. Had Stocker's bond been entered up when Clark took his mortgage, an equity might have grown out of that circumstance, dating from the period of the transaction, and not liable to be disturbed by the introduction of fresh parties. It might then have been contended that Clark advanced his money on the faith that Stocker would proceed on the judgment, or would, on being paid in full, transfer the judgment to him. But the judgment was not entered on the warrant when Clark made the loan, nor would a chancellor have compelled Stocker to enter it. The subsequent entry of it was therefore a fortuitous circumstance, on which Clark had no right to calculate. A creditor who had obtained a lien on more parcels than were requisite for the satisfaction of the debt, could not so manage the application of it as to secure the excess to the debtor; but there was nothing to preclude him from withdrawing the lien from one of the parcels for the benefit of a creditor, although to the exclusion of another whose lien was prior in date.

It is not easy to reconcile this decision with the principle laid down in *Hasting's Case*. If that case establishes anything, it is the equity of a lien creditor, to require one who has a paramount lien and also a right of recourse to another fund, to exhaust the latter fund in the first instance, or use it for his benefit. This equity does not depend on the period when the right of recourse to the other fund is acquired. It arose in *Hasting's case* from the revival of a judgment subsequent to the execution of the mortgage, and which, therefore, could not have been contemplated by the mortgagee. Nor does it, as Chief Justice Gibson seems to have supposed, result exclusively from the obligation of the paramount lien creditor not to cover the property of the debtor from his other creditors. It has another root; that which of several claimants on a fund shall prevail, ought not to depend on the caprice of one of them, but on a settled rule. If a mortgagee who acquires a judgment lien on all the real estate of the mortgagor, after the execution of a second mortgage, can, by the mere exercise of his volition, postpone the second mortgagee to a junior incumbrancer, or vice versa, there is no reason why he should not turn the power to account by exercising it in favor of the highest bidder. Nor can it be admitted that a second mortgagee has no means of compelling the entry of judgment on a bond and warrant of attorney accompanying a first mortgage. He is clearly entitled to stand in

the place of the first mortgagee on paying the amount, and this implies a right of subrogation to the securities held for the debt. See *Giller v. Hoyt*, 7 Howard, Pr. R. 265.

Which of two creditors who have obtained judgments in different counties, shall be subrogated to a prior incumbrance, which is a lien in both, depends in like manner on the dates of the judgments; their equities being equal in all other particulars, and neither having any superiority of right, except that arising from priority in time; *M'Ginnis' Appeal*, 4 Harris, 445. In *M'Ginnis' Appeal*, Cassler obtained judgment in Franklin county against Herchelroth, on the 2d of April, 1849, and on the 5th of that month judgment was rendered against Herchelroth in Cumberland county in favor of M'Ginnis. M'Lanahan had a prior judgment against Herchelroth in both counties. Herchelroth's land in Cumberland was sold by the sheriff, and the proceeds paid to M'Lanahan, and M'Ginnis thereupon claimed subrogation to M'Lanahan's judgment, in Cumberland county, and that he, rather than Cassler, should receive the fund arising from a sheriff's sale of Herchelroth's land there. This application was refused, on the ground that as Cassler's judgment was prior in time, he had the better right. It was decided conversely in *M'Devitt's Appeal*, 20 P. F. Smith, 373, that where judgment was rendered in Philadelphia, for A., in 1868, and in favor of B., in Chester, in the following

year, A. and not B. was entitled to subrogation to an older judgment which bound the land of the debtor in both counties.

The equity of a judgment creditor to marshal the assets as a means of obtaining payment out of a fund that is not subject to the lien of the judgment, will not be enforced against a *bona fide* purchaser; *Bruner's Appeal*, 7 W. & S. 259; *M'Cormick's Appeal*, 7 P. F. Smith, 54; see *Withers v. Carter*, 4 Grattan, 407; *Bruner's Appeal*, 7 W. & S. 269; *Averall v. Wade*, 2 Lloyd & Goold, 252; *Eberhardt's Appeal*, 8 W. & S. 228. Such a case is *prima facie* within the rule that assets will not be marshalled against one who is not indebted to the creditor who asks for the relief; *Eberhardt's Appeal*; *Dunn v. Olney*; *Lloyd v. Galbraith*, 8 Casey, 103; *Wise v. Sheppard*, 13 Illinois, 41. If one of two tracts of land which are subject to a judgment lien, be sold by the defendant in the judgment, a subsequent judgment creditor is not entitled to subrogation to the prior lien, because such a decree would conflict with the equity of the purchaser. Where land, subject to an incumbrance, which is also a charge on other land belonging to the vendor, is sold with an express or implied agreement that the title shall be clear, the vendee is not liable to contribution. It is the duty of a vendor who has been paid in full, to discharge an incumbrance on the land, and if the lien extends to other land, that, and not the land conveyed, is the primary fund for the payment of

the debt. See *Lucas v. Wolbert*, 10 Barr, 73; Rawle on Covenants for Title, 632, 4 ed. In *Ziegler v. Long*, 2 Watts, 205, Hoffman had a judgment lien on several lots belonging to Long, who sold one of them to the plaintiff Ziegler. Judgments were subsequently obtained against Long at the suit of other creditors. Ziegler paid Hoffman's judgment, and it was assigned to him. The remaining lots were then sold under an execution against Long, and it was held that Ziegler had the first claim on the fund as the assignee of Hoffman's judgment. Sergeant, J., said, that a chancellor would have "compelled Hoffman to take his judgment out of Long's other lands in exoneration of the land sold to Ziegler, or, to assign the judgment to Ziegler on receiving the amount." "If such was the rule as it regarded Long, such must also be the rule with regard to one who obtained judgment against him subsequently to the sale." It is established in conformity with this decision, that as one who buys land which is subject to the lien of an incumbrance, which is also a lien on other land belonging to the vendor, may require the creditor to proceed in the first instance against the latter fund, so he will have the same right as it regards a creditor who obtains judgment subsequent to the sale; *Bruner's Appeal*, 7 W. & S. 269; *Eberhardt's Appeal*, 8 Id. 327; *Dunn v. Olney*, 2 Harris, 219; *Wise v. Harris*, 13 Illinois, 41, 48.

It seems that a paramount judgment will not be marshalled as

against a grant with warranty to a volunteer, in order to leave the real estate of the grantor free for the discharge of a judgment which has been entered subsequently to the grant; *Thompson v. Murray*, 2 Hill Ch. 204, 213; *Cumming v. Cumming*, 3 Kelly, 460; because such a gift is valid against the donor, and therefore equally valid against one claiming under him as a creditor, unless it can be impeached for fraud.

In *Reynolds v. Tooker*, 18 Wend. 591, the Dutchess County Bank obtained judgment against Tooker and Hait, and levied on certain chattels belonging to them, and on a ship which they had built for a whaling company. Tooker and Hait had been paid for the ship, but it was still undelivered in their yard. An execution was issued and placed in the sheriff's hands, by another creditor with instructions to proceed. The bank then assigned its judgment to the whaling company, who withdrew the levy on the ship; and the rest of the property was sold under both writs. It was contended on behalf of the plaintiff in the second writ, that as the ship would have sold for enough to satisfy both judgments, if things had been suffered to take their legal course, he was entitled to the money in the sheriff's hands. Bronson, Justice, said, that this argument would have been valid if the judgment debtors had been the real owners of the vessel. But inasmuch as they had been paid in full, it equitably belonged to the whaling company, who had the first and best right to

insist that the bank should resort to the other property before touching the ship. It followed, that the fund must be paid to them, and not to the second execution creditor.

The question whether an incumbrance is to be borne by the vendor or purchaser, nevertheless, depends on the intention of the parties, as manifested by the contract of sale. Where the conveyance is in terms subject to the lien, the obligation necessarily devolves on the purchaser. In the absence of such proof, it may be necessary to have recourse to extrinsic evidence. A vendor who receives the full value of the premises, obviously ought to clear them of encumbrances. But it is not less obvious that where an allowance is made for an incumbrance in fixing the price, or where the purchaser retains the amount under an express or implied agreement that it shall be applied to the discharge of the lien, the purchaser is personally liable, and not the vendor, and a court of equity may compel the fulfilment of the obligation, by substituting the vendor in the place of the incumbrancer; *In re M'Gill*, 6 Barr, 504; *Morris v. Oakford*, 9 Id. 498; *Halsey v. Reed*, 9 Paige, 546; *Marsh v. Pike*, 10 Id. 595; *Harris v. Crawford*, 2 Denio, 594; *Atwood v. Vincent*, 17 Conn. 575, *ante*. And as he is entitled to subrogation, so it may be enforced in aid of those claiming under him as judgment creditors; *Morris v. Oakford*, 9 Barr, 498.

It has, notwithstanding, been held in several instances, that where one of several tracts belonging to the same person, and encumbered by a common lien, is sold and conveyed by him, the land which he still retains is primarily liable although the price be not paid in full; *Eberhardt's Appeal*, 8 W. & S. 327; *Lloyd v. Galbraith*, 8 Casey, 303. A junior encumbrancer will not, therefore, agreeably to this view, be subrogated to the paramount lien as against the purchaser, even to the extent of the unpaid purchase-money. In *Eberhardt's Appeal*, Hein had a judgment lien on three lots of ground belonging to the defendant in the judgment, Rice. The latter subsequently conveyed one of the lots to Spinner for the consideration of four hundred dollars, receiving one hundred dollars down, and a note by which Spinner promised to pay Hein three hundred dollars on account of the lien held by Hein. The court held that Rice had no color of equity to require Hein to proceed in the first instance against Spinner's lot for any portion of his judgment; and that a subsequent judgment creditor of Rice must consequently be postponed to Spinner's judgment creditors. Sergeant, J., dissented; and we may agree with the remark of Mr. Justice Bell, in *Dun v. Olney*, 2 Harris, 219, 223, that sufficient weight was not given to the purchaser's undertaking to apply the unpaid purchase-money in discharge of the paramount incumbrance. See *Biddon v. De Witt*, 7 Wright, 326.

AS BETWEEN CREDITORS OF DIFFERENT PERSONS.

The rule that he who has a right of recourse to two funds shall not so exercise it as unnecessarily to disappoint him who has only one, does not apply as between creditors of different persons. It is the obligation of the debtor which renders it incumbent on the creditor not to adopt a course whereby that obligation may be impaired. There is no justice in charging one who is not indebted to me, in order that I may be paid. If I have a joint judgment against A. and B., and Jones has a several judgment against B., Jones cannot require me to proceed in the first instance against A., nor can I be required to cede my judgment to Jones on receiving the amount. Such, at least, is the rule, unless there is some reason why the judgment should be paid by A. rather than B.

It was defined by Lord Eldon, in *Ex parte Kendall*, 17 Vesey, 520, in the following terms: "We have gone this length: if A. has a right to go upon two funds, and B. upon one, of the *same debtor*, and the funds are the *property of the same person*, A. shall take payment from that fund, to which he can resort exclusively, so that both may be paid; but it was never said that if I have a demand against A. and B., a creditor of B. shall compel me to seek payment from A., if not founded in some equity giving B. for his own sake, as if he was a surety, &c., a right to compel to seek payment of A. It must be established that it is just

and equitable that A. ought to pay in the first instance, or there is no equity to compel a man to go against A., who has a resort to both funds."

The doctrine is established on this basis in the United States; *Dunn v. Olney*, 2 Harris, 219, 221; *Lloyd v. Walbraith*, 8 Casey, 103, 105, 108; *Eberhardt's Appeal*, 8 W. & S. 327, 332; *Ayres v. Husted*, 15 Conn. 504; *Wise v. Shepherd*, 13 Illinois, 41; *Sanders v. Cook*, 22 Indiana, 436; *House v. Thompson*, 3 Head. 512; *Meech v. Allen*, 17 New York, 300, 304; *Dorr v. Shaw*, 4 Johnson's Ch. 17. In *Dorr v. Shaw*, the defendant had a joint judgment against David Stafford and his son, Peter Stafford, which was a lien on seventy-two acres belonging to the father, and thirty acres of the son's. The plaintiff held a younger judgment lien on the father's land. He subsequently bought the father's land, and the defendant became the purchaser of that which was owned by the son. A bill was then filed, asking that the defendant should be enjoined from levying the seventy-two acre tract, or be compelled to assign his judgment to the plaintiff on receiving the debt, interest, and costs. Chancellor Kent said, that "if both judgments had been against David Stafford only, the rule that the prior creditor must be thrown first on the fund not reached by the second judgment, might have applied. But here we have no means of knowing whether he or his son ought to pay the debt; and it might be very unjust, as between those two original

debtors, if the court should interfere, and charge the debt upon one of them, instead of the other. They are not before the court, and we have nothing in the case to guide us in making a selection between them. The consequence is, that we cannot interfere."

It results from what is here said, that a chancellor will not marshal the assets as between creditors of different persons, unless it appears affirmatively that the debtor whose estate is sought to be charged, is primarily liable. Hence, a several creditor of a partner cannot compel a partnership creditor to proceed in the first instance, against the assets of another member of the firm, unless the latter would, on a settlement of the partnership accounts, be primarily liable as between himself and his co-partners, for the joint debts; *Sterling v. Brightbill*, 5 Watts, 229. In *Sterling v. Brightbill*, the Harrisburg Bank had a judgment against Ritchey & Elder, for a partnership debt, and Brightbill who had a several judgment against Ritchey, asked for subrogation to the bank's judgments as against Elder's estate. There was no evidence as to the state of the partnership accounts between Elder and Ritchey. Kennedy, Justice, said that Brightbill's lien was for the proper debt of Ritchey alone, and great injustice might be done to Elder by making his estate liable for the payment of Ritchey's debt, without ascertaining whether he is not Ritchey's creditor to an equal or greater amount than one-half of

the judgment to which Brightbill asked for subrogation. The court below seemed to have considered that in the absence of proof it should be intended that each partner was under an equal obligation to contribute to the debts of the firm. But this was substituting conjecture for the certainty which is essential to the administration of justice. It would be contrary to the dicta of Lord Eldon in *Ex parte Kendall*, that before compelling a creditor who had a right of recourse against the estate of two debtors to proceed against one of them, *it must be established* that the latter ought to pay in the first instance.

In like manner, a joint creditor will not be compelled to proceed against the administrator of a deceased partner, in order to leave the assets of a surviving partner free for the discharge of his individual liabilities, unless it is shown that a decree would be equitable as between the partners; *Meech v. Allen*, 17 New York, 300. In *Meech v. Allen*, the firm of Taylor & Pratt was dissolved by Pratt's death, and the defendant subsequently obtained judgment against Taylor as the surviving partner for a partnership debt, which took effect as a lien on Taylor's land in the city of New York. A judgment was then recovered by the complainant against Taylor for a several debt, and became a lien on the same land. The complainant filed a bill alleging the inadequacy of the land to pay both judgments, and that Pratt's estate was adequate to satisfy the defend-

ant's judgment, and asking that the defendant should be compelled to have recourse to it in the first instance, or that the complainant should be subrogated to the lien of the defendant's judgment against Taylor's real estate. Selden, J., said, that the only difference in principle between the case in hand and that of *Dorr v. Shaw*, was that there it did not appear that the joint debtors were partners. This was a difference which operated against the prayer of the bill. Where two individuals, not partners, are jointly indebted, there may be reason for a presumption that each owes one-half of the debt, and that there is an equity in favor of an individual creditor of one of them, to have so much of the joint debt paid by the co-debtor. No such presumption can be indulged with regard to partners, and the separate creditor must wait until the partnership accounts are settled before he can claim anything from the partnership property. If the bill had averred that there was sufficient partnership property upon which the defendant's judgment was a lien, the complainant might possibly be entitled to some relief. But the averment was simply that the estate of the deceased partner was adequate to satisfy the judgment.

Where, nevertheless, one of two joint debtors is equitably entitled to require that the debt shall be paid by the other, rather than himself, the equity may be enforced for the benefit of his separate creditors.

The principle is of obvious ap-

plication as between a joint judgment against a principal and surety, and a several judgment against the surety. The surety has a clear equity to be subrogated to the judgment against the principal, and it is a general rule that every right in the nature of property that can be enforced by a debtor, shall be made available for the payment of his debts. The ends of justice are, therefore, attained circuitously, by subrogating the surety to the judgment against the principal, and then putting the surety's creditors in his place; *King v. M^r Vickar*, 3 Sandford, Ch. 192; *Wise v. Shepherd*, 13 Illinois, 41, 47; *ante*, 144.

"Subrogation," said Strong, J., in *Lloyd v. Galbraith*, 8 Casey, 103, 108, "may be admitted in some cases, where the two funds belong to different persons, if the fund not taken be the one which in equity is primarily liable. Thus, where one creditor has a judgment against principal and surety, and another has a judgment against the surety alone, if, in such a case, the creditor of the two collect his debt from the surety, the other creditor is entitled to the use of his judgment against the principal; *Gearhart v. Jordan*, 1 Jones, 325. There are other instances than the one I have given. In them all, however, the equity of the second creditor is precisely that of the debtor, and is worked out through the equity of the debtor; *Ex parte Kendall*."

The question arose in *Neff v. Miller*, 8 Barr, 347, out of an application by a judgment creditor

of a surety, to be substituted to a judgment against the principal, which had been paid out of the surety's assets. It was objected, that the rule under which a chancellor marshals assets, does not apply between creditors of different persons. But the court held, that the foundation of the argument fails where the relation between the debtors is such as to render one primarily liable. "The peculiarity of the question before us," said Bell, J., "is, that one creditor, having a joint and several incumbrance against the estates of two distinct debtors, claimed and received the amount of that incumbrance from the separate estate of one of the debtors, and thus defeated the claim of a lien creditor of the latter. It is then the case of two funds belonging to different debtors, and not an instance of a double fund belonging to a common debtor. Under such circumstances, a court of equity will not, in general, compel the joint creditor to resort to one of his debtors for payment, so as to leave the estate of the other debtor for the payment of his separate and several debt, for, as between the two debtors, this might be inequitable; and the equity subsisting between them ought not to be sacrificed merely to promote the interest of the separate creditor. Nor will chancery, for the same reason, substitute the several to the place of the joint creditor, who has compelled payment from the estate of the debtor of the former. But where the joint debt ought to be paid by one of the debtors, a court

of equity will so marshal the securities as to compel the joint creditors to have recourse to that debtor, so as to leave the estate of the other open to the claims of his individual creditors; or, if the joint creditor has already appropriated the latter fund, it will permit the several creditors to come in *pro tanto*, by way of subrogation, upon the fund which ought to have paid the joint debt; 1 Story, Eq. sec. 642, 643; per Lord Eldon, *Ex parte Kendall*, 17 Vesey, 521; *Sterling v. Brightbill*, 5 W. 229. Thus, if A. have a judgment, which is a lien on the lands of B. and C., and D. own a younger judgment, which is a lien on the lands of C. only, and the joint judgment be levied on, and paid out of the estate of C., to the exclusion of the younger judgment, D. will not be subrogated to the rights of A., to enable him to obtain from the estate of B. payment of his several judgment; for B. was not the debtor of D., and for aught that appears, C. may be indebted to B. to the full amount of A.'s judgment. But if B. and C. were partners, and gave the first judgment on the partnership account; and on a settlement of accounts between them, it appears that B. was indebted to C. to the amount of the joint judgment, the judgment creditor of C. would be substituted as against the estate of B., *pro tanto*; *Dorr v. Shaw*, 4 Johnson, Ch. Rep. 17. It would be the same if the judgment was recovered by A. for B.'s proper debt, C. being merely surety; for in these cases, B. ought to have

paid the judgment, and C.'s estate taken for it, to the exclusion of C.'s judgment creditors, he ought, on equitable principles, to be permitted to receive out of B.'s estate, so much as he had lost by the application of C.'s estate to the payment of B.'s proper debt. Nor can the subsequent judgment creditors of B. complain of this. They acquired their securities with a full knowledge of, and subordinate to the prior joint judgment, and have no legal or equitable right to demand that a mere surety shall discharge it for their benefit.

"The principles that have been brought to view are of easy application in this instance, and, indeed, the illustration which has been offered exactly embraces the case. Here is a surety, whose money has been applied in the payment of the debt of his principal, to the exclusion of his own proper creditors. That he would be entitled to come in, by way of substitution, upon the estate of the principal, is everyday equity; and I think it equally clear, that his creditor, who has suffered by the appropriation of a fund which otherwise would have been available for the discharge of his claim, may well ask to stand upon this equity, to the extent of the deprivation to which he has been subjected." This decision was cited and followed in *Gearhart v. Jordan*, 1 Jones, 325.

The principle is virtually the same where a partner assumes the partnership debts in consideration of a transfer of the assets, or on the dissolution of the firm. The effect of such a transaction is to

render him a principal debtor, and the outgoing partners sureties, and as they are entitled to subrogation to the liens and securities of the joint creditors, so their separate creditors may claim the same privilege; vol. 1, 147; See *Frow's Estate*, 23 P. F. Smith, 459.

The question is more complicated where a separate creditor of a partner, relies on the state of the partnership accounts as a reason for compelling a creditor, who has a paramount judgment against the firm, to proceed in the first instance against the real estate of the other partner. It is obviously inequitable to compel one who has a joint judgment against A. and B. to enforce it against B., in the absence of proof that he, rather than A., should pay the debt. The prayer of the bill, consequently, will not be granted, unless it turns out on a settlement of the partnership accounts that one of the defendants ought to pay the debt in discharge of the other's estate; *Gearhart v. Jordan*, 1 Jones, 325, 331.

IN FAVOR OF SURETIES.

In the instances hitherto considered, the right of subrogation grew out of the equity of the creditor, but it may also arise from the equity of the debtor to require that the obligation shall be borne by another rather than himself. As between two persons who are under a common obligation, the creditor should proceed against him who is in the first instance primarily liable, or if such recourse would involve delay or inconvenience, assign the remedy

against him to the other obligor on receiving the full amount of the demand. Such is the common case of a surety who pays the amount of a judgment which has been obtained for the debt, and uses the judgment as a means of obtaining contribution from the co-sureties, or indemnity from the principal. (Notes to *Dering v. Winchelsea*, vol. 1.)

The doctrine is a beneficial one, and has been amplified and applied with wise and increasing liberality in modern times. It is, nevertheless, subject to a technical difficulty, arising from the nature of the equity and the circumstances under which alone it can be enforced. It is well settled that subrogation will not be decreed until the creditor is paid in full; *Field v. Hamilton*, 45 Vermont, 35; *Hoover v. Epler*, 2 P. F. Smith, 522; *Magee v. Liggett*, 38 Mississippi, 139. It were obviously unjust to deprive him of the control of the debt while any part of it remains unsatisfied. See vol. 1, 152. A surety may file a bill to compel the principal to fulfil the obligation as soon as it matures; *Marsh v. Pike*, 10 Paige, 595, 597; See vol. 1, 135; but this is distinct from the right of subrogation. Now this perquisite to the exercise of the right is to a great extent destructive of the subject to which the right relates. A payment by one who is directly liable as a co-obligor or contractor, is legally a satisfaction of the debt and of all the securities held for it by the creditor; see *Bowditch v. Green*,

3 Metcalf, 360, 362. It does not vary the case, that the person who makes the payment is a surety, and so appears on the face of the note or bond; *The Ontario Bank v. Walker*, 1 Hill, 652; *The Bank of Salina v. Abbot*, 3 Denio, 181. It is accordingly established in the English courts, that a surety may be subrogated on payment to the collateral securities for the debt, but cannot have an assignment of the debt itself, because that is determined by the act on which he founds his claim, vol. 1, 129; *Copis v. Middleton*, 1 T. & R. 229. If the debt is secured by a bond or mortgage, the surety is entitled to an assignment of the mortgage, but not of the bond. So if the principal debtor transfers the bond of a third person as a security for his own, the surety may be subrogated to the latter bond, but cannot assert any right under the former, or to a judgment which has been obtained upon it by the creditor. The rule was established on this basis by Lord Eldon in *Copis v. Middleton*, and is adopted in North Carolina and Alabama, and as it would seem in Vermont. See *Hodgson v. Stevens*, 3 Mylne & Keene, 183; *Sherwood v. Collier*, 3 Devereux, 380; *Hodges v. Armstrong*, Ib. 253; *Briley v. Sugg*, 1 Dev. & Bat. Eq. 366; *Houston v. The Bank*, 25 Alabama, 250.

Such a distinction is hardly logical or just. It supposes that the accessory may exist, notwithstanding the extinguishment of the principal. If the bond be gone, how can a mortgage given for the

bond be enforced? It may be said, that although the debt is paid, the legal estate remains in the mortgagee, and that a court of equity will compel him to use it for the surety's benefit, or compel the principal to redeem on pain of being foreclosed. But this implies that a chancellor may regard a debt which has been extinguished, as it regards the creditor, as subsisting for the indemnity of the surety, contrary to the view of Lord Eldon in *Copis v. Middleton*. The argument is, moreover, inapplicable throughout the greater part of the United States, where payment *ipso facto* divests a mortgage without the necessity for a reconveyance. See vol. 1, 870.

It is accordingly well settled throughout the greater part of the United States, that payment by a surety is *prima facie* a purchase, entitling him to stand in the place of the creditor as it regards the debt, and every means or remedy by which it is secured; *Hays v. Ward*, 4 Johnson Ch. 123. In the language of C. J. Gibson, "What is very payment in law may not be payment in equity," because a chancellor will "enjoin the principal obligor from setting up an unjust defence;" *Croft v. Moore*, 9 Watts, 451, 453. Or as the doctrine is stated by the same judge in *Fleming v. Beaver*, 2 Rawle, 132, actual payment discharges a judgment at law, but not in equity, if justice requires the parties in interest to be restrained from alleging it, or insisting on their legal rights. "Agreeably to the modern doctrine on this sub-

ject, said Chancellor Walworth in *Cuyler v. Ernsworth*, 1 Paige, 32, the surety by the mere payment of the debt, and without any actual assignment from the creditor, is in equity subrogated to all the rights and remedies of the creditor for the recovery of his debt against the principal debtor or his property, or against the co-sureties or their property, to the extent of what they are equitably bound to contribute. (Nap. Code, art. 1251, 1252; Bell's Dick., art. *beneficium cedendarum actionum*; Civ. Code of Louis, art. 2157, 2158; 2 Robin. Prac. 136; *Cheesebrough v. Millard*, 1 John Ch. Rep. 409; *Eppes v. Randolph*, 2 Call's Rep. 125, 189; *M' Mahon v. Fawcett*, 2 Rand. Rep. 514."

It is well settled in conformity to this principle, that a surety who pays an execution issued on a joint judgment against himself and the principal, may be subrogated to the judgment, although nothing is said or done at the time to denote an intention that the debt should survive; *Sandford v. M'Lean*, 3 Paige, 122; *Dempsey v. Bush*, 18 Ohio, N. S. 376; *Cottrell's Appeal*, 11 Casey, 294; and although the writ be returned satisfied, and so appears of record; See vol. 1, 152; *Perkins v. Kershaw*, 1 Hill Ch. 344; *Baily v. Brownfield*, 8 Harris, 41, 44; *Hess' Estate*, 19 P. F. Smith, 272; *Lathrop v. Dale*, 1 Barr, 512; *Hill v. Manser*, 11 Grattan, 522; *Dozier v. Lewis*, 27 Mississippi, 679; *Edgerly v. Emerson*, 3 Foster, 555; *Low v. Blodgett*, 1 Id. 121.

The principle is the same whether the payment is made directly by the surety, or by one who intervenes at his request, and the creditor cannot defeat the right by withholding his assent, or refusing to take the money except in satisfaction. The privilege does not extend beyond the surety to a principal co-obligor or contractor; *Baily v. Brownfield*, 8 Harris, 41; or to one who pays out of the assets of the principal, or as a trustee for him; *Kinley v. Hill*, 4 W. & S. 426. The right of subrogation extends beyond the remedy against the principal to the rights and remedies of the creditors against third persons, who are collaterally liable for the debt; *Billings v. Sprague*, 49 Illinois, 509; *York v. Landis*, 65 North Carolina, 535; *Kershaw v. The Bank*, 2 Caldwell, 397; *Berthold v. Berthold*, 46 Missouri, 557; *Butler v. Birkey*, 13 Ohio, N. S. 514. So a surety is entitled to subrogation against one who becomes answerable for the debt subsequently as bail in error, or for a stay of execution; *Pott v. Nathans*, 1 W. & S. 156; *Wallace's Estate*, 9 P. F. Smith, 401, 406. Conversely payment by a surety who intervenes subsequently at the principal's request, will not confer a right of subrogation against the surety in the original obligation; *Patterson v. Pope*, 5 Dana, 246; *The Bank v. Rudy*, 2 Bush, 326; notes to *Dering v. Winchelsea*, vol. 1, 156. But there is no reason why a third person should not purchase the debt with his own money at the principal's request, or for the purpose of giv-

ing him time, and then enforce it against the surety, subject to the surety's right to insist that proceedings shall be instituted forthwith against the principal. See 2 Am. Lead. Cases, 412, 5 ed.; *Tabor v. VanDeusen*, 3 Gray, 498.

In considering a prayer for subrogation regard should be had to the substance of the transaction rather than its form, and the bill dismissed if it appears that the complainant shared in the benefit of the consideration, and though nominally a surety ought to contribute ratably to the payment of the debt. See *Kuhn v. North*, 10 S. & R. 399.

Where the right of subrogation exists, as against a principal debtor, it may also be enforced against one claiming under him as a purchaser with notice, or as a creditor (*Cherry v. Monroe*, 2 Barb. Ch.; *Dempsey v. Bush*, 18 Ohio, N. S. 376; *Jumel v. Jumel*, 7 Paige), though not against a *bona fide* purchaser; *Reilly v. Mayer*, 2 Beasley, 351; *Williams v. Washington*, 1 Dev. Eq.; *Wise v. Shepherd*, 13 Illinois; *Orvis v. Newel*, 17 Conn. 97.

Where the prayer of the bill is simply to substitute the surety for the principal without imposing any new or greater burden, it is not requisite that the purchaser should have had notice of the complainant's equity. As a surety may file a bill before payment to compel the creditor to enforce the lien of a judgment or a mortgage for the debt, against the principal, or one to whom the latter has conveyed; *Marsh v. Pike*, 10 Paige, *post*, 283;

Irick v. Black, 2 C. E. Green, 189; so he may adopt the same course after payment, because such relief does not affect any existing equity, and simply places the purchaser where he would have been if the creditor had assigned the lien to a third person on receiving the amount; *Dempsey v. Bush*, 18 Ohio, N. S. 376; *Cherry v. Monroe*, 2 Barb. Ch.

The case is obviously different where the bill seeks to impose an additional charge on the purchaser, or to deprive him of a means of obtaining indemnity or contribution. A surety who has mortgaged his own property as a security for the debt, cannot, it has been said, be subrogated to the lien of the creditor on another tract, which has been mortgaged by the principal for the same debt, as against a purchaser from the principal without notice of the suretyship, because the purchaser is *prima facie* entitled to require that both tracts should contribute equally to the discharge of the obligation, and may have been influenced by that in buying; *Orvis v. Newell*, 17 Conn. 97.

The better opinion seems to be that as subrogation is simply a means of rendering the surety's right to contribution or indemnity effectual, it must be enforced before the expiration of the six years, which would be a bar in assumption under the statute of limitations, and that the surety will be precluded by suffering that time to elapse without having the debt assigned to him, or filing a bill; *Nel-*

son v. Fury, 16 Ohio, N. S. 552; *Funk v. Mehaffy*, 8 Watts, 384. See vol. 1, 145.

In the *Ohio Life Ins. Co. v. Winn*, 4 Maryland Ch. 253, the court held that a mortgage given to secure a debt due by simple contract may be enforced although the debt itself is barred by the statute, because a chancellor will not suffer the mortgagee to redeem without doing equity; see *Heyer v. Pruyn*, 7 Paige, 465; *Jackson v. Sackett*, 7 Wend. 94. It was said to follow that a creditor who is entitled to be substituted for such a mortgagee will also be exempted from the operation of the statute.

The right of subrogation results from the natural justice of placing the charge where it ought to rest. It may, therefore, be enforced whenever an obligation which is common to two or more funds or persons ought to be borne by one of them rather than another. This cannot ordinarily be said of partners or co-contractors, and hence payment by one of several joint debtors does not ordinarily entitle him to stand in the place of the creditor as against the rest; *Holmes v. Day*, 108 Mass. 563. Where, however, a partner assumes the debts of the firm, he becomes the principal debtor, and the other partners sureties, and they may as such be entitled to subrogation if compelled to pay through his default; *Morris v. Oakford*, 9 Barr, 498, 500; *Wood v. Dodgson*, 2 M. & S. 195; *The Ætna Ins. Co. v. Wires*, 2 Williams, 93; *Cherry v. Monroe*, 2 Barb. Ch.;

M'Cormick v. Irwin, 11 Casey, 111; *Frow's Estate*, 23 P. F. Smith, 459; see vol. 1, 147.

In *The Ætna Ins. Co. v. Wires*, the suit was brought for a partnership debt. It appeared in evidence that it had been agreed between the defendants on the dissolution of the firm, that one of them should pay the debt, and that it was subsequently paid with funds supplied by the other defendant and assigned to his brother in trust for him. The court held that the last named defendant stood in the position of a surety, and that the judgment might be enforced for his use, notwithstanding the payment.

In like manner, a partner who gives a mortgage on land which belongs to him individually, for a partnership debt, is a surety as it regards the mortgaged premises, and if these are taken for the debt, the mortgagor and his separate creditors may be subrogated to the remedy of the joint creditor against the assets of the partnership; *Averill v. Loucks*, 6 Barb. 470. The reason of the thing is the same where two joint purchasers agree between themselves, that one of them shall assume the whole of the debt, and receive the whole benefit of the consideration. In *Cherry v. Monro*, 2 Barb. Ch. 168, Seymour and Cherry bought land and gave a bond and mortgage, and Cherry subsequently conveyed his moiety of the land to Seymour in consideration of an agreement on his part to pay the bond. It was held that Cherry thereby became a surety, and was entitled to

be subrogated to the mortgage, if compelled to pay the bond through the default of Seymour. The chancellor said, "After the mortgaged premises had been thus conveyed, the equitable rights of the parties to that transaction were the same as though Seymour had owned the whole lot originally, and had mortgaged it to secure his own debt, and Cherry had joined with him in the bond for the same debt as a mere surety. Had that been the real form of the transaction originally, no one can doubt that as between the owner of the equity of redemption in the mortgaged premises, and the surety in the bond, the land would be the primary fund for the payment of the debt. And if the surety should be called upon by the mortgagees for payment, he would have the right to be subrogated in their place, and to their remedy against the land for the payment of the debt." It results from these decisions, that if the parties stand in the relation of principal and surety when the debt is paid, it is immaterial that they held a different relation at the execution of the contract, or that both are primarily liable to the creditor.

The authorities above referred to show that the surety's right to subrogation does not grow out of the contract with the creditor, but from his relation with the principal, which renders it incumbent on the latter to exonerate the surety. Wherever one is liable in person or estate to a charge which ought to be borne primarily by another

person or his estate, the person first named will have the equity of a surety, and be entitled to the securities and remedies of a creditor as a means of carrying that equity into effect; *Wilks v. Harper*, 2 Barb. Ch. 338.

A sale ordinarily implies, that the vendee shall have a clear and unincumbered title, *ante*, 271. Unless it is otherwise agreed, a judgment, mortgage, or other incumbrance should be discharged by the vendor. And if he fails in the performance of this obligation, the vendee may be subrogated to the incumbrance as against the vendor, and any property belonging to him on which it is a lien.

The form in which the question arises does not affect the principle. If the whole or part of an estate which has been sold free from incumbrances, is swept away under the operation of a lien, which ought to be discharged by the vendor, the purchaser and those claiming under him will be entitled to stand in the shoes of the lien creditor for the purpose of obtaining indemnity or reimbursement. *Eddy v. Travers*, 6 Paige, 521. In *Eddy v. Travers*, land which had been conveyed for a valuable consideration by an heir, was sold by the administrator under an order of court for the payment of the ancestor's debts, and the purchaser was held to be entitled to subrogation to the lien of the debtor on land which had descended to the other heirs, as a means of obtaining contribution.

The question is, nevertheless, one of intention, depending on the

terms of the contract, and when it is expressly or impliedly agreed that the incumbrance shall be deducted from the consideration, or paid by the purchaser, the vendor stands in the position of a surety, and is entitled to exoneration at the expense of the land; *Morris v. Oakford*, 9 Barr, 498; *In re M'Gill*, 6 Id. 594; *Skinner v. Harner*, 12 Harris, 123, 125; and such is manifestly the rule where the equity of redemption is conveyed as such, or the deed is in terms subject to the incumbrance, or the grantee covenants to pay the debt; *Ferris v. Crawford*, 2 Denio, 595; *Atwood v. Vincent*, 17 Conn. 575; *Halsey v. Reid*, 9 Paige, 446; *Jumel v. Jumel*, 7 Id. 554; *Cox v. Wheeler*, Ib. 258; *Vanderkemp v. Shelton*, 11 Id. 34; *Hansell v. Lutz*, 8 Harris, 284. In *Marsh v. Pike*, 10 Paige, 595, the complainant sold and conveyed certain premises in the City of New York to M'Lean, subject to a mortgage of three thousand dollars, which M'Lean covenanted to pay in consideration of a corresponding deduction from the price. M'Lean subsequently sold the same premises to Towle, who entered into a like covenant. After the mortgage became due, Marsh filed a bill to compel M'Lean and Towle to fulfil their covenants. The Chancellor held that the effect of the several conveyances and covenants was to make the complainant a surety, and the defendants, Towle and M'Lean, the principal debtors as it regarded the bond and mortgage; Towle, being primarily, and M'Lean second-

arily liable, as between themselves. The complainant might, therefore, have satisfied the mortgage, and been substituted in the place of the mortgagees as against the land. This, however, was not his only remedy. He was entitled to come into a court of chancery to compel the defendants, to whom he stood as a mere surety, to save him harmless by the discharge of the debt. It was true that M'Lean was the person who agreed directly with the complainant to discharge the lien; but as Towle had entered into a similar agreement with M'Lean, and was, moreover, the owner of the mortgaged premises, the decree of the court below was right in declaring him primarily liable, and that M'Lean should have a remedy over and against him, if he made default. The case of *Klapworth v. Dressler*, 2 Beasley, 62, is to the same effect.

It results from the same principle, that a sale of the equity of redemption under a judgment and execution against the mortgagor, renders the land the primary fund for the payment of the debt, and if the mortgagor is subsequently compelled to pay the bond, he may be subrogated to the mortgage as a means of obtaining indemnity from the purchaser; *Hansell v. Lutz*, 8 Harris, 284; *Heyer v. Pruyn*, 7 Paige, 465; *Tice v. Annin*, 2 John. Cha. 128.

It is a necessary sequence from these premises, that if the mortgage is assigned to the purchaser of the equity of redemption, or if he conveys the equity of redemption

to the mortgagee, it is to the extent of the value of the land a satisfaction of the mortgage, because the opposite conclusion would involve the incongruity of holding that an amount might be recovered from the mortgagee on the bond, which he would be entitled to recover back by being substituted to the mortgage; *Tice v. Annin*, *Stevenson v. Black*, *Saxton*, 338; see *Klapworth v. Dressler*, 2 Beasley, 62.

In *Jumel v. Jumel*, 7 Paige, 591, the principle was applied under the following circumstances. The owner of land executed a bond and mortgage to one Berger, and subsequently conveyed the equity of redemption in the mortgaged premises to Mary Jumel Bowes, by a deed containing a recital that the conveyance was subject to the mortgage. Mary Jumel Bowes afterwards conveyed the premises to a trustee for the separate use of the mortgagor's wife. The mortgagor died, and his widow having taken out letters of administration, discharged the bond out of his personal estate. And it was held that she being the equitable owner of the land which was primarily chargeable with the mortgage debt, was not entitled to be credited as administratrix with a payment which she had really made on her own account.

The chancellor said, "that it was plain from the terms of the original deed, that the grantee was to take the premises subject to the payment of the mortgage, and the grantee having accepted the conveyance subject to that implied

condition, was bound as between herself and the mortgagor to pay off and discharge the mortgage, so as to relieve him from personal liability to Berger on the bond. Although this could not deprive Berger of the right to resort to the personal liability of the mortgagor, or to the mortgaged premises, at his election to obtain satisfaction of his debt, yet if the grantee of the land permitted the debt to be collected of the grantor, upon his bond, instead of paying it herself as she was bound to do in equity according to the implied condition in her deed, he had an equitable claim to be subrogated to the rights of the mortgagee to enable him to reimburse himself by a resort to the mortgaged premises. And as this equitable right to resort to the land as the primary fund for the payment of the mortgage debt, appeared upon the face of the deed, through which the grantee of Mary Jumel Bowes obtained his title, he was chargeable with notice of that equitable right, equally as if the deed to himself had in terms declared that he was to take the premises subject to the payment of the mortgage."

It results from these decisions that where land is sold and conveyed subject to an incumbrance, it is primarily answerable for the payment of the debt, and if the vendee afterwards conveys the premises to a purchaser with notice, the original vendor is entitled to stand in the place of the incumbrancer as against the land in the hands of such subsequent purchaser; *Jumel*

v. *Jumel*; *Tice v. Annin*, 2 John. Ch. 135; *Cocks v. Wheeler*, 7 Paige, 248, 250. The vendee becomes the principal debtor, the vendor a surety. And as the securities given to the surety by the principal debtor enure for the benefit of the creditor, so the incumbrancer may enforce the express or implied undertaking of the vendee to discharge the debt; *Halsey v. Reeves*, 9 Paige, 446, 452. See vol. 1, 174.

SUBROGATION NOT ENFORCED CONTRARY TO THE EQUITIES OF THIRD PERSONS.

As subrogation is an equity, it will not be enforced where the effect will be to prejudice or impair the rights of third persons, it being well settled that where both parties have an equal claim to the consideration of a chancellor, the law will be suffered to take its course; *Miller v. Jacobs*, 3 Watts, 437; *Ziegler v. Louk*, 2 Id. 206; *Erb's Appeal*, 2 Pearson & Watts, 296; *M'Ginnis' Appeal*, 4 Harris, 445; *Wallace's Estate*, 9 P. F. Smith, 401; *Withers v. Carter*, 4 Grattan, 407. "Where the equities are balanced, the legal course of an execution is not to be disturbed;" *Miller v. Jacobs*. The assets will not, therefore, be marshalled to the exclusion of creditor, unless the party who asks for relief has a prior right or a superior equity; *M'Ginnis' Appeal*. For a like reason it is a good answer to a demand for subrogation that the party who will be prejudiced by it, or against whom it is sought to be enforced, is a purchaser for value and with-

outnotice; *The Mechanics' B. & L. Association v. Conover*, 1 M'Carter, 219; *Rush v. The State*, 20 Indiana, 432; *Douglas' Appeal*, 12 Wright, 223; *Reynolds v. Tooker*, 18 Wend. 591; *Orvis v. Newell*, 17 Conn. 97. In the case last cited two tracts belonging severally to A. and B., were mortgaged by them as security for a note. B. was in fact a surety, but this did not appear on the face of the instrument. B. paid the note, and it was held that he was not thereby entitled to be subrogated to the mortgage as against a purchaser from A., without notice of the suretyship.

In *Douglass' Appeal*, judgment was obtained against a principal and surety, which took effect as a lien on the real estate of the principal. An execution issued against both defendants, which was paid by the surety. The sheriff, thereupon returned the writ endorsed, "money made," and with a receipt in full from the plaintiff's attorney. The land was sold two years afterwards at a sheriff's sale, and the court held that the subsequent lien creditors were entitled to the fund in preference to the surety, who had slept on his rights, and omitted to obtain a decree of subrogation, or have the judgment marked to his use in due season.

The principle was applied in a somewhat different form in *Reilly v. Mayer*, 1 Beasley, 55. There stock which had been pledged as collateral security for a debt secured by mortgage, was fraudulently transferred to a *bona fide*

purchaser. The mortgagor executed a second mortgage to the complainant, and it was held that the latter could not require the first mortgagor to resort to the stock before proceeding against the land.

For a like reason, a court of equity will not compel a creditor to proceed against the estate of a surety, in order to leave the principal's estate free for the discharge of his debts. For as the surety has a right of subrogation against the principal, so no one claiming under the principal can be entitled to subrogation against the surety; *Johns v. Reardon*, 11 Maryland, 465. In *Husted v. Ayers*, 15 Conn. 504, a wife mortgaged her real estate to secure her husband's debt. The mortgagees subsequently attached the husband's personal property, and a bill was filed by a subsequent attaching creditor to compel him to enforce the mortgage. The court held that the wife's equity was not only first in point of time, but also, better than the complainants. She had agreed to be answerable for the mortgage debt, but not to third persons, nor for other debts. To subject her indirectly to a liability which she had not assumed, would be contrary to the natural equity, which was the corner stone of the doctrine of subrogation.

WHEN PAYMENT OPERATES AS A PURCHASE.

Payment by one who is collaterally liable as drawer, endorser or guarantor, is not an extinguishment even at law, unless it is so made and received; and takes effect in equity

as a purchase of all the creditors' rights and remedies against the party primarily liable for the debt. *Jones v. Broadhurst*, 9 C. B. 177; *Williams v. James*, 15 Q. B. 498; *Callow v. Lawrance*, 3 M. & S. 95; *Hubbard v. Jackson*, 4 Bring. 390; *Gould v. Eager*, 7 Mass. 615; *Clason v. Morris*, 10 Johnson, 426; *Wilson v. Wright*, 7 Richardson, 399. In *Clason v. Morris*, judgments were recovered against the maker and endorser of a note, and the endorser was subrogated to the judgment against the maker. In like manner, a guarantor becomes a purchaser on payment, and as such entitled to subrogation; *Elkinton v. Newman*, 8 Harris, 481; *Matthews v. Aiken*, 1 Comstock, 395; and it does not vary the legal aspect of the case that he entered into the agreement at the request of the creditor, and without the knowledge or assent of the debtor; *Matthews v. Aikens*; *Talmage v. Burlingame*, 9 Barr, 21, 24. Under these circumstances he cannot maintain assumpsit against the principal, but is not the less entitled to subrogation. It is the assumption of the debt at the request of the creditor which renders it incumbent on him to assign on being paid in full. In *Matthews v. Aiken*, Johnson, J., said, "that the right of a surety to demand of the creditor whom he has paid in full, the securities against the principal debtor, and to stand in his shoes against the principal, does not depend at all on any agreement or contract on the part of the debtor with the surety, but grows

rather out of a relation between the surety and the creditor, and is founded not on any contract expressed or implied, but springs from the ground of natural justice."

It is well settled that one cannot acquire a right of action against another by a voluntary payment of his debt; there must be a request, or an obligation from which a request may be implied; *Oden v. Elliott*, 10 B. Monroe, 315; *The Bank v. Rudy*, 2 Bush. 326, 331; and it is a consequence of this principle that subrogation will not be enforced in favor of a volunteer; see *Richmond v. Marston*, 15 Indiana, 174; *Mosier's Appeal*, 6 P. F. Smith, 76; *Gadsden v. Brown*, 1 Spear, Eq. 4; *Shinn v. Budd*, M'Carter, Ch. 234; *Sanford v. M'Clure*, 3 Paige, 122; *Wilkes v. Harper*, 2 Barb. Ch. 338; 1 Comstock, 586; *Carter v. Black*, 4 Dev. & Bat. 25; *Littleton v. Thompson*, 2 Beasley, 274; 1 Smith's Lead. Cases, 292, 7 Am. ed. See *Hoover v. Eppler*, 2 P. F. Smith, 524; *Wallace's Estate*, 9 Id. 401. In *Wallace's Estate* a tax gatherer who advanced the amount instead of collecting it, was held to have no right of subrogation within this rule.

If, however, such a payment is made in the name of the debtor, and adopted or ratified by him, it will as effectually extinguish the debt as if it had been made at his request, and may then serve as the foundation of a recovery in assumpsit, for money paid, laid out and expended for his use. See *Belshaw v. Bush*, 11 C. B. 191, 206.

Unless the rule that subrogation will not be decreed in favor of a volunteer is applied cautiously, it may lead to results that are not reconcilable with justice. Whether payment operates as a purchase or as an extinguishment, depends first on the design, and next on the right of him who makes the payment. See *Gernon v. M'Cann*, 23 Louisiana Ann. 84; 1 Smith's Lead. Cases, 634, 7 Am. ed.; *Moore v. Beason*, 46 New Hamp. 215, 219. If a stranger pays the amount of a judgment with an express or implied agreement that it shall subsist for his use, it is an equitable assignment, and will be so enforced in chancery. See *Kuhn v. North*, 10 S. & R. 399. But a stranger cannot acquire such a right without the assent of the creditor (*Sanford v. M'Lean*, 3 Paige, 122; *The Bank v. Rudy*, 2 Bush. 226;) unless he intervenes at the request of the debtor, and for his benefit, when the creditor is, as it would seem, compellable to assign on receiving the debt, interest and costs, *post*. But a payment by one who is a surety, or secondarily liable for the debt, is a purchase if so designed, although the intention to keep the debt alive is not made known to the principal debtor or the creditor, or assented to by them; *Mosiers' Appeal*, 6 P. F. Smith, 75.

It has also been held that where the assets will be marshalled in favor of a creditor, they will also be marshalled in favor of an administrator, guardian, or trustee, who has paid the debt; *Torr's Estate*, 2 Rawle, 250; *Wallace's*

Appeal, 5 Barr, 103; *Kelchner v. Forney*, 5 Casey, 47; *M'Gaw v. Huffman*, 12 Grattan, 627; *Ellicott v. Ellicott*, 6 Gill & J. 35. A junior judgment creditor may be subrogated to a paramount judgment, as against an intervening judgment creditor, although he neglects to have the paramount judgment marked to his use, and the satisfaction is erroneously entered of record; *Mosier's Appeal*, 6 P. F. Smith, 76. Thompson, C. J., said that "the omission to record such an entry might be material where subsequent liens were concerned, but was immaterial as it regarded one that was already fixed."

It results from the same principle, that a *bona fide* purchaser at an administrator's sale for the payment of debts, who pays off a mortgage in the belief that he has acquired a valid title to the land, may be subrogated to the lien of the mortgage as against the heir, if the latter sets the sale aside for a defect of form; *Vallee v. Wheeler*, 29 Missouri, 152. The question was, nevertheless, determined the other way in *Peters v. Florence*, 2 Wright, 194, in a case substantially the same. But there is little doubt that a payment by one who has an interest to protect, although remote or slight, may take effect as a purchase, if such an interpretation will subserve the purposes of justice; *Moore v. Beason*, 46 New Hamp. 215; *Hastings v. Stevens*, 29 Id. 573; *John G. Coater's Case*, 2 Johnson, Ch. 504.

It was determined in *Budd v. Shinn*, that an administrator who

discharges a mortgage out of his own funds, is a volunteer, and therefore not entitled to subrogation, but the relief was asked against a grantee, from one to whom the administrator had sold the land for the payment of debts, and not against a devisee or heir.

It results from what has been said, that as a stranger cannot extinguish a debt without the debtor's assent, so he cannot purchase it without the creditor's. If neither condition is satisfied, the act is null, and does not confer a right, or extinguish that which existed previously. See *Merryman v. The State*, 5 Harris & Johnson, 423; *The Sun M. Ins. Co. v. The Independent M. Ins. Co.*, 15 Maryland, 297; *Shaw v. Burr*, 1 M'Carter, 234; *Wilson v. Brown*, 2 Beasley, 277; *Peters v. Florence*, 2 Wright, 194. It was accordingly held in the case last cited, that the payment of a mortgagee by an executor, under a mistaken impression that he was the owner of the property, or that the debt was due by the testatrix, did not entitle him to subrogation, it appearing that his intention was to satisfy and not to purchase, and that no assignment had been made to him or for his benefit. The court held that one could not claim as a purchaser in the absence of a contract of sale, and that when such a contract was not made by the parties, it could not be made for them by a chancellor. But the creditor may obviously agree to transfer the debt to a third person, in consideration of receiving the whole or any part

of the amount without consulting the debtor, and if such is the intent with which the money is given and received, the transaction will operate as an equitable assignment, notwithstanding any defect of form. See vol. 1, 157.

The rule that the debt ceases to exist on payment, is not universal even at law; or, to speak more accurately, as payment is the performance of a pecuniary obligation, it must proceed from the debtor, or from some one acting on his behalf; *James v. Isaacs*, 12 C. B. 791; *Kemp v. Ball*, 10 Exchequer, 607; 1 Smith's Lead. Cas. 634, 7th Am. ed. A ratification may, as in other cases, take the place of a request. B. may take advantage of payment made for him by A., though he did not authorize A.; and hence a note or money given by A. on account of B. may be pleaded to an action brought against B. for the debt, and it is not a sufficient reply that A. was a volunteer whom B. might have disavowed; *Belshaw v. Bush*, 11 C. B. 191; *Simpson v. Egginton*, 1 Exchequer, 845. So, if B. is a surety, such a payment may entitle him to subrogation against any one who is primarily liable for the debt. But one cannot ratify an act which is not done on his account; and hence if a stranger pays a debt under a mistaken belief that it is his, the payment is not a defence to an action against the person by whom the obligation is really due; *The Sun M. Ins. Co. v. The Independent M. Ins. Co.*, 15 Maryland, 297.

As a payment may operate as a

purchase, when requisite for the ends of justice, so the purchase of a debt will not confer a right when equity and good conscience require that the obligation should cease; vol. 1, 136. See *Kilborn v. Robbins*, 8 Allen, 466, 471. A principal cannot throw the burden on the surety by direct means, and should not be allowed to do so through the agency of another; *Irick v. Black*, 2 C. E. Green, 189. If the payment is made with his funds by whatever hand, the debt is extinguished; *Kinley v. Hall*, 4 W. & S. 426. So a partner cannot equitably purchase a firm debt through a third person, and enforce it against his co-partners; *Logan v. Reynolds*, 21 Alabama, 26; see *M'Intyre v. Miller*, 13 M. & W. 472; see vol. 1, 130. An attempt by one who is primarily liable to shift the burden unduly to another, is contrary to the principle which lies at the foundation of the doctrine of subrogation, and should be enjoined; see *Brackett v. Winslow*, 17 Mass. 153, 160; *Kuhn v. North*. But a third person who has purchased the debt with his own money at the request of the principal, in order to afford him time, but without an agreement to that effect, may enforce it subsequently against the surety, subject to the right of the surety to require that any assets of the principal which are accessible, shall be taken in execution in the first instance; see *Tabor v. Van Deusen*, 3 Gray, 498; *Irick v. Black*.

In *Sanford v. M'Clain*, 3 Paige, 122, Chancellor Walworth

held the following language: "If the complainant had actually advanced the money to pay off those judgments, it is doubtful whether he would have been equitably entitled to be substituted in their place without some conventional arrangement to that effect with the creditors. It is only in cases where the person advancing money, to pay the debt of a third party, stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor, as a matter of course, without any agreement to that effect. In other cases, the demand of a creditor which is paid with the money of a third person, and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished. Such, also, is the rule of the civil law; although by that law a surety paying the debt is subrogated to the rights of the creditor *ipso facto*;" see *Curtis v. Kitchen*, 8 Martin's Rep. 706; *Wilson v. Brown*, 1 Beasley, 277.

Notwithstanding the weight due to these remarks, it is not easy to determine the effect of a merely voluntary payment by one who supposes that he is under an obligation. It certainly does not extinguish the debt, nor does it confer a right of subrogation. Where the mistake is purely one of law, it can hardly be the duty of the creditor to refund. Yet, as he retains the right to proceed against the debtor, it would seem

he ought to exercise it for the benefit of the person who has fallen into the error; see *The Sun M. Ins. Co. v. The I. M. Ins. Co.*, 15 Maryland; *Berthold v. Berthold*, 46 Missouri, 557; *Merryman v. The State*, 5 Harris & J. 423; *Robinson v. Leavett*, 7 New Hampshire, 100; *Low v. Blodgett*, 1 Foster, 121; *Buck v. Blanchard*, 2 Id. 303; *Heath v. West*, 6 Id. 131; *Drew v. Rust*, 36 New Hampshire, 335.

INVERSE ORDER OF ALIENATION.

The authorities which have been cited show that a vendor who has been paid in full cannot throw the burden of encumbrances on the purchaser, *ante*, 270. If a judgment is obtained which is a lien on the defendant's land, and he sells and conveys part of it, the judgment creditor ought to proceed in the first instance against the unsold portion, and if he takes that which has been sold in execution, the purchaser may be subrogated to the judgment; *In re M'Gill*, 6 Barr, 514; *Champlin v. Williams*, 9 Id. 340. As this equity is obligatory on the vendor, so it may be enforced against one claiming under him subsequently as a purchaser, whose right cannot rise higher than his. Hence the established rule of American jurisprudence, that where land subject to an incumbrance is sold successively in parcels, each of them will be liable in the inverse order of alienation. If a judgment or mortgage is a lien on three tracts of land belonging to the same person, who sells one of them to A., another

afterwards to B., and finally, the third to C., A. is entitled to exoneration at the expense of B. and C., while B. has a similar right against C.; and if an execution is issued on the judgment, the court may direct that C.'s land shall be first exposed to sale, next B.'s, and that A.'s shall not be sold, unless the other tracts do not produce enough to satisfy the debt; *Mevey's Appeal*, 4 Barr, 80.

The equity depends first on the purchaser's right to have so much of the land as he has bought and paid for, free from incumbrance, and next on the duty of the judgment creditor who has two funds open to him, to take that which will not prejudice the purchaser; *The Agricultural Bank v. Pallen*, 1 Freeman Ch. 419, 8 Smedes & Marshall, 337. In *Pallen v. The Agricultural Bank*, the chancellor said: "It is a general principle that where one party has a lien on or interest in two estates, and another has a lien on and interest in one of those estates only, the latter is entitled to throw the former upon that estate which he cannot reach, if that be necessary to adjust the rights of both parties, and can be done without prejudice to him who holds the double security. In administering these equities, the court does not assume to divest or postpone a prior incumbrance, but simply to so apply and limit it, that equal justice may be done to all concerned in the fund to which it attaches. I can see no reason in favor of limiting the doctrine to mere incumbrances. It can

have no necessary dependence upon the character of the interest or title of the claimants; it rests upon the intrinsic justice and morality of the maxim that a party shall so exercise his own rights as not to do unnecessary injury to those of others." It was said in like manner, in *Hurd v. Eaton*, 22 Illinois, 122, that a court of equity would compel a judgment creditor to exhaust the property of the judgment debtor, before levying on land, which though subject to the lien of the judgment, had become the property of a third person through a sale or a conveyance.

In *Gill v. Lyon*, 1 Johnson's, Ch. 447, one who had purchased land and given a mortgage for the purchase-money, sold part of the mortgaged premises to the defendant, and the residue was subsequently bought by the plaintiff at a sale under a judgment, which had been obtained against the mortgagor after the sale to the defendant. The chancellor held, that as the vendor could not compel his vendee to contribute to the payment of the mortgage, so no such claim could be enforced by the purchaser whose right did not rise higher than the person from whom he bought.

This decision was cited and confirmed in *Clowes v. Dickinson*, 5 Johnson, Ch. 295; 9 Cowen, 403. There a judgment against one Vanderheyden, was a lien on two tracts of land belonging to him, which may be designated respectively, as A. & B. He sold tract A. to the complainant, and the

defendant afterwards bought tract B. under an execution issued on the judgment. The judgment was then assigned to a third person in trust for the defendant, who caused tract B. to be levied on and exposed for sale, and became the purchaser. The bill alleged that tract B. was more than adequate to satisfy the judgment, and that the subsequent levy and sale of tract A. were wrongful, and then prayed that the defendant might be compelled to convey the last mentioned tract to the plaintiff. The chancellor held that when the plaintiff bought from Vanderheyden, the residue of Vanderheyden's land became in equity first chargeable with the burden of the judgment. If the judgment creditor had attempted to enforce the lien against the tract which had been conveyed to the plaintiff, he would have been compelled to levy in the first instance upon the land remaining unsold in the hands of Vanderheyden. If a descent had been cast, the land would have fallen to the heir, charged with the burden which had attached to it while in the hands of the ancestor; and it was plain on principle and under the authority of *Gill v. Lyon*, that a purchaser stood in this respect on the same footing as the heir. Both were necessarily subject to the rule that one has not a higher or better right than the person from whom he derives title. If, therefore, the complainant had asked for an injunction to restrain the levy which had been made on his land, it would have been granted. But

inasmuch as he had stood by and suffered the legal title to be conveyed to the defendant, who had afterwards made valuable improvements, the remedy would be limited to a pecuniary compensation for the value of the land, which was to be estimated by what it brought at the sheriff's sale. This decision was affirmed by the court of errors, except on the question of amount, which was held to depend on the real value of the land, and not on the price paid to the sheriff.

It is well settled in conformity with these decisions, that where land, which is subject to the lien of a mortgage or other paramount incumbrance, is sold in parcels successively to different persons, the buyers are *prima facie* chargeable in the inverse order of alienation. Such is the established rule in New York and Pennsylvania; and it prevails throughout the greater part of the United States; *James v. Hubbard*, 1 Paige, 228; *Gouverneur v. Lynch*, 2 Id. 300; *Jenkins v. Freyer*, 4 Id. 47; *Guion v. Knapp*, 6 Id. 35; *Patty v. Pease*, 8 Id. 279; *Skeel v. Spraker*, Ib. 182; *Chapman v. West*, 17 N. York, 125; *Jones v. Myrick*, 8 Grattan, 179; *Cooper v. Bigly*, 13 Michigan, 463; *The Howard Ins. Co. v. Halsey*, 4 Selden, 271; *Nackin v. Stanley*, 10 S. & R. 450; *Taylor's Ex'ors v. Maris*, 5 Rawle, 51; *Cowden's Estate*, 1 Barr, 267; *Mevey's Appeal*, 4 Id. 80; *Paxton v. Harrier*, 1 Jones, 312; *Cooper v. Bigley*, 13 Michigan, 463; *Iglehart v. Crane*, 42 Illinois, 372; *Hunt v. Mansfield*, 31 Conn. 478;

Nelson v. Trump, 6 Ohio, N. S. 97; *Wykoff v. Davis*, 3 Green Ch. 224; *Brown v. Simmons*, 44 New Hampshire, 475; *Gates v. Adams*, 24 Vermont, 71; *Pallen v. The Agricultural Bank*, 1 Freeman, 419; *Thompson v. Murray*, 2 Hill Ch. 204, 213; *Stone v. Schultz*, 1 Id. 465, 500; *The Bank v. Howard*, 1 Strobhart Eq. 173; *Wright v. Atkinson*, 3 Sneed. 585; *Conrad v. Harrison*, 3 Leigh, 532; *The Bank v. Dundas*, 11 Alabama, 661, 668; *Cummings v. Cummings*, 3 Kelly, 460; *Blair v. Ward*, 2 Stockton Ch. 119; *Gaskill v. Gaskill*, 2 Beasley, 400; *Mount v. Potts*, 8 C. E. Green, 188; *The Commercial Bank v. The Western Reserve Bank*, 11 Ohio, 444; *Shannon v. Marselis*, Saxton, 413; *Holden v. Pike*, 24 Maine, 427; *Cushing v. Ayer*, 25 Id. 383; *Shepherd v. Adams*, 32 Id. 63; *Allen v. Clark*, 17 Pick. 47; *Chase v. Woodbury*, 6 Cushing, 143; *Bradley v. George*, 2 Allen, 392; *Welsh v. Beers*, 8 Allen, 151; *Kilborn v. Robbins*, Ib. 466; *George v. Wood*, 9 Allen, 80.

The cases of *Parkman v. Welch*, 19 Pick. 241, and *The Presbyterian Corporation v. Wallace*, 3 Rawle, 109, which laid down a different principle, have been set aside by the subsequent course of decision. See *Cowden's Estate*, 1 Barr, 267; *George v. Wood*.

In *Bradley v. George*, 2 Allen, 892, Daniels having mortgaged sixteen acres of land, conveyed six acres of the same land with warranty to the plaintiff. He afterwards mortgaged the residue to the defendant, who took an assignment

of the paramount incumbrance. The court held that as the plaintiff's part of the land, was exonerated by the warranty from the mortgage as between him and Daniels, it was also exonerated as against one who derived title subsequently from Daniels. The defendant might undoubtedly as assignee of the first mortgage, have proceeded to a foreclosure and sale of the whole of the mortgaged premises, if the whole was requisite to satisfy the mortgage debt. But as the ten acres which Daniels had retained were adequate for that purpose, he might be restrained from adopting a course which would result in a circuity of action as between him and the plaintiff.

The doctrine was perspicuously stated by Chancellor Kent, in *Clowes v. Dickinson*, and shown to be one which though administered in chancery, has its origin in common law. "The principles of equity, are clearly laid down in *Sir William Harbert's case* (3 Coke, 11, b), where it was resolved, that if A. be seised of three acres, and acknowledge a recognizance or statute, and enfeoff B. of one acre, C. of another acre, and the third acre descends to his heir, and if execution be sued out against the heir, he shall not have contribution against the purchasers, for the heir sits in the seat of his ancestor; and the rule is the same, though the purchaser take the land without a valuable consideration, and though the heir be charged as terre-tenant, (vide *Harvey v. Woodhouse*, 1731 Select Cases in Ch. 3, 4, S. P.) It was also held in the same

case, that the land of the conusor in the recognizance was exclusively to be charged, when divers persons have purchased any of the land subject to the recognizance, because the purchaser does not stand in the same degree with the conusor himself; but where there are several heirs, or where several persons join in a recognizance, one heir, or one conusor, should not be charged exclusively, for their relations and duties were equal, and the charge should be equal.

"This case settles the question of contribution as between the vendor and the purchaser, or the heirs of the vendor and the purchaser; and if there be several purchasers in succession, at different times, I apprehend that in that case, also, there is no equality, and no contribution as between these purchasers. Thus, for instance, if there be a judgment against a person owning at the time three acres of land, and he sells one acre to A., the two remaining acres are first chargeable in equity with the payment of the judgment debt, as we have already seen, whether the land be in the hands of the debtor himself or of his heirs. If he sells another acre to B., the remaining acre is then chargeable in the first instance with the debt, as against B., as well as against A., and if it should prove insufficient, then the acre sold to B. ought to supply the deficiency, in preference to the acre sold to A., because, when B. purchased, he took his lands chargeable with the debt in the hands of the debtor, in preference to the land sold to A. In this respect,

we may say of him, as is said of the heir, he sits in the seat of his grantor, and must take the land with all its equitable burdens; it cannot be in the power of the debtor, by the act of assigning or selling his remaining land, to throw the burden of the judgment, or a ratable part of it, back upon A. It is to be observed, that the debt, in this case, is the personal obligation of the debtor, and that the charge on the land is only by way of security; the case is not analogous to a rent charge, which grows out of the land itself, and where every purchaser of distinct parcels of a tract of land charged with the rent, takes it with such a proportionable part of the charge. The owners of the land, in that case, all stand equal, and if the whole rent be levied upon one, he shall be eased in equity by a contribution from the rest of the purchasers, because of the equality of right between them; (1 Eq. Cas. Abr. tit. Contribution, A. 1.)"

Notwithstanding the doubt suggested by Story (2 Story Eq. Sec. 1233), this reasoning has not been successfully impugned. See *Cowden Estate*, 6 Barr, 267, 271; *Brown v. Simmons*, 44 New Hampshire, 475, 478. If a purchaser may cast the burden of a paramount incumbrance on the vendor, he must have the same right against one to whom the vendor subsequently conveys. It would otherwise be in the vendor's power to defeat the right by simply parting with the land. It is well settled, that if A. is entitled as against B., he will also be entitled

as against one claiming subsequently under B.; *Cowden's Estate*. The only exception that of a *bona fide* purchase, does not apply, where land is sold subject to an incumbrance covering other land, because the vendee is put on inquiry and may ascertain the truth by examining the record.

It is immaterial as it regards the application of the principle, whether the paramount incumbrance was created by the vendor, or results from the act of a prior owner. If land, which has been mortgaged, is conveyed to a purchaser, and sold by him successively in parcels to different persons, each parcel will be liable to the mortgage debt in the inverse order of alienation; *Cummings v. Cummings*, 3 Kelley, 460; *Nellons v. Truax*, 6 Ohio, N. S. 97; *Wykoff v. Davis*, 3 Green, Ch. 224. The vendor is charged not because the lien is for his debt, but because he has agreed to indemnify the purchaser; *Guion v. Knapp*, 6 Paige, 35. "The principle," said Chancellor Walworth, in *Guion v. Knapp*, "of charging different parcels of the mortgaged premises, which have been sold at different times subsequent to the mortgage, in the inverse order of their alienation, is not always confined to the original alienations by the mortgagor, who is personally liable for the payment of the debt. The principle is equally applicable to several conveyances at different times, by a grantee of the whole or a part of the mortgaged premises, where he conveys with warranty. Thus, if the mortgage is

a lien upon 200 acres of land, and the mortgagor conveys 100 acres thereof to A., the 100 acres which remains in the hands of the mortgagor, is to be first charged with the payment of the debt, and, if that is not sufficient, the other 100 acres is next to be resorted to. But, if A. has subsequently conveyed one-half of his 100 acres to B. with warranty, the 50 acres remaining in the hands of A. is, in equity, first chargeable with the payment of the balance of the debt, which cannot be raised by a sale of the 100 acres that still belong to the mortgagor or his subsequent grantee, before resort can be had to the 50 acres which A. has conveyed with warranty. And if A. conveys his remaining 50 acres to C., either with or without warranty, that portion of the premises is still liable for the balance of the mortgage debt, and must first be sold before a resort can be had to the 50 acres previously conveyed with warranty to B."

The rule is not less applicable as between successive mortgagees of land which is charged with the lien of a paramount incumbrance, because each is entitled to require that so much of the value of the land as is not needed to satisfy the antecedent liens, shall be appropriated to his use, and this right being valid as against the mortgagor, cannot be defeated by his act in subjecting the premises to an additional charge in favor of a third person; *Cowden's Estate*, 1 Barr, 267; *Schryver v. Teller*, 9 Paige, 173; *The New York L.*

Ins. Co. v. Melnor, 1 Barb. Ch. 353; *Conrad v. Harrison*, 3 Leigh, 532; *Messervey v. Barrelli*, 2 Hill, Ch. 576.

One who has a right of subrogation to an incumbrance, is as much entitled to the aid of a chancellor as if the lien had been created for his benefit, and hence a purchaser of part of a tract which is subject to an antecedent judgment, may apply for an injunction to prevent any act of waste or spoliation tending to render the residue inadequate to satisfy the judgment; *Johnson v. White*, 11 Barb. 96. See vol. 1, 1021.

The principle is irrespective of the origin or nature of the incumbrance, and when real estate is charged by will with debts or legacies, and sold successively in parcels to different persons, each is chargeable in the inverse order of alienation, and the aid of a chancellor may be asked to place the burden where it must ultimately rest; *Nellons v. Truax*, 6 Ohio, N. S. 97; *Jenkins v. Freyer*, 4 Paige, 47.

Where a grant of part of the land covered by an incumbrance contains a covenant of warranty, there can be no doubt that the burden is to be borne exclusively by the residue of the land in the hands of the grantor. This results not from the technical operation of the covenant, but from the evidence which it affords of the intent, and the effect will be the same if it appears unmistakably from any part of the deed, or from a collateral writing, that the vendee is to have an unincumbered

title; *Cooper v. Bigley*, 13 Michigan, 474. In *Cooper v. Bigley*, the court held that the rule that the vendor's property must be exhausted before recourse can be had to the vendee's, depends on the justice of paying a man's debts out of his own estate, instead of that which he has conveyed to another. It does not, therefore, necessarily depend on the existence of a covenant of warranty in the deed. An owner may, in disposing of his property, charge any part of it with an incumbrance which is common to the whole, and if he does, the purchaser will take it subject to the burden, whatever may be the relative date of his deed; *Welch v. Beers*, 2 Allen, 151; *Kilborn v. Robbins*, Ib. 466, 471. A covenant of warranty may have a material influence in showing that the grantee is to be exempt from a paramount charge, but there is no sufficient ground for holding that such an intent cannot be deduced where the title is not warranted. On the contrary, the doctrine that the lien should be enforced against the vendor's land, before proceeding against that which he has parted with, applies, unless there is evidence of an opposite design. This is the inference of common sense, because one who sells a part of a tract which he has mortgaged, may reasonably be supposed to intend that the portion which remains undisposed of in his hands, shall be appropriated in the first instance to the payment of the debt.

The administration of this rule depends primarily on the maxim,

prior in tempore potior in jure, As between equal equities that is best which is first in point of time. It is not requisite that the second purchaser should have notice of the equity of the first purchaser; *Ellison v. Pecare*, 29 Barb. 333; but it is requisite that the first purchaser should not have misled the second by omitting to perfect his title. See *Chase v. Woodbury*, 6 Cushing, 143; *Brown v. Simmons*, 44 New Hampshire, 475; *La Farge Fire Ins. Co. v. Bell*, 22 Barb. 54; *The New York Life Ins. Co. v. Cutler*, 3 Sandford, Ch. 176; *Chapman v. West*, 17 New York, 125. If part of an incumbered tract is sold to A., and the residue to B., each has an equal right against the vendor, but A. has the advantage of being first in point of time. If B. means to be secure he should inquire whether the title to the residue is still in the vendor, and as the registry is open to him for this purpose, if A.'s deed has been duly recorded, it will operate as constructive notice to B.; *Chapman v. West*. It follows conversely, that the rule will not be enforced in favor of a purchaser whose title does not appear of record, unless the defect is supplied by notice in some other form; *Chase v. Woodbury*. Under these circumstances the second purchaser presumably acts in the belief that he is the first, and should be protected in a right which has been acquired in good faith and for value; *Brown v. Simmons*, 44 New Hampshire, 475, 479. In the case last cited, Bel- lows, J., said, that although a

grant of a part of the land covered by a mortgage, does not in terms impose a lien upon what is left, yet as it makes such residue primarily liable for the whole debt, it is in effect as much a new incumbrance as if the grantor had given a mortgage to the purchaser to indemnify him against the paramount lien. The case is, therefore, clearly within the spirit of the registry acts, which are designed to give notice to creditors and purchasers of every deed that can in anywise affect the title. Unless a purchaser of part of a tract of land has notice that another part had been conveyed to a third person, he may regard it as still belonging to the vendor, and therefore primarily liable for the discharge of a mortgage which was a lien on the entire tract.

In *Chase v. Woodbury*, Nathaniel Sibley mortgaged a farm belonging to him to one Darius Russell. He then sold and conveyed one half of the farm with warranty to Sylvester Sibley, and on the same day executed a deed with warranty of the other half to Reuben Sibley. The plaintiff afterwards purchased Sylvester's moiety, and obtained a deed. The deed to Sylvester Sibley was recorded on the day that it bore date, but Reuben Sibley did not record his deed until after the conveyance from Sylvester Sibley to the plaintiff. The court held, that as the deeds to Reuben and Sylvester were simultaneous, and as there was nothing in the terms of either of them to subordinate it to the

other, both were equally subject to the mortgage. But Reuben did not put his deed on record, until after the plaintiff had acquired title. His failure in this regard was manifestly calculated to mislead the plaintiff. On consulting the record, she would be induced to believe that one-half of the premises remained in the possession of the original grantor, and was primarily liable to the mortgage debt. Reuben, though standing in the first instance on the same footing as Sylvester, must consequently be postponed to one who had presumably suffered through his laches.

It had been contended that the deed from Nathaniel Sibley to Reuben would not have been notice to the plaintiff if recorded, because it was not of the land which she had purchased. But the theory of the defendant was, that because the deeds to Reuben and Sylvester were simultaneous, both moieties were equally liable to contribute to the payment of the mortgage debt. If so, Reuben's failure to record his deed was in effect a failure to record an equitable charge of one half of the mortgage debt, growing out of that conveyance. He was, therefore, in the same position as if he had taken a mortgage from the original grantor, Nathaniel, of the other moiety of the land as a counter security, and failed to record it.

It results from these decisions, that "where the record discloses an incumbrance on property of which a party is taking a convey-

ance, and also discloses, the further fact that the incumbrance rests on other property, and on an examination directed to such other property, it becomes apparent that a conveyance of the latter has been made, which creates an equitable right to throw the burden of the incumbrance on the first property, the purchaser will be presumed to have made such examination, and will be regarded as constructively notified of such equity;" *Hunt v. Mansfield*, 31 Conn. 488; *Brown v. Simmons*, 44 New Hampshire, 475, 481; *ante*, 154, notes to *Le Neve v. Le Neve*.

The failure of the purchaser to record his title, may be supplied by information conveyed through other channels; *George v. Kent*, 7 Allen, 16; *Pike v. Goodenow*. One who enters into an agreement for the purchase of land, and pays the price, thereby acquires a right to subrogation to the lien of a paramount incumbrance on other land belonging to the vendor; *Chapman v. West*, 17 New York, 125; *James v. Hubbard*, 1 Paige, 228; and a purchaser with notice of this equity will be subject to it, although the title of the first purchaser has not been perfected by a conveyance, or recorded. In *Chapman v. West*, constructive notice arising from a suit for the specific performance of a contract for the sale of part of an incumbered tract, was accordingly held to render the residue of the tract chargeable in the inverse order of alienation as against a buyer *pendente lite*.

In *Chapman v. West*, Draper

mortgaged two lots of ground, and then entered into a written agreement with the complainant to sell one of them to him, clear of incumbrances. The complainant filed a bill against Draper, and made the mortgagees parties with a prayer that they might be enjoined from proceeding against the lot which the complainant had purchased, unless the other lot was inadequate to satisfy the mortgage. Strong, J., said, "The appellant was entitled to a decree for a specific performance of the contract with Draper. If a conveyance to him had been executed at that time, he would have acquired by it, as an incident, the equitable right to require the mortgagees to seek satisfaction upon a foreclosure, by a sale in the first instance of that portion of the mortgaged premises still owned by Draper, after the conveyance to the appellant. It is a familiar principle of equity, that when mortgaged premises are sold subsequent to the mortgage to different purchasers in parcels, the parcels on foreclosure are to be sold in the inverse order of their alienation, according to the equities of the respective purchasers in regard to the payment of the mortgage (*Stuyvesant v. Hall*, 2 Barb. Ch. R. 154; *Guion v. Knapp*, 6 Paige, 35; *Howard Ins. Co. v. Halsey*, 4 Seld. 271). When sufficient is realized by the sale of one or more parcels to pay the mortgage debt and costs, the remaining parcels are of course discharged of the lien.

It is supposed by the counsel

for the appellant that it was necessary, in order to secure the appellant this equitable right, to make the mortgagees parties to the suit. The argument is, that Draper might, before the appellant could compel the execution by him of a deed of the premises embraced in the contract, and put it on record, sell the residue of the mortgaged premises to a *bona fide* purchaser, who would have priority over him in respect to the order of sale of the premises on the foreclosure of the mortgage; that filing a notice of *lis pendens*, if the action was against Draper alone, would not be notice to subsequent purchasers of that part of the premises not embraced in the contract; and that to make it notice to them, the mortgagees must also be defendants. This argument is radically erroneous in the view taken by it of the operation of the notice of *lis pendens*, in case Draper was the sole defendant. The notice in that case would be notice to a purchaser *pendente lite* of any portion of the mortgaged premises, precisely as the record of a deed from Draper to the appellant of the parcel contracted by him, would be notice of the conveyance. It would be as much the duty of the purchaser, in investigating the title of a parcel he was about to purchase, to look for a notice of *lis pendens* in a litigation involving another parcel covered by the mortgage, as to look for the record of a deed of the latter parcel. The suit would involve the right of priority in the sale of parcels on a foreclosure of

the mortgages, as an incident to the conveyance, and thus the case would be within the established rule, that the filing of a notice of *lis pendens* is notice of the bill, and of the rights of the plaintiff set forth therein, to all purchasers of any part of the subject of the litigation pending the action (*Parks v. Jackson*, 11 Wend. 442, and cases there cited; *Stuyvesant v. Hall*, 2 Barb. Ch. R. 160). Uniting the mortgagees in the action with Draper as defendants, makes no difference in regard to the operation of the notice filed. They had not the legal title to the premises mortgaged, and could not convey them, and subsequent purchasers from Draper would not be bound to look for or be chargeable with notices of *lis pendens* against the mortgagees. The filing of such notices against Draper only would be notice to such purchasers, whether the mortgagees were or were not joined with him in the action. The only notice required to secure to the appellant all his equitable rights would be, that the appellant had made the contract with Draper, and was entitled to a deed under it."

The principle was applied in another form in *Pike v. Goodenow*, 12 Allen, 492, Heard mortgaged a lot of sixty acres to the Massachusetts General Hospital. He then mortgaged the lot to Abigail Millis, except one acre and ten rods which he afterwards conveyed to Steadman, by a deed executed in 1840, but not recorded till August, 1866. In April, 1842, Abigail Millis purchased the equity of re-

demption to so much of premises as had been mortgaged to her, and the title descended on her death to the plaintiff, who, in February, 1865, took an assignment of the original mortgage to the hospital. Finally, on the 10th of March, 1865, Steadman conveyed the one acre and ten rods to the defendant. It appeared in evidence that the plaintiff had paid the interest on the paramount mortgage for twenty-six years without calling on any other party for contribution. Hoar, J., said, that on the execution of the conveyance from Heard to Steadman, the equity of redemption under the mortgage to Abigail Millis, became primarily liable to the paramount encumbrance. This charge followed the land into her hands, and when the plaintiff inherited "her rights and obligations, the duty of contributing toward the payment of the original mortgage stood thus: 1. The plaintiff as owner of the equity of redemption of the second mortgage, was first liable for the full amount. 2. Steadman, as the next previous grantee, was liable to make good any deficiency in the value of that equity; and 3. The plaintiff as owner of the second mortgage, would be the last to be called on. If, therefore, the value of the equity of redemption which the plaintiff inherited, was equal in value to the sum due on the original mortgage, he was bound as between himself and the defendant, to pay it; and having paid and taken an assignment of it could not use it as a subsisting means of compelling the defendant to con-

tribute to a charge which had virtually been extinguished."

It was immaterial that Steadman's deed was not recorded, because the plaintiff's deed described his land as bounded by "land of Francis Steadman," which agreeably to the decision in *George v. Kent*, 7 Allen, 16, was actual notice of Steadman's title," *ante*, 39.

There was another consideration tending to the same result. The plaintiff had paid the interest in full on the first mortgage for more than a quarter of a century without requiring Steadman to contribute. After such a lapse of time by analogy to the statute of limitations, a chancellor would presume that the sufficiency of the estate primarily liable, had been fixed and agreed on between the parties. The court did not mean to intimate that the holder of the original mortgage, having received the payments of interest exclusively from the owner of a part of the equity of redemption for any number of years, would by that fact alone be precluded from subjecting the whole property which his mortgage covered to a foreclosure. His interest being regularly paid by a person in possession of a part of the land, he would have no reason to know or inquire from whom it came, or to know what grants of the estate had been made by the mortgagor. But between the grantees of the equity of redemption in separate parcels of the land, it is a question from the beginning of the existence of equities, which may be determined by agreement, or by a valuation of the property which the

lapse of time may make difficult of proof. Hence their conduct in respect to the interest, has a direct bearing upon the question who is liable for the payment of the principal; *Black River Saving Bank v. Edwards*, 10 Gray, 397.

It is more difficult to apply the principle where lands are charged by distinct instruments with the same debt, and then sold successively to different persons. Suppose that a mortgage is executed and a judgment entered on the accompanying bond, which becomes a lien on other land belonging to the mortgagor, will a purchaser of the last mentioned land be entitled to subrogation to the mortgage as against a subsequent purchaser of the mortgaged premises? Here there is nothing to put the second purchaser on inquiry, or enable him to discover the prior right of the first, and it may be contended that he should not be affected with an equity which he has no means of ascertaining. See *Green v. Ramage*, 18 Ohio, 428.

In *Green v. Ramage*, a debtor mortgaged lot No. 39 to A., and afterwards gave him a mortgage on lot 30 as an additional security. Lot 30 was subsequently mortgaged to B. and lot 39 to C. It was held that B. and C. stood on the same level and were under an equal obligation to contribute to the discharge of the paramount incumbrance. A like decision in *Osborne v. Carr*, 12 Conn. 195, was cited and approved in *Hunt v. Mansfield*, 31 Conn. 488.

This conclusion is not altogether satisfactory. One who buys with

an express or implied agreement for an unincumbered title, is a surety as it regards a debt which is a charge on the land, and may as such be subrogated to the remedies of the creditor. If the latter holds two mortgages for the debt, one on the premises which have been conveyed to the purchaser, and one on other land of the vendor, the purchaser may require that the latter shall be enforced in the first instance, or assigned to him as a means of compensation. A sale of the land bound by the last mentioned mortgage to a subsequent purchaser, gives rise to a similar equity in his favor, which is valid as against the vendor. But inasmuch as the ground has been pre-occupied by the first purchaser, the case falls within the rule that as between equal equities the first must prevail. See *Ellison v. Pe-care*, 29 Barb. 333.

Where land which has been sold successively in parcels, is liable to a paramount incumbrance in the inverse order of alienation, the equity cannot be defeated by procuring a release or assignment from the incumbrancer, and any such device will be frustrated by a court of equity. See *Hunt v. Mansfield*, 31 Conn. 488; *Loury v. M'Kenney*, 18 P. F. Smith, 294. In *Loury v. M'Kenney*, the defendant in a judgment which was a lien on two tracts belonging to him, sold one of them to Ballard, and afterwards conveyed the other tract to M'Kinney, who obtained a release of the last mentioned tract, took an assignment of the judgment, and levied on the land

first sold. The court held that Ballard's land was surety for the payment of the judgment, and as the land which had been conveyed to M'Kinney was of sufficient value to pay the debt, the transfer of the judgment to him was an equitable extinguishment of the lien.

The doctrine of *Clowes v. Dickenson* is rejected in Kentucky, and successive purchasers of different parcels of land, which are subject to a common incumbrance, held to be under an obligation to contribute ratably to the burden; *Burk v. Chrisman*, 3 B. Monroe, 50; *Dickey v. Thompson*, 8 Id. 312.

The rule under consideration grows out of the relation between the vendor and vendee. It is because the vendee may throw the burden of the paramount incumbrance on the vendor that a subsequent purchaser from the vendor is also bound. The application of the rule, therefore, depends on the contract of sale. Where the vendor conveys with a covenant of general warranty or against incumbrances, he is manifestly liable for any lien or charge on the land. The effect is the same agreeably to the authorities in Pennsylvania, where the deed purports to convey the land, as distinguished from the right, title and interest of the vendor; *Wolbert v. Lucas*, 10 Barr, 73; see *Cooper v. Bigley*, 13 Michigan, 474; 2 Smith's Lead. Case, 737, 7 ed. There is a manifest difference where a vendee of part of the land covered by a mortgage agrees in terms, or by a necessary implication, to be answer-

ble for the whole of the mortgage debt in consideration of a corresponding deduction from the purchase-money. Under these circumstances the equity is reversed, and the vendor, and those claiming under him will be subrogated to the mortgage against the vendee, and any one to whom he subsequently conveys; *Chapman v. Beardsley*, 31 Conn. 115; *Atwood v. Vincent*, 17 Id. 575; *Kilborn v. Robbins*, 8 Allen, 466, 471; *Welch v. Bears*, 1b. 151; *Engle v. Haines*, 1 Halsted's Ch. 187, 632; *Caruthers v. Hall*, 10 Michigan, 40; see *Ferris v. Crawford*, 2 Denio, 595.

In *Chapman v. Beardsley*, A. mortgaged his homestead and an adjacent lot to secure the payment of a note. He subsequently sold the lot to B., in consideration of a promise on his part to pay the note. B. subsequently conveyed the lot to C., informing him of the promise, and that it had not been fulfilled; to which C. replied that as he had not made the promise, he did not consider himself bound by it. The court held that although the promise did not run with the land, it was, nevertheless, obligatory on a purchaser with notice. The lot which had been conveyed to C. was, therefore, the primary fund for the discharge of the mortgage, and must be taken in execution before proceeding against the residue of the premises in the hands of the mortgagor, or of a purchaser from him. The cases of *Engle v. Haines* and *Caruthers v. Holt* are to the same effect.

In like manner, a purchaser of

part of a tract covered by a paramount incumbrance, who gives a mortgage for the purchase-money, may be postponed to the extent of the amount due to a second purchaser who has paid in full, and the equity is worked out under these circumstances by subrogating the second purchaser to the vendor's lien. See *Allen v. Clark*, 17 Pick. 47.

There is a third class of cases, where the vendor conveys his right title and interest, in part of the land covered by a paramount incumbrance, without a warranty or covenant against incumbrances; *Aiken v. Cole*, 37 New Hampshire, 50; *Carpenter v. Koons*, 8 Harris, 222; *Fisher v. Clyde*, 1 W. & S. 544. Here, the vendor and purchaser stand on the same footing, and both must contribute in the ratio of their respective interests. Hence, where an equity of redemption is sold as such in parcels to successive purchasers, all are alike liable to the mortgage debt, and not in the inverse order of alienation. The principle applies whether the sale is the act of the mortgagor, or of the sheriff under an execution; *Fisher v. Clyde*; *Carpenter v. Koons*. Nor does it affect the application of the principle that the vendor enters into a collateral agreement to indemnify the first purchaser, which is not made known to the second, or recorded; *Aiken v. Cole*.

In *Carpenter v. Koons*, two lots of land were subject to a common mortgage. The sheriff sold the equity of redemption in

one of the lots by virtue of an execution on a judgment against the mortgagor, and afterwards sold the equity of redemption in the other lot under a subsequent execution on the same judgment to a different purchaser. It was held that both purchasers must contribute equally to the mortgage. Black, C. J., said: "A man who purchases part of a tract covered by a mortgage, buying the title out and out, clear of encumbrances, and paying a full price for it, has a plain right to insist that his vendor shall allow the remainder of the mortgaged premises to be taken in satisfaction of the mortgage debt before the part sold is resorted to. This being the right of the vendee against the mortgagor himself, the latter cannot put the former in a worse condition by selling the remainder of the land to another person. The second purchaser sits in the seat of his grantor, and must pay the whole value of what he bought towards the extinguishment of the mortgage, before he can call on the first purchaser to pay anything. The first sale having thrown the whole burden on the part reserved, it cannot be thrown back again by the second sale. In other words, the second purchaser takes the land he buys subject to all the liabilities under which the grantor held it. But if the rule is to cease when the reason of it ceases; it cannot extend to a case where the first sale was made subject to a mortgage; and that is the condition of the present one. The defendant's

ed is older than his adversary's, it it conveys him nothing but e equity of redemption. The t of 1830 provides that if the dest lien be a mortgage, and the nd be sold on a judgment, the eriff's vendee shall take it sub- ot to the mortgage. When, there- re, the defendant made his urchase, he had manifestly no aim on the mortgagor or on ybody else, to pay off the whole ortgage, and relieve him entirely om what was probably the most ardensome part of his contract. is share of the mortgage formed part of the price he agreed to ay for the land. The statute of 1830 entered into and made one ' the elements of his contract.

There is a wide and palpable fference between one who buys nd subject to a mortgage, and is a reduction in the price equal ' the amount of the lien, and urther who pays its full value, nd stipulates for a title clear ' incumbrances. Such a distinc- on is anything in the world but ' theoretical subtlety.' * * *

* Two purchasers at a sheriff's le, subject to a mortgage which a common incumbrance on the nd of both, stand on a level. either of them has done or suf- red anything which entitles him a preference over the other. quality is equity. They must pay e mortgage in proportion to the lue of their respective lots."

It results from these authorities, at the conveyance of part of a act of land, with an express or plied condition that it shall be bject to a mortgage which cov-

ers the whole, does not throw the entire burden on the purchaser, and he is, on the contrary, enti- tled to require that the residue of the land shall contribute in pro- portion to its value to the dis- charge of the incumbrance; *Hoy v. Bramhall*, 4 C. E. Green, 74, 563. In *Hoy v. Bramhall*, the grantor was accordingly held to be under an obligation to con- tribute, although the grant was by the terms of the *habendum* sub- ject to the payment of all liens. And when such is the equity as be- tween the parties, it will follow the land into the hands of those who claim under them as pur- chasers.

It is proper to add, that when land which is subject to a mort- gage or other incumbrance, is sold cotemporaneously in parcels to different persons, they all stand on the same footing, and must contribute ratably to the common burden; *Brown v. Simmons*, 44 New Hampshire, 475, 478; *Chase v. Woodbury*, 6 Cushing, 143. But a chancellor will, nevertheless, in determining the question of pri- ority, look to the date of the con- tract, and not of the deed; *James v. Hubbard*, 1 Paige, 228; see *Champman v. West*, 17 New York, 125.

MARSHALLING AGAINST CREDI- TORS IN DEFAULT.

It is an obvious and well estab- lished principle, that the right of subrogation to the remedy of another, implies an obligation on his part to keep it unimpaired, and if this duty is violated, the loss must be borne by him who is in

default. The principle runs through all the various instances in which a creditor, who has a right of recourse against two funds or persons, may on obtaining satisfaction from one of them, be compelled to use his hold on the other as a means of indemnity or compensation to the person whom he has prejudiced by his choice, *ante*, 259, 277. It may consequently be applied on behalf of creditors, sureties, or purchasers.

We have seen that a paramount creditor who having two funds, takes that which is the only resort of a junior creditor, must cede so much of the other fund as is not requisite for the satisfaction of the debt to the junior creditor. It follows that if he knowingly does any act rendering such a transfer nugatory or impracticable, he will be precluded from proceeding against the doubly charged fund to the extent of the resulting injury; *Glass v. Pullen*, 6 Bush, 346; *Cheesebrough v. Millard*, 1 Johnson, Ch. 219, *ante*. See *Kidder v. Page*, 48 New Hampshire, 380.

The principle may also be applied for the protection of a surety. His right of subrogation and the consequent obligation of the creditor, are well recognized heads of equity; *Lewis v. Palmer*, 28 New York, 376; *Burk v. Chrisman*, 3 B. Monroe, 59; *Brewer v. The Franklin Mills*, 42 New Hampshire, 292; *Arnott v. Woodburn*, 39 Missouri, 99; *Sears v. Laforce*, 17 Iowa, 473; *Storms v. Storms*, 3 Bush, 72. He may as soon as the debt matures file a bill to compel the creditor to use all the means

at his command for obtaining satisfaction, *ante*; and he will on paying the debt be substituted in the place of the creditor, as it regards the contract, and every remedy or security by which the fulfilment of the contract can be enforced, or compensation obtained for the breach; *Andrews v. Merrett*, 58 Maine, 539; *Bonney v. Bonney*, 29 Iowa, 448; *Grant v. Smith*, 46 New York, 93; *Hanson v. Crawley*, 41 Georgia, 303; *Hart v. Clowser*, 30 Indiana, 219; *Peirce v. Goldsbury*, 31 Id. 52; *Huff v. Cole*, 44 Id. 300; *Chickason Co. v. Pitcher*, 36 Iowa, 593; *Howard v. Clark*, 1b. 114; *Preston v. Henning*, 6 Bush, 556; *Rowan v. The Sharp's Rifle Co.*, 33 Conn. Hence, if the creditor varies the contract, or postpones the time of payment, or if the remedies or securities for the debt are lost or rendered unavailable through his default or negligence, the surety may take advantage of it as an equitable defence; *The Black River Bank v. Page*, 44 New York, 453. There is this difference, that while an alteration of the contract exonerates the surety by substituting a new obligation for that which he agreed to fulfil, although he may not be really prejudiced by the change; *The United States v. Simpson*, 2 Penna. 437; *Smith v. The United States*, 2 Wallace, 233; 2 American Lead. Cases, 390, 464, 5 ed., he will not be discharged by the creditor's laches in the care or management of collateral remedies or securities, unless loss ensues, and then only so far as he is actually damnified;

verly v. Rice, 8 Harris, 297; *ff's Appeal*, 9 W. & S. 36; 2 American Lead. Cases, 405, 5 ed.

Neff's Appeal, judgment was sustained against a principal and surety, which took effect as a lien on the principal's land. The principal subsequently sold part of the land, and the creditor released the purchaser in consideration of his paying the purchase-money in satisfaction of an antecedent mortgage. It was held that as this arrangement enhanced the value of the judgment, it did not discharge the surety.

It results from what has been said that the equity of a surety depends on the right of subrogation, and the consequent duty of the creditor to do no act by which the exercise of that right may be frustrated. It may consequently arise wherever one is liable in person or estate for a debt which ought in equity and good conscience be discharged by another. In the cases which have been cited above that a sale of part of the land covered by an incumbrance, entitles the purchaser to be subrogated to the lien as against the residue in the hands of the vendor and those claiming under him. It follows that the incumbrancer cannot release the unsold portion, without exonerating the portion which has been sold, wholly or *pro tanto*. It is not a sufficient answer that the security is his, and he may deal with it as he deems proper, because his right of property is not absolute, but only to use the land as a means of obtaining payment, *ante*; *Stevens v. Cooper*, 1

Johnson's Ch. 425; *Taylor v. Maris*, 5 Rawle, 51. "An act," said Sergeant, J., in the case last cited "which is perfectly innocent and legal in itself, may become improper, if the party has notice that the rights of third persons may be impaired by it; as where a covenantor or releasor is apprised beforehand, that a portion of the land is bound by a subsequent mortgage in favor of another person, and that if he discharges a different portion, and reserves his lien against the part bound by such mortgage, thus loading it with a double burden, the claim of the mortgagee will be sacrificed by his priority. It is manifest that it is unfair and inequitable, that he should voluntarily do an act producing these consequences. *Sic utere tuo ut alienum non lædas*. Thus in an analogous case: A person may buy a legal title free from all secret trusts, but if he has notice of a trust, though he may have paid his money, equity will make him a trustee for the party beneficially interested."

It was accordingly held in *Stevens v. Cooper*, that where several parcels of land belonging to different owners were covered by a mortgage, a release of one of the parcels was a discharge *pro tanto* of the others, because the mortgagee could not be entitled to throw the whole burden on the other parcels, nor to deprive the persons to whom they belonged, of the right to contribution from the parcel which had been released. In like manner, a mortgagee who releases part of the mortgaged

premises, with notice that the residue has been sold to a prior purchaser, will thereby discharge the latter from liability for so much of the mortgage debt as could have been made out of the first mentioned parcel; *Paxton v. Harrier*, 1 Jones, 312; *Guion v. Knappe*, 6 Paige, 43; *Patty v. Peese*, 8 Id. 285; *Brown v. Simmons*, 46 New Hampshire, 475; *Caruthers v. Hall*, 10 Michigan, 40; *Mount v. Potts*, 8 C. E. Green, 188; *Hoy v. Bramhall*, 4 Id. 74, 565; *George v. Wood*, 9 Allen, 80; *Gouverneur v. Lynch*, 2 Id. 500; *The Howard Ins. Co. v. Halsey*, 4 Sandford, 565; 4 Selden, 271. It is well settled under these decisions, that when land which is subject to a mortgage or judgment is sold successively in parcels to different purchasers, with covenants against incumbrances, each parcel is liable in the inverse order of the dates of the contracts of sale, and if the lien creditor releases a parcel from the lien, he will not only discharge that parcel, but also to the extent of its value, every other, which having been sold previously, ought not to be made primarily liable for the debt; *Mount v. Potts*, 8 C. E. Green, 188; *Teaff v. Ross*, 1 Ohio, N. S. 475; *Johnson v. Rice*, 8 Greenleaf, 57.

It follows conversely, that where one has agreed to satisfy an incumbrance in consideration of a conveyance of part of the land covered by the lien, the incumbrancer cannot release that part without discharging the part which remains unconveyed. See *Welsh v. Beers*, 8 Allen, 151; *Klaproth v.*

Dressler, 2 Beasley, 62; *Gaskill v. Siner*, Ib. 400. The principle is virtually the same where the second purchaser is entitled to rank as the first, in consequence of the failure to record the prior deed, *ante*, 298.

For a like reason, where mortgages have been given for the same debt on two different tracts, and one of them is sold, the mortgagee cannot, after receiving notice of the equity of the purchaser, release the other tract without exonerating both. The principle is the same whether both mortgages are given when the debt is contracted, or one of them subsequently, as a means of inducing the mortgagee not to proceed against the land which is conveyed. See *Teaff v. Ross*, 1 Ohio, N. S. 469.

In *Teaff v. Ross*, Holmes sold land to Osborn which he had previously mortgaged to Teaff, and gave Teaff a mortgage on other land in consideration of an agreement on his part not to prosecute the first mortgage, if the property included in the second was adequate to pay the debt. In consequence of Teaff's neglecting to record the second mortgage, it did not become a lien, and the land which it should have covered was swept away under a subsequent judgment against Ross. The court held that the case fell within the principle of *Cheeseborough v. Mil-lard*, and that Teaff had, by omitting to perfect his title under the second mortgage, lost the right to enforce the first against the premises which Holmes had conveyed to Osborn.

his decision indicates that there is a release of a tract of land and a mortgage would exonerate the other tract which is collateral. If, liable, this result will also follow from an omission to record the mortgage by which it is invalidated. See *Capel v. Butler*, 2 Johns, 457; 2 American Lead. Cases, 403, 409, 5 ed. For as the creditor to the party interested in the mentioned tract, is the same in either case, a chancellor may afford relief in both. See *Schroep v. Shaw*, 3 Comstock, 446, 447; 2 American Lead. Cases, 540, 408. The obligation of the creditor to perfect the lien of a collateral security by registering was denied in *Hampton v. M'Cord*, 1 M'Cord, Ch. 707, and *Hampton v. Brevard*, 3 Strobbart, 159; but these cases cannot be reconciled with the main current decision in England and the United States.

The principle was applied in another form in *Harker v. Conrad*, S. & R. 301. The plaintiff held two demands secured respectively by liens on different houses belonging to the same person. Having received a general payment on the account, which was sufficient to discharge either lien, but not both, he suffered the lien on one of the houses to expire, and it was held that he could not prosecute the lien on the other house which had been sold to a third person. Gibson, J., said, that the creditor not having applied the payment, it was the duty of the creditor to appropriate it in a way to protect the purchaser.

In like manner, one who having a set-off which is applicable to either of two demands, knows that one of them has been assigned, cannot pay the other without losing the right of set-off against the assignee; *Berry v. The Church*, 7 Maryland, 574. There judgments were entered on two bonds given for the purchase-money of land. The vendor assigned the elder judgment with notice to the purchaser, who subsequently paid the junior judgment. The vendor died insolvent, and the purchaser having been compelled to satisfy the widow's claim for dower, asked to deduct the amount from the judgment which had been transferred to the assignee. The court held that if the purchaser knew of the claim for dower, it should have been recouped from the judgment which still belonged to the vendor, and the failure to do so precluded the right to take advantage of it as against the assignee, See *Lacy v. The East India Co.*, 4 Vesey, 833.

It is, nevertheless, clear under the authorities and on principle, that the rule in question does not apply, unless the lien creditor has notice of the right which is prejudiced by the release. *Prima facie* an incumbrancer may discharge part of the land without losing his hold on the rest. It is only where a third person has intervened, and this is known to the mortgagee or judgment creditor, that he can be visited with the injurious consequences of an act which would otherwise be innocent or laudable as tending to facilitate a sale, or

perfect the equity of one who has already bought; *Taylor v. Maris*, 5 Rawle, 51, 56. There is a presumption in favor of the continuance of things in the same condition, and a mortgagee is entitled to suppose that the premises belong to the mortgagor, until he is definitely informed to the contrary. If a sale takes place, it is the duty of the purchaser to inform the mortgagor, and not that of the mortgagor to seek out the purchaser. This is the more true, because the one knows where to go, while the other has no such clue; *Taylor v. Maris*, 5 Rawle, 51, 56. Notice, said Sergeant, J., in this case "is essential. It is not sufficient to say, that by the release there is a possibility that injury may result to some one. Perhaps there is no exercise of legal right, from which by possibility a loss may not result to others in particular cases. Whoever buys a legal title, may by possibility do injury by destroying trusts and equities of which he is not apprised. In itself, the act is innocent. It becomes otherwise when the party knows that it will occasion a loss to a third person."

It results from what is here said, that one who alleges that the release of one tract or parcel of land has discharged another in which he is interested as a purchaser, must show that the sale was known to the mortgagee when the release was executed; and the better opinion is that the notice should be so far actual, as to justify the inference that the incumbrancer acted with a wil-

ful disregard of the purchaser's equity.

It is well settled under the authorities, that the registration of a subsequent conveyance of part of the premises covered by a mortgage, is not notice to the mortgagee, and will not preclude him from releasing the part which remains unsold; *Cooper v. Bigley*, 13 Michigan, 463; *James v. Brown*, 11 Id. 23; *Hoy v. Bramhall*, 8 C. E. Green, 565; *Van Orden v. Johnson*, 1 McCarter, 376; *Taylor v. Maris*, 5 Rawle, 51; *Stuyvesant v. Hone*, 1 Sandford, Ch. 419; 2 Barbour, Ch. 137; *Blair v. Ward*, 2 Stockton, Ch. 119. In the case last cited, Sergeant, J., said, "it has been contended that the recording of the mortgage was constructive notice to the holder of the antecedent judgment; but such an argument is untenable. Recording a mortgage or docketing a judgment, is notice of the lien to a subsequent mortgagee, because it is incumbent on him to examine the title before accepting it as a security. But what has a holder of a prior lien to do with subsequent liens? If such a rule were laid down, no one would be safe in discharging any part of the land of a mortgagor or judgment debtor, although the residue might be more than adequate to satisfy the debt. If the defendant meant to gain an equity, he should have notified the plaintiff distinctly of his position, and cautioned him to do no act by which the security would be impaired."

The same view was taken by

chancellor Kent, in *Cheeseborough v. Millard*: "If the judgment creditor had given notice to the owners of the first mortgage, before the arrangement and discharge took place, of the equity which he claimed and expected, I might probably have been inclined to have stayed to a certain extent the operation of the second mortgage. But there is no evidence, nor even ground for presumption, at either Marvin or Millard, the owners of the mortgages, knew of the existence of the judgment when the arrangement was made and carried into effect."

"They were not bound to search for the judgment, and the record was not constructive notice to them; and as the rule of substitution rests on the basis of mere equity and benevolence, the creditor who has thus disabled himself from making it, is not to be injured thereby, provided he acted without knowledge of the other's right, and with good faith and good intention, which is all that equity in such case requires. Pothier's *Traité des Oblig.*, No. 20.) 'The other debtors and creditors,' to adopt the observations of Pothier, 'might, as well as the creditor, have taken care of the right of hypothecation which he has lost; they might summon him, or interrupt at their risk, the third purchasers, or to oppose the decrees. It is only in the case in which they may have put the creditor in default, that they can complain that he has lost his hypothecation.' " It was held in like manner in *George v. Wood*, 9

Allen, 80, that where the purchaser seeks to enforce his equity against the mortgagee, "it is reasonable to require strict proof of notice. He takes his title with full knowledge that it is subject to the mortgage; and if he does not perfect it by a release, he ought not to subject the mortgagee to the constant necessity of investigating transactions between the mortgagor and third persons subsequent to the mortgage, or in order to protect him, when by giving notice he can so easily protect himself. The establishing of such mere collateral equities which do not affect the legal title, cannot be considered as within the purpose intended to be accomplished by the statutes for registration of deeds."

The doctrine of these cases has been recognized throughout the subsequent course of decision; *Hoy v. Bramhall*, 4 C. E. Green, 74, 565; *Caruthers v. Hall*, 10 Michigan, 40; *James v. Brown*, 11 Id. 23; *Cooper v. Bigley*, 13 Id. 463; *The La Farge Ins. Co. v. Bell*, 22 Barb. 54; although the courts have sometimes allowed constructive notice to take the place of the actual warning required in *Cheeseborough v. Millard*; *Reilly v. Meyer*, 1 Beasley, 55, 59; *Guion v. Knapp*, 6 Paige, 35; *Patty v. Pease*, 8 Id. 277; *Blair v. Ward*, 3 Stockton, Ch. 119; *The Howard Ins. Co. v. Kelsey*, 4 Sandford, 565; 4 Selden, 271; *Stuyvesant v. Hone*, 1 Sandford, Ch. 419.

In *Hoy v. Bramhall* the court held that knowledge that the mortgagor had disposed of some part of the land, rendered it incumbent

on the mortgagee to ascertain what that part was, before executing a release which might prejudice the purchaser, while in *The Howard Ins. Co. v. Kelsey*, 4 Sandford, 565; 4 Selden, 271, an inference of notice was drawn from a recital in the release itself, *ante*, 191.

It is well settled that the right of subrogation does not exist as between principal debtors. See *Baily v. Brownfield*, 8 Harris, 41; *Hogan v. Reynolds*, 21 Alabama, 56. Hence a creditor may return a security to one of several co-contractors, or release a judgment which he has obtained against him, without discharging the others; and it is immaterial that they are in fact sureties, unless this is communicated to the creditor. See 2 American Lead. Cases, 457. A different view taken in *Holt v. Body*, 6 Harris, 207; seems to have arisen from a misapprehension of the rule.

A debtor who gives a collateral security, is so far in the position of a surety that he is entitled to a return of the security on satisfying the debt. The creditor is, therefore, responsible for the preservation of the property which has been entrusted to his care. He need not collect the security by suit, or convert it into money by a sale, unless he is expressly required to do so by the debtor; *Ormsby v. Fortune*, 16 S. & R. 302; *Schroeppe v. Shaw*, 3 Comstock, 446; but he is answerable for any act or omission by which the security is impaired, or rendered unavailable as a means of payment. It follows

that while an allegation that the creditor has an adequate security, is not a defence; *Lord v. The Ocean Bank*, 8 Harris, 384; *The Bank of the United States v. Peabody*, Ib. 454, 458; it is, nevertheless, incumbent on him to render an account; and a failure on his part to surrender the security, or account for its non-production, in response to a demand to that effect accompanied by a tender of the amount due, is a sufficient cause for deducting the value of the security from the debt, or for the grant of an injunction to stay proceedings, if the case has gone to judgment; *The Bank of the United States v. Peabody*; *Spalding v. The Bank*, 9 Barr, 28. It has, nevertheless, been held in various instances, that a transfer of the note or bond of a third person as a collateral security, renders it incumbent on the creditor to proceed within a reasonable time to enforce the payment of the instrument by suit, and that any loss which may result from his default in this respect, will be an equitable extinguishment of the debt; *Sullivan v. Morrow*, 4 Indiana, 42. See *Muirhead v. Kirkpatrick*, 9 Harris, 237, 241; *Lawrence v. M'Calmont*, 2 Howard, 426, 454; *Bailey v. Clark*, 1 Cranch, 181, 193; *Spalding v. The Bank*, 9 Barr, 229; *Ex parte Mure*, 1 Coxe, 63; *Williams v. Price*, 1 Simons & Stuart, 581. In *Lyon v. The Huntingdon Bank*, 12 S. & R. 67, a failure to proceed to execution on a judgment which had been confessed by the maker of a note, until he became insol-

ent, was held to discharge the indorser. It was determined in like manner, in *Sullivan v. Morrow*, that the creditor is chargeable on account with any loss which may ensue from his laches in not proceeding to judgment or execution on the securities placed in his hands as collateral. See *Douglass v. Reynolds*, 12 Peters, 497.

A similar doctrine may be found in *Williams v. Price*, 1 Simons & Stuart, 581; and *Ex parte Mure*, 2 Dowe, 63. In the case last cited, a debtor assigned a bond, and warrant of attorney from a third person to confess judgment, to his creditor, who omitted to enter up the judgment for five months, during which time the obligor became insolvent, and the debt was lost. The Lord Chancellor said, "I am of opinion that whoever takes a bond in the manner this was taken, makes it his own, to the effect of binding himself to make it available as far as he can by ordinary diligence. Generally speaking that which would be negligence in one employed to make the bond available, must be so in one who has taken upon himself to make it applicable in payment of the debt of the assignor, and who is invested with complete authority for that purpose."

In like manner, a failure to record a mortgage which has been received as a collateral security, rendering it inoperative as a lien, may exonerate the debtor to the extent of the ensuing loss; See *Capel v. Butler*, 2 Simons, 457; *Teaff v. Ross*, 1 Ohio, N. S. 469, *ante*, 308. The latter point has not-

withstanding been determined the other way in South Carolina, on the ground that a creditor is not under an obligation to use active diligence; *Hampton v. Levy*, 1 McCord, Ch. 107; *Laing v. Brevard*, 3 Strobbart's, Eq. 59.

There can be no doubt that a creditor who in receiving a security, agrees to collect it by suit, is responsible for the non-fulfilment of his engagement. See *Sellers v. Jones*, 10 Harris, 425; *Kiser v. Ruddick*, 8 Blackford, 382. But the better opinion would seem to be that such an agreement should not be implied from the mere fact of accepting a note, bond, or other collateral security for an existing obligation; *Ormsby v. Fortune*; *Schroepfle v. Shaw*, 3 Comstock, 446; *Trotter v. Crockett*, 2 Porter, 401; *Sellers v. Jones*, 10 Harris, 425. The obligation of the creditor to use active diligence in the collection of a collateral security, was accordingly denied in *Schroepfel v. Shaw*; and it was said that he may remain passive until quickened into diligence by the request of the debtor.

Whatever may be thought on this head, it is clear that one who receives a note or bill as security, or in conditional payment, must take the requisite steps to fix the drawer and indorsers, or submit to any loss that may ensue from the default. See *Russell v. Hester*, 10 Alabama, 536; *Trotter v. Crockett*, 2 Porter, 401. But there is some doubt under the authorities, whether the burden of proof is on the debtor, to show that such a

default has resulted in the loss of the debt, or on the creditor, to adduce evidence that the parties to the instrument were insolvent, and that nothing would have been gained by diligence; *Lawrence v. M'Calmont*, 2 Howard; 2 American Leading Cases, 288, 5 ed.

It need hardly be said that wherever the neglect of the creditor in the management of a collateral security will discharge the principal debtor, it will also discharge one who is secondarily liable for the debt; *Capel v. Butler*, 2 Simons & Stuart, 457.

It has been declared in numerous instances that a creditor who has two funds open to him, may be required to proceed in the first instance against that which is beyond the reach of another creditor, who has but a single means of payment; *The Mechanics' Bank v. Edwards*, 1 Barbour, S. C. R. 271; *Besley v. Lawrence*, 11 Paige, 581; *James v. Hubbard*, 1 Id. 228; *Pratt v. St. Clair's Heirs*, 6 Ohio, 227; *Clark v. Pullen*, 6 Bush, 346; *Hurd v. Eaton*, 28 Illinois, 122; *Wurtz v. Hart*, 13 Iowa, 15; *Wright v. Tustin*, 56 Barb. 56; *Clowes v. Dickenson*, 9 Cowen, 403; *Pallen v. The Bank*, 1 Freeman, 419; 8 Smedes & Marshall, 357; *Baine v. Williams*, 10 Id. 113; *Thompson v. Murray*, 2 Hill, Ch. 204, 213; *Henshaw v. Wells*, 9 Humphreys, 568; *The Insurance Co. v. Woodruff*, 2 Dutcher, 541, 558. Such an exercise of the power of a chancellor is obviously extreme, and can only be justified where irreparable injury would result from suffering the law to take its

course. It is conceded that the creditor cannot be shut out from a doubly charged fund, and compelled to resort to another remedy, unless the latter is adequate in all respects to satisfy the debt, *ante*; *Evertson v. Booth*, 19 Johnson, 496; *Ramsey's Appeal*, 2 Watts, 228, 232. Where such is the case, the ends of justice may be attained by subrogation. Where it is not, one who has been diligent or fortunate enough to secure a hold on two funds, should not be deprived of that which is the only prompt and certain means of payment. *Wright v. Simpson*, 6 Vesey, 714, 736; *Post v. Mackall*, 5 Bland. 484; *Jarvis v. Smith*, 7 Abbott, 217; *Moore v. Wright*, 14 South Carolina, 134. The case of *The New York Steamboat Co. v. New Jersey Ferry Co.*, 1 Hopkins, 460, which seems to contravene this rule, was decided by a subordinate tribunal, and can hardly be regarded as an authoritative exposition of the law.

The courts of Pennsylvania have accordingly been constant in maintaining that a creditor should not be hindered or delayed in the collection of the debt, for the sake of leaving the way open to another creditor, whose lien did not attach till afterwards, and who, therefore, has no equity to be first in being paid; *Evans v. Duncan*, 4 Watts, 24.

In *Evans v. Duncan*, land which had been devised, was sold after the testator's death under a judgment and execution against him, and the proceeds paid into court. It was contended on behalf of the

lien creditors of the devisee, that as the testator had specifically charged other land with the payment of his debts, the judgment creditor should proceed against that, and leave the fund in court free for the payment of their demands, Kennedy, J., said: "It is alleged that the court below erred in not appropriating the money to the payment of the debts owing to the creditors of Stephen Duncan, which had become liens upon the land before it was sold. This is contended for on the ground that Thomas Duncan, by his will, after devising the land from which the money has been raised, to his son Stephen Duncan, in fee, has appropriated other lands and funds for the payment of his debts; and that although the creditors of Thomas Duncan, in seeking payment of their debts, are not confined or restricted exclusively to look to the funds and property which he has set apart for that purpose in his will; yet having them and the residue of his estate all bound for the payment of their debts, equity will compel them, as they have two funds, to resort to that fund which will enable the creditors of Stephen Duncan to have their debts paid also. But the creditors of Thomas Duncan, having the elder claim upon the fund in the court below, and being entitled to be paid immediately out of it, cannot be delayed, but have a right to be preferred, unless some good reason, consistent with the principles of justice as well as equity, can be given why it should not be so. It may be very advan-

tageous and all-important to them to receive their money with as little delay as possible; and being entitled to have received their debts long since, if they could have got them, it would, therefore, be contrary to both law and equity to pass a decree that would in its effect delay them in the receipt thereof a single minute longer than is indispensably necessary for a final determination of the controversy. The law considers it fraudulent to hinder or delay creditors in receiving their just debts after they have become payable. But it is self-evident, that to decree the money in court to the creditors of Stephen Duncan, would inevitably delay the creditors of Thomas Duncan, in the receipt of their debts, to a future period almost unknown. It would necessarily postpone the payment of them until money for that purpose could be raised from the sale of other lands, which might require considerable time, perhaps years, to accomplish it." The question was again considered in *Neff's Appeal*, 9 W. & S. 36. Judgment had been obtained against a principal and surety, which bound the real estate of both. The surety's land was sold, and it was contended that the proceeds should be appropriated to the payment of a younger judgment, and the senior judgment creditor compelled to resort to the principal's land, which was proved to be adequate to satisfy the debt. Kennedy, J., said, that if both estates had been sold and were in the hands of the sheriff for

distribution, it would be just to pay the elder judgment out of the fund which the subsequent incumbrancer could not reach. Such was not the case. Several months must elapse before payment could be obtained from the principal's estate, and there was no justice in requiring a creditor to submit to such a delay, because he had a double remedy. A decree of subrogation would accomplish all that the younger creditor was entitled to ask for, and all that a chancellor could equitably grant.

So, in *Ramsey's Appeal*, 2 Watts, 220, a bank which had a lien on its own stock for money lent, was held to be entitled to the fund arising from a sale of the real estate of the borrower's land; and the relief afforded to his prior judgment creditors was by subrogating them to the lien on the stock. The case of *Dunlap v. Clemants*, 7 Alabama, 539, is substantially to the same effect.

It was said in like manner, in *Post v. Mackall*, 3 Bland, 484, 511: "Great care must be taken," "in making such an arrangement, not to lessen or impair, in any manner whatever, the obligation of the creditor's contract. It can only be made where all the parties are before the court, and the whole subject is within its jurisdiction; and when it is clear, that the creditor can sustain no loss, nor be in any way delayed, or have his claim subjected to any additional peril. For if the parties have not been all brought before the court; or if they cannot be brought before it; because of their not having any

such privity of interest as will warrant the making of them parties to the same suit; or if the funds cannot be embraced within the scope of the same suit; and much more so, if they be not both of them within the jurisdiction of the court, it would be utterly impracticable to make any such arrangement in favor of any one set of creditors against another, the security of whose claim may be thus greatly endangered, and the satisfaction of it necessarily delayed." It was accordingly determined that a creditor could not be enjoined from enforcing a mortgage to the exclusion of a junior lien on the ground of his holding another mortgage for the debt on property beyond the jurisdiction of the court. So in *Gray v. Carmon*, 3 Iredell, Eq., the court held that, if there be any case where the creditor will be compelled to look to the collateral securities which he has received from the creditor, before proceeding against the surety, it is when these afford a remedy not less plain, direct and certain than that which he is compelled to forego. See *Gary v. Hignut*, 32 Maryland, 552.

It is well settled, in conformity with these decisions, that when there is no special equity, a creditor will not be controlled in the selection of his remedies, at the instance of a junior claimant, although he will be held rigorously to the duty of preserving them intact for the protection of the party whom he disappoints by his election; *Fowler v. Barksdale*, 1 Harper, Ch. 164; *Jones v. Zollickoffer*, 2 Hawkes

623; *Briggs v. The Planters' Bank*, Freeman, Ch. 574; *Markham v. Calvert*, 5 Howard, Miss. R. 427; *Mix v. Hotchkiss*, 14 Conn. 32; *Doub v. Barnes*, 4 Gill, 1; *Reigle v. Leiter*, 8 Maryland, 405; *The Mechanics' Association v. Conover*, 1 M'Carter, 219; *Morrison v. Kurtz*, 15 Illinois, 193; *The U. S. v. Duncan*, 12 Id. 523; *Emmons v. Bradley*, 56 Maine, 333; *Cornish v. Wilson*, 6 Gill, 299; *Gibson v. M'Corrick*, 10 Gill & J. 107.

For an analogous reason it is not a defence to a suit against a surety, that the creditor has a lien on the real estate of the principal, which affords an adequate means of satisfaction, or that the creditor is in possession of collateral securities which might be rendered available for that purpose; *Kirkman v. The Bank of America*, 2 Coldwell, 397. *The Ins. Co. v. Smith*, 1 Jones, Penna. 120; *Hawks v. Geddis*, 16 S. & R. 123; 1 Watts. 280; *Gary v. Hignutt*, 32 Maryland, 552, 559. This is the more obvious, because the surety may file a bill to enforce the payment of the debt as soon as it matures, and be subrogated to all the creditor's remedies as a means for the attainment of that object. See *Irick v. Black*, 2 C. E. Green, 109; 2 American Lead. Cases, 5 ed. 412, *post* notes to *Rees v. Berrington*. And one who, instead of adopting this course, waits until execution is about to go against himself, comes too late with an application which should have been made at an earlier period.

There is nothing in these de-

cisions to preclude a court from so regulating its process as to do justice among all the parties whose interests are at stake. A creditor who has a paramount lien on property belonging to several persons, or in which several persons are concerned, and may proceed forthwith to execution against any part, should sell that first which is primarily liable. Such a fund is as much under legal control as if it were in court, and the process should be so moulded as to avoid circuitry, and spare him whose liability is secondary the sacrifice incident to a forced sale. See *Watson v. Bain*, 7 Maryland, 117. The sheriff may consequently be directed not to sell land which the defendant in the judgment has conveyed, unless that which he retains does not produce enough to satisfy the debt, or the court may direct that land which has been conveyed successively in parcels to different purchasers, shall be sold in the inverse order of alienation; *Mevey's Appeal*, 4 Barr, 80; *James v. Hubbard*, 1 Page. So a creditor who has judgment, and can proceed forthwith to take the principal's estate in execution, may be restrained from seizing the surety's goods or land, until the principal's property is disposed of and proves inadequate to pay the debt; and this course will be unhesitatingly adopted where there is a collusive attempt to exonerate the principal at the surety's expense; *Irick v. Black*, 2 C. E. Green, 109. Under these circumstances, there is no hinderance or delay, and the creditor is merely

required to throw the burden in the first instance where it should ultimately rest. See *Halsey v. Reed*, 9 Paige, 446; *Besby v. Lawrence*, 11 Id. 501; *Goulburn v. Stevens*, 1 Maryland Ch. 420; *Wright v. Atkinson*, 3 Sneed. 185.

In *Irick v. Black*, a joint judgment was obtained against a principal and surety, and a levy made on the principal debtor's goods. His father then took an assignment of the judgment, and directed the sheriff to stay the proceedings against him, and make the money out of the property of the surety. The latter applied to the Court of Chancery for an injunction, which was granted, on the ground that there had been a concerted effort to control the course of the law to the surety's prejudice.

In like manner, where land belonging to husband and wife, which had been mortgaged for the husband's debt, was sold, and the proceeds brought into court for distribution, the husband's share of the fund was appropriated to the payment of the mortgage, and the balance awarded to the wife; *Vartie v. Underwood*, 18 Barb. 56.

The argument in favor of confining a creditor in the first instance to the fund which is primarily liable to the debt, is much stronger than it can well be for enjoining a paramount incumbrancer at the instance of one who holds a junior lien. If the land of a surety is taken in execution, he may be compelled to seek redress through an execution against the principal. Hence, two forced sales instead of one.

Moreover, the injury incident to the loss of land does not always admit of a pecuniary compensation.

Another reason for protecting a secondary fund by injunction, is to avoid circuitry of action. A court of equity will not permit a vendor who has obtained an assignment of a paramount mortgage to enforce it against the vendee, where the latter would be entitled to recover the amount in assumpsit, or on the covenants in his deed. See *Tice v. Annin*, 2 Johnson, Ch. 128; *Heyer v. Pruyer*, 7 Paige, 465; *Stevenson v. Black*, Saxton, 338; *ante*, 284, 294. For a like reason where a principal debtor succeeds on the creditor's decease to his estate as a legatee or under the statute of distributions, a chancellor may enjoin the administrator from proceeding to execution against the surety; *Wright v. Austin*, 55 Barb. 13.

It is universally conceded that the burden is on him who would confine a creditor to a particular fund or remedy to show that it affords a sure, prompt and adequate means of payment; *Wright v. Simpson*, 6 Vesey, 714; *Woolcocks v. Hart*, 1 Paige, 185; *Everton v. Booth*, Johnson, Ch. 19; Johnson, 486; and in the case last cited, the court of appeals reversed the decree of the chancellor on the ground that this did not sufficiently appear from the proofs. "I yield," said Spencer, J., "my entire assent to the proposition, that where a party has two funds out of which he can satisfy his debt, and another creditor has a

lien, posterior in point of time, on one of the funds only, the first creditor will, in equity, be compelled to resort to that fund which the junior creditor cannot touch, in order that the junior creditor may avail himself of his own security, where it can be done without injustice or injury to the debtor or creditor. This principle, which is so equitable and just, was thus illustrated by Lord Hardwicke, in *Lanoy v. The Duke and Duchess of Athol*, 2 Atkins, 446. 'Suppose,' he said, 'a person who has two real estates, mortgages both to one person, and afterwards, only one estate to a second mortgagee, the court, in order to relieve the second mortgagee, have directed the first to take his satisfaction out of that estate only which is not included in the mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgagee.' The same principle was adopted in *Wright v. Nutt*, 1 H. Bl. 150, and in *Hays v. Ward*, 4 Johns. Ch. Rep. 132, and in several other cases. But a court of equity will take care not to give the junior creditor this relief, if it will endanger thereby the prior creditor, or in the least impair his prior right to raise his debt out of both funds. The utmost that equity enjoins in such a case is, that the creditor who has a prior right to two funds, shall first exhaust that to which the junior creditor cannot resort; but where there exists any doubt of the sufficiency of that fund, or even where the prior creditor is not willing to

run the hazard of getting payment out of that fund, I know of no principle of equity which can take from him any part of his security until he is completely satisfied."

So, in *Brinkerhoff v. Marvin*, 5 Johnson, Ch. 320, it was said to be a sufficient answer to a bill by a subsequent judgment creditor, to compel the holder of a prior judgment to exhaust a bond and mortgage which had been transferred to him as security for the judgment debt, that the right under the mortgage was disputed, and that it would not be equitable to detain the respondents from their remedy on the judgment, until they had entered upon and concluded a litigation which was confessedly doubtful, and might be protracted.

The doctrine that one who has two funds open to him shall not take that which is the sole dependence of another, was invoked in *Wright v. Nutt*, 1 H. Bl. 126; 3 Brown, Ch. Cas. 326, on behalf of an exile, whose property had been confiscated by the country whence he had fled, and was alleged to be accessible to his creditors, though not to himself. It had been held, as far back as *Holditch v. Mist*, 1 Peere Williams, 695, that an act of Parliament divesting the estate of a South Sea director, and placing it in the hands of trustees for the payment of his debts, did not render it incumbent on a creditor to have recourse to the fund thus set apart, or warrant an injunction to restrain him from proceeding to judgment in the ordinary course of law. The point arose sixty

years afterwards, in *Wright v. Nutt*, under peculiar circumstances. The estate of Sir James Wright, an American loyalist, was confiscated by the State of Georgia, and vested in commissioners for the use of the State, subject to the payment of such debts as he might owe to any persons well affected to the independence of the United States, who should prove their claims within twelve months. His American creditors followed him to England, and one of them, Charles Pinkney, brought a suit which went to judgment. Wright died, and his executors filed a bill against Pinkney, alleging that if he had not obtained satisfaction out of the confiscated effects in Georgia, it was through his own wilful default, and that it was incumbent on him to resort to that fund, especially as it was entirely beyond the reach of Sir James Wright, in his lifetime, and of the complainants since his death. The bill, therefore, prayed that the respondent might deliver up the note on which he had sued for cancellation, or that he might be directed to have recourse in the first instance to the fund which was open to him in the United States. The answer averred that the respondent attempted to prove the debt before the commissioners in Georgia, and that they disallowed the claim.

Lord Thurlow held, that a creditor who, having the power to obtain payment out of a particular fund, pursued the debtor, might be enjoined, especially if it was from the circumstances of the

case impossible for him to assign the fund to the debtor, or collect it for his use. To make the principle effectual in the case before the court, it must be shown that the confiscated estate was not only of a greater value than the demand in suit, but than all the demands against the estate; for, if it turned out to be a defective fund, incapable of satisfying the debt but in part, it would, at the most, be a discharge *pro tanto*. It must also appear that the fund was still available; or, if it was not, that it was owing to the defendant's want of diligence. In *Foliot v. Ogden*, 1 H. Bl. 123, Lord Loughborough held, that such a defence was not maintainable at law, but expressed his entire concurrence with the principles advanced in *Wright v. Nutt*, as affording a good ground for the intervention of a chancellor.

When, however, the question arose in *Wright v. Simpson*, 6 Vesey, 714, *Wright v. Nutt*, was virtually overruled, and the court reverted to the doctrine of *Houl-ditch v. Mist*. Lord Eldon said, that the fund in the State of Georgia might be likened to a pledge or collateral security. Were it a pledge given by the debtor and accepted by the creditor, there would still be great difficulty in maintaining that the exclusion of the debtor through the fortune of war from re-entering on his property in America, could preclude the right to charge him personally in England. It was not a pledge, but a fund that had been thrown on the creditor by an

act not his own, and the debtor had, therefore, less cause for requiring the creditor to suspend the right of suit until he had made the most of the fund. If the case was likened to that of principal and surety, it had never been supposed that the creditor was under an obligation to use active diligence against the principal. A surety is a guarantor, and it is his business to see that the principal pays, and not the creditor. On giving an indemnity against the risk, delay and expense, the surety might call on the creditor to do the best that he could for his benefit, and might require him to prove under a commission in bankruptcy. Another argument was, that the creditor's inability to assign the fund, rendered it incumbent on him to have recourse to it in the first instance. Such an equity might be enforced under the head of marshalling assets, if not at the instance of the debtor, in cases growing out of his acts, and where he would be indirectly benefited. But the authorities did not warrant the inference, that one who had taken a personal security could be compelled to suspend his remedy on it, and have recourse to another fund, which he had not accepted as a pledge.

The chancellor was not, therefore, prepared to accede to the doctrine of *Wright v. Nutt*; but if the principles laid down in that judgment were sound, the evidence did not bring the case within those principles. It did not appear that the creditor had the clear means of making the fund in Georgia avail-

able for the payment of the debt, or that he had committed any wilful default. The bill would, consequently be dismissed. See *M'Call v. Hinckley*, 9 Vermont, 143; *Cohen v. The Commissioners of the Sinking Fund*, 7 Smedes & Marshall, 165; 2 American Lead. Cases, 407, 5 ed.

Notwithstanding some partial differences, the general rule is well defined. A creditor who has two funds will not be postponed at the instance of another who has but one, unless it appears that the fund to which he is referred can be reached without litigation, delay, or expense, nor unless it is beyond all question adequate to meet the debt. It is a condition of such relief, that the remedy which is left open to the senior creditor shall be as certain, prompt and efficient as that which he is compelled to forego; *Evertson v. Booth*; *Fowler v. Barksdale*, Harper's Eq. 165; *Goodwin v. The State Bank*, 4 Dessausure, 393; *Gadberry v. M'Clure*, 4 Strobbart Eq. 178; *Felder v. Murphy*, 2 Richardson Eq. 58; *Moore v. Wright*, 14 Id. 734; *Jarvis v. Smith*, 7 Abbott, 217; *Walker v. Coover*, 2 S. Carolina, 16; *Vanmeter v. Ely*, 1 Beasley, 272; *Kidder v. Page*, 48 N. Hamp. 380. The burden of establishing this is on the creditor who asks to have the assets marshalled, and he must not only show that he will suffer if the injunction is refused, but that granting it will not prejudice or hinder one whose right is older, and therefore better than his own. Were the rule otherwise, the diligence which

secures two securities, might embarrass or defeat, instead of accelerating, the collection of the debt. It follows, that a creditor who is not in default, will not be excluded from a fund within the jurisdiction of the court, and compelled to resort to another in a different State or country; *Wright v. Simpson*, 6 Vesey, 714; *Durham v. Williams*, 39 Georgia, 312; although he may well be put on terms, and required to execute an assignment of the more distant fund as a means of indemnifying the creditor whom he disappoints by taking that which is close at hand.

It is well settled that the receipt of a collateral security does not preclude the right to proceed to judgment and execution against the debtor, and his insolvency will not vary the rule, or authorize a chancellor to enjoin the creditor. The case is not necessarily the same when the fund is in the hands of a court of equity, and effect may then be given to the principle that equality is equity. It is, nevertheless, established, that in the distribution of legal assets, equity follows the law, and enforces legal rights and priorities; *Rutledge v. Hazlehurst*, 1 M'Cord Ch. 466; *M'Candlish v. Keene*, 13 Grattan, 615, 634; *post*, notes to *Silk v. Prime*; and legal assets do not lose their character or become merely equitable on the decease of the debtor, or the assignment of his estate for the benefit of his creditors. Hence, a creditor may receive a dividend on the whole amount of the debt, from an insol-

vent estate in the hands of an administrator or assignee, without surrendering his collateral securities, although he is only entitled to satisfaction, and must account for any surplus that may remain after the debt is paid. Such, at least, seems to be the rule in England, and it is generally followed in the United States; *Findlay v. Hosmer*, 2 Conn. 530; *West v. The Bank of Rutland*, 19 Vermont, 403; *Putnam v. Russell*, 17 Id. 154; *Cornish v. Wilson*, 6 Gill, 303; *Clarke v. Henshaw*, 30 Indiana, 144; *Logan v. Anderson*, 18 B. Monroe, 114; *ante*, 258.

A different rule prevails in bankruptcy, where the creditor may either surrender his securities, and prove the whole amount of the debt, or receive a dividend on so much of the debt as is not paid from the proceeds of the securities, but cannot resort to both funds as a means of being paid in full. See *Ex parte Farnsworth*, 1 Lowell, 497; *Wallace v. Conrad*, 3 Brewster, 329; 7 Philadelphia, 114; *In the matter of Bigelow*, 2 Benedict, 480. If a creditor having a judgment against a bankrupt, which is a lien upon his real estate, proves the debt, and comes in on the bankrupt's estate for the whole, the assignee is entitled to be subrogated to the lien of the judgment on the land; *Wallace v. Conrad*, *supra*; see *Cook v. Farrington*, 104 Mass. 212. This conclusion results from the provisions of the Bankrupt Act, and does not afford an analogy for cases not within the statute. It is, nevertheless, adopted in Mas-

sachusetts and Iowa, in the distribution of the assets of insolvent estates by assignees or administrators; *Amory v. Francis*, 48 Mass. 368; *Foreman v. Boutelle*, 13 Metcalf, 159; *Wurtz v. Hart*, 13 Iowa, 515. The same view was taken in *Bell v. Fleming*, 1 Beasley, 13, 499; but the question did not arise, and the point determined was, that proving the debt does not necessarily preclude the right to enforce the security. See *Cook v. Farrington*.

MARSHALLING IN AID OF LEGATEES.

It is well settled, that the personal estate of a decedent is the primary fund for the payment of his debts; *Howes v. Dehon*, 3 Gray, 205; *Clarke v. Henshaw*, 30 Indiana, 144; *Marsh v. Marsh*, 10 B. Monroe, 360; *Clinefelter v. Ayres*, 14 Illinois, 329; *Kelsey v. Western*, 2 Comstock, 500; *Gibson v. M'Cormick*, 10 Gill & Johnson, 65; *Hoye v. Brewer*, 3 Gill & J. 153; *Wyse v. Smith*, 4 Id. 296; *Rogers v. Rogers*, 1 Paige, 188; *Holman's Appeal*, 12 Harris, 174. See notes to *Ancaster v. Mayer*, vol. 1, 917. The rule applies, although the debts are a charge on the land. This is equally true, whether the charge is created during the life of the debtor, or imposed by his will, and would result on principle were it not established under the authorities. A debt does not cease to be a personal liability or become a primary charge on the land, on passing into judgment; *Rogers v. Rogers*, 1 Paige, 183, 194; *Stevens v. Gregg*, 10 Gill & J. 143; nor is a bond or

promissory note less the principal obligation because it is secured by a mortgage; *Dandridge v. Minge*, 4 Randolph, 397; *Gould v. Winthrop*, 5 Rhode Island, 319; *Bradford v. Forbes*, 9 Allen, 365; *Plimpton v. Fuller*, 11 Id. 139; *Thomas v. Thomas*, 2 Green, 356; *Hoff's Appeal*, 12 Harris, 200, 204; *Mansell's Estate*, 1 Parsons' Eq. 369. So a testamentary charge of debts, or a direction that the land shall be sold for the payment of debts, does not render it the primary fund, and merely gives the creditors an additional recourse in case the personal estate proves insufficient; *Livingston v. Newkirk*, 3 Johnson's Ch. 312; *Cornish v. Wilson*, 6 Gill, 209; *Nagle's Appeal*, 1 Harris, 260, 264. It is consequently the duty of the executor, notwithstanding the existence of any such lien or charge, to satisfy the debt out of the personal assets; *Stevens v. Gregg*; *Dandridge v. Minge*; *Gould v. Winthrop*; *Hoff's Appeal*; and a devise of the land subject to a mortgage or other incumbrance, does not exclude the operation of this rule, or render the land primarily liable. See vol. 1, 902; *Mansell's Estate*, 1 Parsons' Eq. 637, 639.

The rule is, nevertheless, not so much one of law as an inference drawn from the ordinary course of business. As one whose personal property is sufficient does not ordinarily sell his real estate as a means of discharging his liabilities, so the presumption is that he did not intend that such a sale should be made after his decease.

This presumption may, notwithstanding, be repelled by any language in the will denoting that the testator had a different design; *Ruston v. Ruston*, 2 Dallas, 243; *Lee, Appellant*, 18 Pick. 285; *M'Laughlin v. M'Laughlin*, 12 Harris, 20. He may provide in express terms that his debts shall be paid in the first instance out of his real estate, or he may do so impliedly by appropriating the personalty to other objects. See *M'Fail's Appeal*, 8 Barr, 290. A bequest of a sum of money or of a specific chattel, is an implied direction that it shall not be taken for the payment of debts, *ante*. See *Elliott v. Carter*, 9 Grattan, 541; *Fenwick v. Chapman*, 9 Peters, 466; *The Bank of the U. S. v. Bromly*, 1 Howard, 134, 149. Hence a pecuniary or specific legatee is entitled to exoneration at the expense of the heir; *Patterson v. Scott*, 1 DeGex, M. & G. 531; *Robarts v. Wortham*, 2 Dev. Eq. 173. When, however, the land is devised, the presumption in favor of the devisee is as strong as that for the legatee, and as devises, are specific, stronger, unless the legacies are also given specifically. Hence, while a pecuniary legatee may be substituted for a creditor who has exhausted the personal estate, as it regards the descended real estate, he has no such right as against a devisee, while devises and specific and demonstrative bequests stand at the same level, and contribute equally; *Brant's Will*, 40 Missouri, 266, 280; *Cryder's Appeal*, 1 Jones' Penna. 72; *Woodworth's Estate*, 31 California, 595, 616;

Shreeve v. Shreeve, 2 Stockton, Ch. 385; *Chase v. Lockerman*, 11 Gill & Johnson, 186, 204; *Hallowell's Appeal*, 11 Harris, 223; *Elliott v. Carter*, 9 Grattan, 549; *Thomas v. Thomas*, 2 Green, Ch. 356; *Armstrong's Appeal*, 13 P. F. Smith, 312.

It has long been held, that if the specialty creditors exhaust the personal estate, the legatees will be subrogated to their remedy against the land. The equity could not be enforced in the case of simple contract debts, because they were not a charge on the real estate; *Hallowell's Estate*, 11 Harris, 223. This obstacle does not exist since the change in the law rendering land assets for the payment of all debts, and there is no reason why the descended real estate should not be marshalled in aid of a legatee who has been disappointed by the recourse of the simple contract creditors to the land; *Hallowell's Appeal*; *Loomis' Appeal*, 10 Barr, 387.

This is now generally conceded where the bequest is specific; but the rule has not yet been established in the United States with regard to pecuniary legacies; *Stevenson v. Gregg*, 10 Gill & J. 143; *Woodworth's Estate*; although there can be little doubt that it will ultimately obtain here as it does in England; *ante*. See *Patterson v. Scott*, 1 De Gex, M. & G. 531; *Adams' Eq.* 263, Am. note.

It has, notwithstanding, been held in some instances, that devises stand at a higher level than specific legacies, and cannot be

called on for contribution where such a bequest fails through the insufficiency of the personal estate, unless the testator has manifested his intention to place both on the same footing by charging the land, or it is subject to a lien; *Shreeve v. Shreeve*, 2 Stockton Ch. 385; *Warley v. Warley*, 1 Bailey Eq.; *Rogers v. Rogers*, 1 Paine, 188, 190; *Elliott v. Carter*, 9 Grattan, 541, 549. See *Hubbell v. Hubbell*, 9 Pick. 561, where the question was said to be an open one in Massachusetts.

In *Rogers v. Rogers*, 1 Paige, 188, 190, the chancellor said: "If the testator specifically bequeaths his chattels to one person, and devises his real estate to another, without any directions as to which property shall be appropriated to satisfy an existing judgment against him, the personal property must first be applied to that object."

It was held, in like manner, in *Elliot v. Carter*, 9 Grattan, 541, that where the debts are charged on the whole estate real and personal, devisees and specific legatees must contribute equally if the personalty proves insufficient; but that where there is no such charge, the specific legacies must be appropriated before resorting to the real estate in the hands of the devisee. The court cited and relied on *Mirehouse v. Scaife*, 2 Mylne & Keene, 635, but the point there determined was that a pecuniary legatee is not entitled to contribution from land devised.

A similar view was taken by Chief Justice Gibson, in *Loomis'*

Appeal, 10 Barr, 387, 399. "Where the estate is neither charged with debts nor legacies, nor subject to a specific lien, and it does not descend, but is devised to a stranger, or the heir, a chancellor refuses to marshal the assets in favor of a general legatee, because there is no reason to think he was as near the testator's heart as the specific devisee."

It is, nevertheless, well settled, as the language thus held implies, that a debt secured by mortgage, or other specific lien, shall not be paid out of the personal assets to the prejudice of a pecuniary or specific bequest, and that such a legatee may, on the contrary, require the mortgagee to proceed in the first instance against the land, whether it has fallen by descent to the heir, or been devised; *Ruston v. Ruston*, 2 Yeates, 54; *Hoff's Appeal*, 12 Harris, 200, 206; *Gould v. Winthrop*, 5 Rhode Island, 319, 323; *Mason's Estate*, 1 Parson's Eq. 129, 132; *Thomas v. Thomas*, 2 Green's Ch. 356; *Elliott v. Carter*, 9 Grattan, 941. Yet in *Mollan v. Griffiths*, 3 Paige, 142, the chancellor seems to have thought that, although pecuniary and specific legatees are alike entitled to this equity, as it regards the heir, it will not be enforced against a devisee in favor of a pecuniary legatee.

When this branch of the law was moulded, personal property was comparatively insignificant, and the courts have been slow to note the change through which it has become not less important

than real estate. This will appear on contrasting the order of marshalling assets as prescribed in Massachusetts and Pennsylvania, at an earlier period, with that which is followed at the present day. In *Hayes v. Jackson*, 6 Mass. 149, the rule was said to be, "1. The personal estate, excepting specific bequests, or such of it as is exempted from the payment of debts. 2. The real estate which is appropriated in the will as a fund for the payment. 3. The descended estate, whether the testator was seised of it when the will was made, or it was afterwards acquired. 4. The rents and profits of it, received by the heir after the testator's death; and 5. The lands specifically devised, although they may be generally charged with the payment of the debts, but not specially appropriated for that purpose."

Here, specific legacies are declared to be exempt from liability for debts until the descended real estate has been appropriated for that purpose, but no such preference is accorded to pecuniary legacies. When the question arose twenty years afterwards in Pennsylvania, general pecuniary legatees were held to be entitled to exoneration at the expense of the heir, while the liability of devisees to contribute ratably with specific bequests, was impliedly denied. Bell, J., said that the assets were to be applied in the following order: "1. The general personal estate not expressly, or by implication exempted. 2. Lands expressly devised to pay debts. 3.

Estates descended to the heir. 4. Devised land, charged with the payment of debts generally whether devised in terms general or specific (every devise of land being in its nature specific). 5. General pecuniary legacies, *pro rata*. 6. Specific legacies, *pro rata*. 7. Real estate devised whether in terms general or specific." *Hoover v. Hoover*, 5 Barr 351.

The point was not, however, actually before the court in these instances; and when it arose in the subsequent course of decision the right of specific and demonstrative legatees to contribution from devisees, was said to be a clear in Pennsylvania with regard to all debts, as it was in England in the case of bonds and other obligations under seal; *Hallowell's Estate*, 11 Harris, 223; *Armstrong's Appeal*, 13 P. F. Smith 312.

In *Armstrong's Appeal*, Sharswood, J., said: "It was settled in England, by *Long v. Short*, 1 P. Wms. 403, that specific devises of land, and specific bequests of personalty, must abate ratably in case of a deficiency of assets for the payment of the bond debts of the testator, because both land and chattels were liable in law for those debts, and it was equally the intention of the testator that the legatee should have the chattel and the devisee the land; 1 *Rope on Legacies*, 254. In this State where lands have always been assets for the payment of debts by simple contract, as well as by specialty, the rule is general, tha

wherever there is a deficiency of assets to pay both debts and legacies, specific devisees and specific legatees shall contribute proportionably. What is termed a demonstrative legacy partakes, in this respect, of the privilege of a specific legacy. A demonstrative legacy is the bequest of a certain sum of money, with a direction that it shall be paid out of a particular fund. It differs from a specific legacy in this respect, that if the fund out of which it is payable fails for any cause, it is, nevertheless, entitled to come on the estate as a general legacy, and it differs from a general legacy in this, that it does not abate in that class, but in the class of specific legacies; 1 Roper on Legacies, 153. It is settled by this court, that in the marshalling of assets for the payment of the debts of a testator, specific devisees of land abate proportionably with specific and demonstrative legacies; *Barkley's Estate*, 10 Barr, 387; *Hallowell's Estate*, 11 Harris, 223." The right of legatees to marshal the assets for the payment of simple contract debts, was also recognized in *Lightfoot v. Lightfoot*, 27 Alabama, 351; *Worley v. Worley*, 1 Bailey Eq. 397; and *Brant's Will*, 40 Missouri, 206.

It results from these decisions, that where, as in Pennsylvania, lands are subject by law to a general charge of debts, they may be marshalled in aid of legacies wherever such a course could be adopted, if the charge were imposed by the will. See *The Commonwealth v. Shelby*, 13 S. & R.

348, 354; *Tombs v. Roch*, 2 Collyer, 496.

Although pecuniary legacies are entitled to the benefit of this principle as against the heir, they cannot, agreeably to the main current of decision, ask for contribution or exoneration from lands devised; *ante*; *Woodsworth's Estate*, 31 California, 595; *Clifton v. Burt*, 1 P. Wms. 678; *Tombs v. Roch*, 2 Collyer, 496, 505; *Livingston v. Livingston*, 3 Johnson's Ch. 148, 158; *Haines v. Wood*, 8 Pick. 478.

In *Hensman v. Fryer*, 3 L. R. Ch. App. 420, the doctrine that "if the testator's intention must fail from the insufficiency of the assets it shall fail to the equal prejudice of all the gifts, whether of real or personal estate;" 2 Collyer, 490, 505; was held to reach far enough to entitle a pecuniary legatee to contribution from a devisee for the payment of debts, whether due by specialty or simple contract. Lord Chelmsford said: "The testator intended that the legatee should have her legacy, as well as the devisee the devised estate. But she will be entirely disappointed if the devisee is not made to bear a proportion at least of the debts which the personal estate was insufficient to satisfy. Vice-Chancellor Knight Bruce, in *Tombs v. Roch*, 2 Collyer, 502, laid down an equitable principle which is applicable to the present case; namely, that "every will ought to be read as in effect embodying a declaration by the testator, that the payment of his debts shall be, as far as possible, so arranged as not to disappoint any of the gifts made by it,

unless the instrument discloses a different intention." The equality here claimed for pecuniary legacies is, nevertheless, at variance with the judgment in *Tombs v. Roch*, which was that a pecuniary legacy stands at a lower level than a specific bequest, and cannot, therefore, rank with a devise. The devise in *Hensman v. Freyer*, was residuary, but this does not reconcile the authorities, because Lord Chelmsford held that a residuary devise is not less definite and specific since the Wills Act than it was before.

A different view prevails in some of the States, drawn from the following considerations: A specialty creditor has a common law right to bring suit against the heir, which was extended by the Statute 3 & 4 Will. & M. c. 14, to devisees, (see *post*; notes to *Silk v. Prime*;) and hence, if instead of adopting this course, he exhausts the personal estate, the specific legatees may claim the benefit of the principle on which a court of equity marshals assets. Such is not the position of a simple contract creditor. He has no direct remedy against the land, and can only have recourse to it in the event of the insufficiency of the personal property. It were, therefore, manifestly unjust to require the executor to pay him in the first instance, out of the personal estate. Such a decree would be at variance with the rule that a creditor shall not be satisfied at the expense of one who is interested in a fund which is secondarily liable, for the sake of

leaving the primary fund open to another claimant. This is conceded as it regards creditors, *ante*; and should apply *a fortiori* to a legatee, whose claim depends exclusively on the bounty of the testator. See *Alston v. Mumford*, 1 Brockenborough, 266; *Miller v. Harwell*, 3 Murphy, 104. Accordingly, in *Chase v. Lockerman*, 11 Gill & J. 185, the Maryland Court of Appeals, held that although devisees stand at the same level with specific legacies, and must contribute pro rata towards the satisfaction of specialty debts, no such obligation exists where the personal estate is exhausted in paying simple contract creditors because it is still the primary fund for such purposes, as it was the only one at common law.

Such is the rule in North Carolina and Maryland; *Miller v. Harwell*; *Robards v. Wortham*, 2 Dev. Eq. 173; *Chase v. Lockerman*, 11 Gill & J. 186; *Dugan v. Hollins*, 4 Maryland, Ch. 11; and as it would seem, in Virginia. See *Alston v. Mumford*; *Elliott v. Carter*, 9 Grattan, 541. The reasoning on which it is based may be logical, but the result can hardly be vindicated as consistent with the equality which should be the aim of a court of equity in marshalling assets; that if there is not enough for all, each demand shall abate in an equal ratio. See *Tombs v. Roch*, 2 Collyer, 490, 503; *The Commonwealth v. Shelby*, 13 S. & R. 343, 353.

In *Robards v. Wortham*, 2 Dev. Eq. 173, Ruffin, J., said, "Descended lands must pay all debts

for which the real estate is liable, in exoneration of all but residuary legacies, or of other lands specifically devised for the payment of debts. And if the creditors go upon the personalty, the legatees may have an indemnity out of the realty. This is an old rule of the Court of Chancery (Ch. Ca., 2 pl. 4). It is founded on this: that a man who is able to pay all his debts, and has something over to give away, may give it as he chooses. He cannot, indeed, restrain the creditor from resorting to any fund made liable to him by law. But if the creditor will, through mere caprice or convenience, go upon that fund which the testator meant for a particular donee, instead of that other, left open alike by the law and the testator for his satisfaction, the donee shall be reimbursed out of the latter fund. And as to debts due by specialty, in which the heir is bound, this principle has been extended to the protection of pecuniary legatees, much more specific legatees; *Hanby v. Roberts*, Amb. 127; *Galton v. Hancock*, 2 Atk. 430; *Aldrich v. Cooper*, 8 Ves. 396. If, therefore, the heir be made to pay such a debt, he may reinstate himself out of the executor, if there be a residue; because both at law and in this court, that is liable before land; but if there be no residue, but only things given away in legacies, he cannot, but must rest under the burden. *E converso*, if such legacies be applied to the discharge of such a debt, the legatee shall be reinstated by standing in the place of

the satisfied creditor; *Hanby v. Roberts*. It follows, that in no case in England can the legatee be reimbursed out of the land for a simple contract debt, paid out of his legacy; for the heir was not liable for that to the creditor to whose rights and remedies only is the legatee substituted. It is the same here; because simple contract creditors can have recourse to the land only after exhausting the personalty, and therefore the legatee cannot ask the land to replace that personalty, which would be an absurdity, as was held in *Miller v. Johnson*, 3 Murph. 194." See *Thomas v. Thomas*, 2 C. E. Green, 356.

In *Alston v. Mumford*, 1 Brockenborough, 266, it was held for a like reason, that the assets would not be marshalled by throwing a creditor who had obtained judgment for a simple contract debt, on the land, for the sake of leaving the personal estate free for the satisfaction of simple contract creditors, because he has no right of recourse to the real estate, unless the personalty is inadequate to satisfy the judgment. The court held, that where a fund is not liable, except in the event of the failure of another fund, which is, in point of fact, sufficient to pay the debt, the creditor is not entitled to resort to the first named fund, because the fund primarily liable will otherwise be inadequate to satisfy other demands.

If this argument were adopted in Pennsylvania, where the right of a specialty creditor to bring

suit against the heir or devisee has become obsolete, and the personality is the primary fund for the payment of all debts, the assets could not be marshalled in any case in aid of a legatee; see *Torr's Estate*, 3 Rawle, 250, 253.

It has been declared in some instances, that where debts are charged on the land, devisees must contribute equally with pecuniary legacies. See *Hoover v. Hoover*, 5 Barr, 351, 357; *Elliott v. Carter*, 9 Grattan, 541, 552; and the cases which have been cited show that a devisee of land incumbered by a mortgage, is not entitled to contribution from pecuniary or specific legatees; *ante*, 323.

By the revised statutes of Massachusetts, "If any estate, real or personal, that has been devised or bequeathed, is taken as payment for the debts of the testator, all the other devisees or legatees shall contribute so that the loss shall fall equally upon all." But specific devisees and legacies are not within this provision, and do not contribute to the payment of the testator's debts until the general devisees and legacies are exhausted. A residuary legatee cannot require pecuniary and specific legatees to abate; and since the revised statute, ch. 62, § 3, by which a testator is enabled to dispose by will of subsequently acquired real estate, a residuary devise is within the same principle, and has no claim for contribution on pecuniary or specific devisees or bequests; *Blaney v. Blaney*, 1 Cushing, 107.

Agreeably to the statute law of

the same State, land descended, or which has not been specifically devised, is to be sold for the payment of debts and legacies, if the personal estate is deficient; and in *Ellis v. Paige*, 7 Cushing, 161, land which had been specifically devised to the heir for the same estate, which he would have taken independently of the will, was held to be descended real estate within this rule; see *Loomis' Appeal*, 10 Barr, 387, 390.

To exonerate the personal estate, there must either be express words, or a plain indication that such is the testator's purpose; *Clinefelter v. Ayres*, 16 Illinois, 329; *Marsh v. Marsh*, 10 B. Monroe, 360. It is not enough that he has charged the land; it must also appear that he intended to discharge the personality; *Collis v. Robbins*, 2 De Gex & Smale, 131; *Kirkpatrick v. Rogers* 7 Iredell, Eq. 44. See vol. 1, 917. Hence a devise for the payment of debts, and *a fortiori*, a charge of debts does not make the real estate primarily liable, or preclude the heir from requiring that a mortgage or judgment which is a lien on the land, shall be discharged by the executor.

It is, notwithstanding, held in South Carolina, that a charge for the payment of debts on any portion of the estate, real or personal, denotes an intention that it shall be primarily applicable for that purpose, unless the inference is repelled by the context, or the general scope and tenor of the will; *Hall v. Hall*, 2 M'Cord's Ch. 303; *Warley v. Warley*, 1 Bailey's Eq.

404; *Pell v. Ball*, 1 Spear's Eq. 520; *Pinckney v. Pinckney*, 2 Richardson's Eq. 235.

It seems that a direction to sell exclusively for the payment of debts, or a devise in trust to pay debts, where that appears to have been the sole or principal motive for the creation of the trust, will render the land the primary fund, and exonerate the personal estate; *Roberts v. Wortham*, 2 Dev. Eq. 173; *ante*, vol. 1, 918. If, said Ruffin, J., in *Roberts v. Wortham*, "lands be devised to be sold for the express purpose of paying debts, and the surplus given away as money, there can be no doubt they are first liable, even as between them and a residuary legatee, unless some express interest is given to another in the land fund." And the authorities concur that where the testator manifestly intends that the land shall be appropriated in the first instance to the discharge of his liabilities, his purpose will be carried into effect by the law; *The Commonwealth v. Shelby*, 13 S. & R. 348, 354; *Spraker v. Van Alstyne*, 13 Wend. 582; *M'Fait's Appeal*, 8 Barr, 290; *Lee, Appellant*, 18 Pick. 258; *M'Laughlin v. M'Laughlin*, 12 Harris, 20. Such an interpretation may be put on a bequest of the whole personal estate, with a direction that the debts shall be paid out of the land, or on a devise, on condition that the devisee pays the debts; *Miles v. Leigh*, 3 Atkins, 375; *Marsh v. Marsh*, 10 B. Monroe, 360, 368; *M'Fait's Appeal*.

When from the nature of the

gift or the meritorious claim of the legatee, a specific legacy is manifestly designed to take effect at all events, it will be entitled to exoneration at the expense of land devised; see *Fenwick v. Chapman*, 9 Peters, 471; *The Bank of the U. S. v. Beverly*, 1 Howard, 134, 149; *The Commonwealth v. Shelby*, 13 S. & R. 348; *Stuart v. Carson*, 1 Dessausure, 500; and in *Fenwick v. Chapman* the manumission of a slave by a will containing a charge of debts, was humanely held to be a bequest of his freedom, entitling him to throw the creditors on the land in the hands of the devisee. In *Stuart v. Carson*, a legacy bequeathed for services was exonerated on a like ground at the expense of lands devised; while in *The Commonwealth v. Shelby*, the court held that a bequest to a wife of specific articles out of the estate, must remain untouched until all the other real and personal assets were exhausted. So a bequest to a wife, who is otherwise unprovided for may, especially when it is in lieu of dower, be exempt from contribution to the payment of debts, at the expense of legacies which would otherwise stand at the same level; see *Hallowell's Estate*, 11 Harris, 223; *Creed v. Creed*, 1 Drury & Warren, 416; *Clery's Appeal*, 11 Casey, 54.

The presumption in favor of appropriating the personal estate to the payment of debts before recourse is had to the land, is not repelled by a residuary bequest, because the terms of the gift imply that the legatee is to

take what remains after the claims on the estate are satisfied. Hence the real assets will not be marshalled in aid of a residuary legacy, although subject to a mortgage or other specific lien; *Rider v. Wager*, 2 P. Wms. 328; *Hamilton v. Worloy*, 4 Brown, C. C. 204; *Ruston v. Ruston*, 2 Yeates, 54, 63; see notes to *Ancaster v. Mayer*, vol. 1; or even of a bequest of the whole personal estate, although not in terms residuary, unless there are words of demonstration or description to render it specific, or unless there is a plain declaration or manifest intent, that the land shall be primarily chargeable with the payment of debts; *Howe v. The Earl of Dartmouth*, 7 Vesey, 137, *post*. Otherwise the inference is that the testator intended the legatee to have, not a fixed or determinate amount or value, but such personal property as he might die possessed of, subject to the payment of debts, and of the pecuniary or specific bequests made in the will. This presumption applies notwithstanding a general charge of debts on the land, whether imposed by the testator, or implied as in this country by the law; *Ancaster v. Mayer*, 1 Brown's C. C. 454; *Keiling v. Brown*, 5 Vesey, 359; although a specific appropriation of the land for the payment of debts making it the primary fund, will exonerate the personalty; *Adams v. Meyrick*, 1 Equity Cases, Abr. 271; *Wainwright v. Bendlowes*, 2 Vernon, 718; *Webb v. Jones*, 2 Brown's C. C. 60; *Bardwell v. Bardwell*, 10 Pick, 19; *Lee, Ap-*

pellant, 18 Id. 285; *Spraker v. Van Alstyne*, 18 Wend. 200; while the same result may follow from a bequest of the personalty to one person, and a devise conditioned for the payment of debts, to another; *M'Fait's Appeal*, 9 Barr, 90.

Although the heir is entitled to exoneration at the expense of a residuary legatee, yet the rule is the other way where the legacy is pecuniary or specific; for as the testator has manifested an intention that the legatee should have a bequest certain in nature or amount, it will be presumed that he did not mean that the gift should be defeated by the payment of debts; *Lightfoot v. Lightfoot*, 27 Alabama, 351; see *Hensman v. Fryer*, 3 L. R. Ch. 424: and it was said in *Lightfoot v. Lightfoot*, that a bequest of all the testator's property of a specific kind, is at all events in this regard specific. "The bounty of the testator entitles a legatee to marshal the assets; and the choice of the creditors, to proceed against the personal estate, instead of the real estate descended, shall not preclude the payment of the legacy;" *Post v. Mackall*, 3 Bland, 486, 508; *Miller v. Harwell*, 3 Murphy, 195; *Brown v. James*, 3 Strobhart's Eq. 24. "If the debt is a specific lien upon the land, as in the case of a mortgage, a legatee may in some cases stand in the place of the mortgagee, who has exhausted the personal estate, even as against a devisee;" per Walworth, Chancellor, *Mollan v. Griffith*, 3 Paige, 402.

Pecuniary and general legatees

were also held entitled to throw the burden of debts on the heir, in *Robards v. Wortham*, 2 Dev. Equity, 173; *Warley v. Warley*, 1 Bailey Equity, 397; *Brown v. James*, 3 Strobbart, Equity, 424, and *Dunlap v. Dunlap*, 4 Dessausure, 305; and it has been seen that specific and demonstrative bequests are entitled to contribution from lands devised; *Crider's Appeal*, 1 Jones, Penna. 723.

The weight of authority is in favor of regarding a bequest of "all my personal estate," or "the whole of my personal estate," as residuary, unless a contrary intention appears from the context, or can be gathered from the other clauses of the will; *Howe v. The Earl of Dartmouth*, 7 Vesey, 137, *post*; *Woodward's Estate*, 31 California, 595, 602; *Walker's Estate*, 3 Rawle, 229. Such a bequest obviously is not pecuniary, and to regard it as specific would involve two inconveniences, one, that after acquired personal property would not pass by the will, the other, that the bequest would be addeemed wholly or *pro tanto*, by a sale of the property, or the conversion of it into another form; *Howe v. Earl of Dartmouth*. It is, therefore, interpreted as a gift of all the personal estate that the testator may have at his death, which is not otherwise appropriated by his will, or by the law; *Walker's Estate*, 3 Rawle, 229.

In *Walker's Estate*, the testator gave his wife certain real estate, and "all his household goods and furniture, moneys, bonds, mortgages, outstanding

debts due and owing to him, and all other his personal estate of what nature and kind soever. He also made a devise in trust for his son, and devised other land for the separate use of his daughter. These devises and bequests embraced all that the testator owned at the date of the will, although he subsequently purchased land. It was held, that the bequest to the wife was not specific, and that there was nothing in the will which denoted an intention to exempt any part of the personalty from the payment of debts, and that the whole must consequently be applied for that purpose before the after-acquired real estate could be resorted to. To exonerate the personalty, said Rogers, J., "the will must contain express words for that purpose, a clear, manifest intention, a plain declaration, or a necessary inference, tantamount to express words. The question, in each particular case of exemption, resolves itself into this: Does there appear from the whole testamentary disposition, taken together, an intention on the part of the testator, so expressed as to convince a judicial mind that it was meant not merely to charge the real estate, but so to charge it, as to exempt the personal? For it is not by an intention to charge the real, but by an intention to discharge the personal estate, that the question is to be decided. There is nothing in the will of the testator which clearly manifests an intention to charge his real estate with the payment of his debts, nor

would that be necessary, as between the legatee and the heirs of the land descended, provided it was manifest he intended to exempt his personal estate; and this is the great difficulty with which the legatee has to contend. And, this intention we are required to infer, from something which has occurred since the date of the will. The testator disposed of all his property, real and personal, and as between the devisees in the will, it is not to be questioned that the personal estate would be liable to the debts. It would be a singular construction, to infer an intention to charge lands with the payment of debts, which the testator acquired after making his will; and the case of *Hays v. Jackson*, 6 Mass. R. 149, decides that a testator cannot, in his will, charge after-purchased lands any more than he can devise them. The case which bears the strongest analogy to the present, is the one just cited. The rule, as laid down by Chief Justice Parsons, is applicable here. The case was this: The testator ordered his debts to be paid; made a specific devise of certain lands to his sister, and devised all the residue of which he should die seised to a residuary legatee. He died seised of lands purchased after the making of the will, which, of consequence, did not pass. The executors applied for license to sell real estate for the payment of debts. The court directed them, first to sell the devised lands not included in the specific devise, and next, the

lands which descended to the heirs. The Chief Justice says, 'Jackson first provides that his debts and funeral charges be paid; he next bequeaths legacies to his nephews and nieces, and makes a specific devise to his sister Susanna Gray. Then he gives to Mrs. Swan, in fee, all the remaining part of his estate, real and personal; the just construction of which is, when my debts and funeral charges, and the legacies are paid, and the specific devise to my sister is deducted, then what remains, whether real or personal, I devise, in fee, to Mrs. Swan.' In one respect, this is a stronger case than the present, for here the court ordered the real, as well as the personal estate, devised to Mrs. Swan, to be sold, before the descended lands. A distinction has been attempted between the cases, and it is true, that they are not in every feature exactly alike, which, indeed, is seldom, if ever, the case in precedents on the construction of wills. It is objected, that here there is no direction to pay debts, and that this is the case of a primary, and not a residuary devise. To this I answer, that every testator is presumed to know the law of the country in which he lives, and to make his will in reference to it. The estate of the testator is equally bound, without as with such a direction, and in the order that has been indicated. Such a clause in the will, although usual, is by no means necessary in Pennsylvania. The personal fund is the

first in order for the payment of debts, whether mentioned in the will or not, and this is not doubted, as between the devisee of the real estate and the legatee, and how it can make any difference as regards the heirs of the descended lands, I am at a loss to discover. It is hardly necessary to quarrel about terms, but Elizabeth Walker is nothing more nor less than a residuary legatee. The intention of the testator, at the time of the making of the will, most certainly was, that after his debts and funeral charges were paid, then what remained he bequeathed to his widow as legatee. If nothing remained, then nothing is bequeathed to her. It cannot in any sense be considered as a specific bequest of the remainder to her. The law creates the fund for the payment of the debts, and the testator bequeaths to her what remains, after satisfying the requisitions of the law. If this be the true reading of the will, then the widow will get precisely what the testator intended she should have, viz., all that remained of his personal estate at the time of his death, after payment of the charges which the law imposes upon the land."

It results from this decision that a bequest of all the personal estate is not specific, though containing an enumeration of items, and does not denote an intention to exempt the property so bequeathed from the payment of debts, or entitle the legatee to marshal the real estate as against the heir; *Broadwell v. Broadwell*, 4 Metcalfe, Ky. 290. So a bequest of all the testa-

tor's goods, chattels or choses in action of a particular kind, is general and not specific, because it will take effect on any property of that kind which he may acquire subsequently to the execution of the will; *Woodworth's Estate*, 31 California, 595, 601; see *Pell v. Ball*, Speer Eq. 518. The question nevertheless depends on the intention denoted in the will, and if that plainly is that a gift of all the testator's personal estate, or of all his goods and chattels of a certain description shall be specific, and exempt from the payment of debts, the burden will be thrown on the land, or it will be required to contribute as best serves the end which the donor had in view; see vol. 1, 929; *Miles v. Leigh*, 3 Atkins, 573; *Marsh v. Marsh*, 10 B. Monroe, 360; *Hoes v. Van Hoesen*, 1 Barb. Ch. 380, 400; 1 Comstock, 120; *Lunt v. Hopkins*, 7 Simons, 43; *Booth v. Blundell*, 1 Merivale, 228; *Bethune v. Kennedy*, 1 Mylne & Craig, 114; *Lightfoot v. Lightfoot*, 27 Alabama, 351; *Everett v. Lane*, 2 Iredell, Eq. 548; *Wallace v. Wallace*, 2 Foster, 149, 155.

The following cases may be referred to among many which exemplify this principle: In *McLaughlin v. McLaughlin*, 12 Harris, 20, the testator, after directing that his debts and funeral expenses should be paid out of the first moneys that should come to the hands of his executors from any portion of his estate, real or personal, gave the whole of his household and personal property to his wife. He then directed his

executors to dispose of the whole or any part of his real estate, if requisite for the comfortable subsistence of his wife, or the payment of a pecuniary bequest he had given to his brother, and finally made his nephew his residuary legatee, to whom his executors were directed to deliver all sums of money that might remain in their hands from the collection of his debts, and all and every part of his remaining real estate. It was held that the legacy to the wife was virtually specific, and entitled to exoneration at the expense of the real estate.

In *Spraker v. Van Alstyne*, 13 Wend. 582; 18 Id. 200; Cornelius Van Alstyne gave all his household goods and movable effects to his wife, and directed that she should be maintained out of his estate during her life. He next directed that all his debts should be paid by his sons Martin and Cornelius. Then followed a devise to them of certain lands. It was held by the Court of Appeal, reversing the judgment of the Supreme Court, that the land devised was the primary fund for the payment of debts, and must be applied for that purpose before recourse could be had to the personal estate which had been left to the widow.

In the case of *Lee, Appellant*, 18 Pick. 258; the testator's personal property was, with the exception of certain books and shares of stock, bequeathed to his wife, and certain real estate belonging to him in New York was devised to his executors in trust to dispose

of the same and pay his debts out of the proceeds. After the execution of the will the testator sold that portion of his real estate, and purchased other lands. The court held that the will disclosed a plain design, that his wife should have all the personal estate except the books and stock, without liability for his debts. The direction that these should be paid out of the real estate which had been devised to his executors, made that the primary fund. The sale was a revocation of this devise, but it did not indicate a change of the intention that the bequest to the wife should not be burdened with the testator's debts. Hence, the property which had been left to her was entitled to exoneration at the expense of the after acquired land.

The courts of South Carolina hold, that whether a bequest of the whole of the personal estate, is general or specific, it manifests an intention that the legatee shall have all the property of that kind belonging to the testator at his death, and consequently entitles him to exoneration from debts which are a charge on the land, at the expense of the heir; *Warley v. Warley*, 1 Bailey Eq. 397. In *Brown v. James*, 3 Strohart's Eq. 24, 27, a bequest of the testator's whole personal estate, or of the residue after specific legacies, was said to be specific, as it regards the right of the legatee to marshal the real assets for the payment of debts; and the rule applies *a fortiori* where the testator bequeathes all

his personal estate, and then goes on to state of what it consists. It has been held on a like ground in New York, that where legacies are charged on real and personal estate, a general bequest of the personalty will exonerate it, and throw the burden on the real estate; *Kelsey v. Deyo*, 5 Cowen, 133; *Hoes v. Van Hoesen*, 1 Barb. Ch. 380; 1 Comstock, 120. In *Harvey v. Graham*, 9 Richardson Eq., and *Lloyd v. Lloyd*, 10 Id. 138, a bequest of all the personal estate, was held not to be a sufficient ground for exonerating it and throwing the burden of debts on the land. But *Verdier v. Verdier*, 12 Richardson Eq. 138, inclines to the doctrine of *Warley Warley*.

A legacy payable out of land is demonstrative, and will not be ademed by the failure or insufficiency of the fund designated for its payment; *Wilcox v. Wilcox*, 11 Allen, 252; *post*, notes to *Ashburner v. Maguire*. But it is at the same time so far specific, that it will not be called on for the payment of debts which are a charge on the land, until the descended real estate is exhausted, and will then be entitled to contribution from land devised. The rule applies, though the bequest is in terms pecuniary, and whether the fund out of which it is payable be real or personal, because one who sets apart a portion of his estate for a particular purpose will be presumed to intend that it shall not be used in a different way. See *Cryder's Appeal*, 1 Jones, 72; *Gaw v. Huffman*, 12 Grattan, 628; VOL. II.—22

M'Campbell v. M'Campbell, 5 Littell, 92; *Wilcox v. Wilcox*, 13 Allen, 252.

It results from the same principle, that where a pecuniary legacy is charged upon or payable out of a specific legacy, it will not abate for the payment of debts until the specific legacy is exhausted; and the rule applies whether the charge is imposed in express terms or implied; *Biddle v. Carraway*, 6 Jones' Eq. 951; *White v. Green*, 1 Iredell Eq. 45. It is well settled, that wherever an intention to exempt any portion of the estate can be gathered from the will, it will be carried into effect, if the other assets are adequate to satisfy the demands of creditors. In *White v. Green*, Ruffin, C. J., said: "The rule that specific legacies do not contribute to or abate with general legacies, meets with an exception where a general legacy is expressly charged upon a specific legacy, or is payable thereout. So, if a pecuniary legacy be given, and there be no fund to pay it, or, rather, if there never was any fund to pay it except the specific legacies, owing to the fact that everything is given away specifically, the necessary construction is that the general legacy is to be raised out of the personal estate, although specifically bequeathed. For it is not to be supposed, that the testator meant to mock the legatee; *Sayer v. Sayer*, Pre. Ch. 393; *Ross on Legacies*, 255, 3d ed.; *White v. Beatty*, 1 Dev. Eq. 87, 320.

Where property of any kind is devised to one person, and a sum

certain bequeathed out of it to another, the intention of the testator manifestly is that the devisee shall only have what remains after paying the legacy, and if the property becomes less valuable, or part of it is required for the payment of debts, the loss will be his, and not that of the person who is to receive the money; *Hoover v. Hoover*, 5 Barr, 351. Let it be supposed that a house worth \$4,000, is given by will to A., and another of equal value to B., with a direction to pay \$2,000 to C., and that in consequence of the insufficiency of the personal estate, debts amounting to \$3,000 devolve on the land, shall C. contribute to the payment of the debts, or shall the burden be thrown exclusively on A. and B.? The answer to this question appears to be, that the sum requisite for the discharge of C.'s legacy having been appropriated exclusively to that object, cannot be taken to satisfy the demands of creditors unless there is no other fund. Hence, A.'s proportion would be \$2,000, B.'s \$1,000, and the legacy to C. would be payable in full.

This view is sustained by the case of *Barclay's Estate*, 10 Barr, 387. The testator directed his executors to sell a certain tract of land "for and towards the performance of his testament." He then devised the residue of his land to his wife for life, remainder to his son in fee. The will then provided that the moneys arising from the sale of the first mentioned tract should, after deducting \$300, be divided equally among his daugh-

ters, and finally contained a bequest of \$100 to each of his three grandchildren. The court held that the \$300 were specifically set apart for the grandchildren. Their legacies being demonstrative, and subject to abate only as between themselves, were to be fully satisfied in the first instance out of the fund appropriated for that purpose. The burden of the debts must consequently be distributed between the land devised to the wife, and the tract directed to be sold, which was in effect devised to the daughters, who might, on paying the amount bequeathed to the grandchildren, have demanded a conveyance of the title. See *Hallowell's Estate*, 11 Harris, 223.

In *Cryder's Appeal*, 1 Jones, 72, the testator directed his farm and fulling mill to be sold, and the purchase money applied to the payment of certain legacies. He also devised other real estate specifically. The personal estate proved insufficient, and it was held, that as the legacies were to be paid out of the proceeds of land, they were specific; that the surplus of that fund above the amount requisite for the payment of the legacies should go to satisfy the debts; and that the legacies and the land specifically devised should then be assessed ratably for any deficiency.

In *Long v. Short*, 1 P. Wms. 403, the testator gave a rent charge of £40 a year out of a leasehold to one person, the leasehold itself to another, and devised a freehold estate to a third, and it was held that the rent charge, the leasehold

subject to it, and the freehold must contribute pro rata to the payment of debts. This may appear at variance with the doctrine of *Barclay's Estate*, that a bequest out of an estate, is not to abate until the property on which it is charged has been exhausted. An explanation may perhaps be found in difference between a pecuniary legacy and a rent.

In *Gaw v. Huffman*, 12 *Grafman*, 628, the testator devised a farm to his sons, subject to the payment of two sums of \$500 each to his other children. He then devised the rest of his land to other persons. The personal estate fell short of the amount requisite to pay the debts, and it became a question in what way the deficiency should be supplied. The court held, that the legacy should be deducted in estimating the value of the land bequeathed to the sons, and that it, the legacies themselves, and the remaining land should contribute ratably, *Moncure, J.*, said, that the legacies charged upon the land and carved out of it, were certainly not more specific than the land itself, nor better entitled to exemption from liability to debts." This argument does not touch the question whether the legacies should have been called on, before the fund indicated for their payment was exhausted. The doctrine that a legacy payable out of land must be assessed ratably with the land, was also applied in *M'Campbell v. M'Campbell*, 5 *Littell*, 92. Whether *Hallowell's Estate*, 11 *Harris*, 20, proceeds on this

ground, or on that taken in *Barclay's Estate*, *ante*, does not sufficiently appear from the report.

The right of a devisee to marshal the assets as against the heir, is not less established than that of a specific legatee, and depends on the same principle; *Brooks v. Dent*, 1 *Maryland*, Ch. 523; *Dugan v. Hollins*, 11 *Maryland*, 41; *Mitchell v. Mitchell*, 21 *Id.* 244; *Livingston v. Newkirk*, 3 *Johnson*, Ch. 312. In *Livingston v. Livingston*, *Ib.* 148, Chancellor Kent declared, that the heir was not entitled to contribution from a devisee towards the satisfaction of creditors, nor would the court help a pecuniary legatee to throw the debts upon a devisee; but devisees must contribute ratably as among themselves, to debts which are from their own nature a charge on the land, or have been imposed upon it by the testator. It is established in accordance with this decision, that a charge of debts on land which is specifically devised, does not render it the primary fund, or preclude the right of the devisee to exoneration from land taken by descent; *Livingston v. Newkirk*, 3 *Johnson*, Ch. 312; *Stires v. Stires*, 1 *Halsted*, 224. For a like reason, a legacy charged generally on the real estate, is payable out of land descended before recourse is had to land devised; *Mitchell v. Mitchell*, 21 *Maryland*, 244.

It is well settled, that a residuary devise is specific, and as such, entitled to contribution from land specifically devised in terms; *Livingston v. Newkirk*; *Shreve*

v. *Shreve*, 2 Stockton, Ch. 385, and the weight of authority is, that this rule has not been varied by the statutes which have brought after acquired real estate within the scope of a will; *Hensman v. Fryer*, 3 L. R. Ch. Appeals, 420; *Shreve v. Shreve*. But the question is one of intention; and where it appears from the tenor of a residuary devise, that the testator only intended to give what should remain after the demands on his estate were satisfied, it will be the primary fund for the payment of debts and legacies after the personal estate has been exhausted; *Hayes v. Jackson*, 6 Mass. 149; *Elliott v. Carter*, 9 Grattan, 541, *post*, 347.

In *Hayes v. Jackson*, 6 Mass. 149, the testator after directing that his debts should be paid, and giving his nephews legacies of \$50 each, made a specific devise to his sister, and then bequeathed "all the remaining part of his estate, real and personal, which he then had or might afterwards acquire," to a residuary devisee. He subsequently acquired other real estate which descended to his heirs, and the court held, that the land comprised in the residuary devise, must be applied to the payment of debts before recourse was had to the after acquired land. Parsons, C. J. said, that "the residuary devise was not specific. It was intended to create a fund for the payment of the debts and legacies, with a gift of what remained, if anything, to the residuary devisee, What was taken from the residuary devise for the payment of debts,

was not taken from the devisee, because he was to have nothing until the debts were paid. "It was intimated in like manner in *Adams v. Brackett*, 5 Metcalf, 280, that where the real estate is blended in a residuary bequest with the personal, both are equally chargeable with debts, and the real estate must be appropriated before any part of the burden can be thrown on the heir; and the same principle was applied in *Hall v. Hall*, 2 M'Cord, Ch. 269.

A devisee is not entitled to contribution from another devisee, to a mortgage, which is peculiar to the land bestowed on himself, unless such was the intention of the testator, which will not be inferred from a general charge of debts on the real estate; *Gibson v. M'Cormick*, 10 Gill & J. 65; *Thomas v. Thomas*, 2 C. E. Green, 356.

In general, a devisee, or the heir of land which was mortgaged by the testator, is entitled to have the mortgage discharged by the executor, because the inference is, that the testator intended that his personal property should be applied to the payment of his debts, although secured on the real estate; *Howes v. Dehon*, 3 Gray, 205; *Plimpton v. Plimpton*, 11 Allen, 139; *Toole v. Swasey*, 106 Mass. 100; *Mansell's Estate*, 1 Parson's Eq. 369; *Winthrop v. Gould*, 5 Rhode Island, 319; *Thomas v. Thomas*, 2 Green, Ch. 356; *Clark v. Henshaw*, 30 Indiana, 144; *Cornish v. Wilson*, 6 Gill, 303 (see notes to *Ancaster v. Mayer*, vol. 1); and the lien of an

unpaid vendor is within this principle as being in effect an equitable mortgage. The presumption is repelled where the testator disposes of the assets differently, by making a pecuniary or specific bequest, and the legatee may consequently require the mortgagee to proceed in the first instance against the land. So the inclination of the authorities is, that a legatee may be subrogated to a vendor's lien, which has been paid out of the personal estate. See vol. 1, 473; *Birds v. Askey*, 24 Bevan, 618; *Durham v. Rhodes*, 25 Maryland, 235.

But the personalty will not be applied to the payment of a mortgage for the benefit of a residuary legatee, who is only entitled to what remains after the payment of debts; *Howes v. Dehon*, 3 Gray, 205; *Plimpton v. Fuller*, 11 Allen, 139.

The rule that the personal estate of a decedent is the fund for the payment of his debts, does not apply to the debts of third persons, although they may be charged on the land. In *re Taylor's Estate*, 8 Exchequer, 384; *Kersey's Case*, 9 S. & R. 71; *Mason's Estate*, 1 Parson's Eq. 129; *Gould v. Winthrop*, 5 Rhode Island, 119, 122, *ante*; see vol. 1, 925. Accordingly, where one acquires real estate which has been mortgaged by a former owner, and transmits it to a devisee or heir, the land is the primary fund for the payment of the mortgage, and the executor is not entitled or compellable to satisfy it out of the personal assets. The principle is the same,

whether the mortgaged premises were acquired by descent, devise, or purchase, and it is immaterial that the decedent agreed with the party of whom he bought, to save him harmless from the mortgage debt, or even that he assumed the debt by a covenant to that effect with the mortgagee, unless his purpose was to exonerate the land, and not merely to induce delay or forbearance; *Cumberland v. Codrington*, 3 Johnson, Ch. 229, 262; *Gould v. Winthrop*, 5 Rhode Island, 319, 321. It was accordingly held in *Mason's Estate*, 1 Parson's Eq. 129, that the purchase of an equity of redemption without any express covenant with the mortgagor or mortgagee, although the conveyance contains a recital that it is under and subject to the mortgage, does not entitle one to whom the premises are subsequently devised, to be exonerated at the expense of the personal estate; and there are numerous authorities to the same effect; see vol. 1, notes to *Ancaster v. Mayor*; *Mitchell v. Mitchell*, 3 Maryland, Ch. 73; *Stevens v. Gregg*, 10 Gill & J. 143; *Gibson v. M'Cormick*, *Ib.* 65. In like manner a devisee of land which is encumbered with a charge in favor of the widow of a former owner, takes it *cum onere*, and cannot require the executor to discharge or satisfy the lien; *Bell v. Bell*, 8 Casey, 309.

In *Cumberland v. Codrington*, Sir Wm. Pulteney took a conveyance of a tract of wild land in the western part of the State of New York, subject to a mortgage, with a covenant to indemnify the

grantor. He died intestate, having paid off part of the incumbrance, and the land descended to the Countess of Bath. Her agent in the United States paid the interest on the mortgage as it accrued, and entered into an engagement to pay the principal, as soon as he could obtain money for the purpose out of the mortgaged premises which she had empowered him to sell. But there was no evidence that this engagement was authorized by the countess, or ratified by her, although she acquiesced in the payments of interest. The court held that there was nothing in the case to render the personal estate of Sir Wm. Pulteney, or of the countess liable to the mortgage debt. Chancellor Kent said, that agreeably to the English authorities, a purchaser of an equity of redemption, who covenants to indemnify the vendor against the mortgage debt, does not thereby make the debt his own so as to render his personal assets the primary fund to pay the mortgage. The cases all agreed that a covenant with the mortgagor is insufficient for that purpose; there must be a direct communication with the mortgagee, and even that is not enough, unless the dealing with the mortgagee be of such a nature as to afford decided evidence of an intention to shift the primary obligation from the real to the personal estate.

It may be observed with regard to this decision, that a covenant by a purchaser of an equity of redemption to save the vendor harm-

less against the mortgage debt, does not impose a certain or fixed liability. Whether the covenant can be forced, and for how much, depends first on the account between the mortgagor and mortgagee, and next on the election of the mortgagee to proceed against the mortgagor personally, instead of having recourse to the land. The covenantor may hope or anticipate that a judgment will not be recovered against the mortgagor, and mean to leave himself free to determine whether he will suffer the mortgagee to foreclose, or discharge the debt out of the personal assets. Such an obligation is, therefore, essentially different from the assumption of a sum certain as due on the bond, and to be paid to the mortgagee as a part of the consideration for the sale.

Accordingly, where an estate was sold for £90, subject to a mortgage, of which £86 were by the writings executed at the time to be paid to the mortgagee, and £4 to the vendor, it was held that the purchaser had thereby made the debt his own, and that his heir was entitled to have the land exonerated at the expense of the personal estate; *Parsons v. Freeman*, Ambler, 115; 2 Peere. Wms. 664, *note*. Lord Hardwicke said, not only might the mortgagee have brought suit on the agreement in the vendor's name for his own use, but the heir was entitled to stand in the vendor's place for the purpose of compelling the appropriation of the assets in the

hands of the executor, to the fulfilment of the obligation which had been incurred by the testator.

In commenting on this decision, Chancellor Kent observed that an agreement between the purchaser and seller of an equity of redemption, treating the mortgage debt, as so much money left in the hands of the purchaser for the use of the mortgagee, may be sufficient ground for a recovery at law by the mortgagee, on the ground that one may enforce a promise made for his benefit; *Hoff's Appeal*, 12 Harris, 200, 205; 2 American Lead. Cases, 177, 5th ed. Such a direct liability incurred for a consideration received by the promisor, rendered the debt his own, and his personal assets were primarily liable.

The principle of *Parsons v. Freeman* was vindicated and applied in *Hoff's Appeal*, 12 Harris, 200. There Hoff purchased a house from Reynolds for \$13,900, subject to a mortgage of \$8,400; but it appeared from a memorandum appended to the deed, that the vendor had "received \$5,500, which, with the mortgage debt of \$8,400 to Isaac Harvey, and the interest due and to become due thereon, is in full of the consideration for the above granted premises." It was also proved that the vendee had paid the interest on the mortgage from the date of the conveyance to his death. Woodward, J., said "it is indisputable that what Hoff bought was not merely the equity of redemption, but the entire interest in the estate, and that the mort-

gage formed part of the price, and had been so assumed as such by him. There can be no doubt on this evidence that he was liable to an action for money had and received at the suit of the mortgagee. The case resembles that of the *Earl of Belvidere v. Rochefort*, 6 Brown, P. C. 520, where it had been held "that the plain intent of the deed was to put the purchaser in the place of the vendor, and that the vendor might not be longer liable to the mortgagee, a sufficient part of the purchase money was left in the purchaser's hand for the satisfaction of the mortgage, the purchaser thereby taking upon himself the vendor's bond and covenant for the payment of the mortgage, as fully as he himself had covenanted to pay it off, and either the vendor or mortgagee might, upon that contract, have compelled him to pay it off." The decree in that case was confirmed by the House of Lords, and though some doubts have been thrown upon it by Lord Thurlow, in *Tweedle v. Tweedle*, 2 B. C. C. 107, and by Lord Alvanley, in *Wood v. Huntingford*, 3 Vesey, 128; still, its good sense is its sufficient vindication, and commends it to our acceptance. Nor is the doctrine of that case destitute of support from authorities of high respectability, as may be seen by consulting *Billinghurst v. Walker*, 2 B. C. C. 608; *Cope v. Cope*, 2 Salk. 449; 2 Ch. Ca. 5; *Pochley v. Pochley*, 1 Vern. 36; *King v. King*, 3 P. W. 360; *Galton v. Hancock*, 2 Atk. 436; *Robinson v. Gee*, 1 Vesey, 251; *Phillips v. Phillips*, 2 Bro. C. 273;

Johnson v. Milkrop, 2 Vern. 112; *Balsh v. Hyarm*, 3 P. W. 455."

"If then, Hoff, in his purchase of Reynolds, made himself liable to the mortgagee in any form of action, how can we hesitate to call the mortgage his debt? It is of no consequence that the mortgagee was not a party to the dealings between Hoff and Reynolds, for it is a rudimental principle that a party may sue on a promise made on sufficient consideration for his use and benefit, though it be made to another and not to himself."

This decision was followed in *Thompson v. Thompson*, 4 Ohio, N. S. 333, and *Lennig's Estate*, 2 P. F. Smith, 135. In the case last cited, the testator entered into a written contract for the purchase of land, which fixed the price at \$57,000, including two mortgages, one for \$12,000, and one for \$25,000. The property was subsequently conveyed, subject to the payment of the mortgage. These were recited as being part of the consideration, and the receipt at the foot of the deed was for \$20,000, "which, with the assumption of the mortgages, is the full consideration, \$57,000, above mentioned." It was held, that the mortgage debt became the purchaser's, and was a charge upon his personal estate.

In *Campbell v. Shrum*, 3 Watts, 60, a contract under seal, by which Shrum agreed to sell and convey a tract of land to Campbell "under and subject to the payment of the purchase-money, and interest," due to a former owner, from whom Shrum had bought, was read as a

covenant on which an action might be brought in Shrum's name for the use of the person who was equitably entitled to the money. The court said that it was not an agreement to indemnify, but an absolute promise to pay a sum certain, which Shrum might enforce without waiting until he was sued by the original vendor. But the weight of authority seems to be that the acceptance of a deed reciting that the property is conveyed, subject to a mortgage or other incumbrance, implies an agreement to indemnify the grantor, but does not enure as an undertaking to pay the debt, unless the amount is included in the consideration, and retained by the vendee as so much money belonging to the incumbrancer; see *Woodward's Appeal*, 2 Wright, 322; *Blank v. German*, 5 W. & S. 42; *Barnet v. Lynch*, 5 B. & C. 589; *Walker v. Physisick*, 5 Barr, 193; *Keim v. Robeson*, 11 Harris, 456; *Trevor v. Perkins*, 5 Wharton, 244; *Waring v. Ward*, 7 Vesey, 337.

In *M'Lenahan v. M'Lenahan*, 3 C. E. Green, 101, an opposite conclusion was deduced from premises which were nearly the same. The premises had been conveyed to the intestate by a deed reciting that they were subject to a mortgage, and the amount of the mortgage debt was deducted from the consideration, and retained by the purchaser, but there was no express covenant or agreement on his part to discharge the mortgage. The heir-at-law filed a bill to have the mortgage satisfied out

of the assets in the hands of the administrator. The chancellor said: "Although the personal estate is the primary fund for the payment of the debts of a decedent, the rule is limited to debts created by him, or for which he has rendered himself personally liable, directly and primarily. Where lands subject to a mortgage debt, not created by the decedent, descend or are devised, the heir or devisee takes them *cum onere*, and is not entitled to have the debt paid out of the personal estate, unless the decedent has directly assumed the debt, intending to make it a charge on his personal estate, or shall have so directed expressly by his will. It is not enough that he has assumed to pay the debt, or has rendered himself liable to be called on directly by the creditor to pay it. Agreeably to the judgment of Chancellor Kent, in *Cumberland v. Coddington*, "there must be a direct communication and contract with the mortgagee, and even that is not enough, unless the dealing with the mortgagee be of such a nature as to afford decided evidence of an intention to shift the primary obligation from the real to the personal fund."

We may doubt whether sufficient heed was given in this instance to the principle indicated by Chancellor Kent, in *Cumberland v. Coddington*, that where the amount of the mortgage is distinctly marked and separated from the price, and by the agreement between the vendor and vendee, left in the hands of the latter for the use of the mortgagee, it is

so much money due to him, and if not paid by the vendee during his life, should be discharged by his executor after his decease. The doctrine of Lord Thurlow in *Billinghurst v. Walker*, 2 Brown, 604, that if the charge is part of the price, the personal estate is liable, must seemingly be understood in this sense. But such a result will not ensue, because the purchaser gives a smaller sum in consideration of taking the estate *cum onere*, nor unless the land is sold for its full or estimated value, and part of the purchase-money retained with an express or implied agreement to appropriate it to the satisfaction of the mortgage debt; *Cumberland v. Coddington*, 3 Johnson's Ch. 229, 260.

The doctrine that a covenant with a mortgagee to pay the mortgage debt does not render it the covenantor's, seems to depend on considerations of a different kind. If the bond originally given for the debt still subsists, it is *prima facie* the principal obligation, and the covenant merely collateral; *Bagot v. Doughton*, 1 Peere Wms. 347; *Cumberland v. Coddington*, 229, 265; *Mason's Estate*, 1 Parson's Eq. 129, 133; and hence, if the covenant is enforced against the purchaser, he may be entitled to stand in the place of the mortgagee on the bond. Under these circumstances, the purchaser is not primarily liable for the payment of the debt, and hence no such obligation can be predicated of his personal assets after his decease. Such is manifestly the rule where land is sold clear of incumbrance

and the vendee is compelled to assume a mortgage on the land in consequence of the default of the vendor; *ante*, 272. Under these circumstances, the mortgagor is the principal debtor, the land comes next, and the vendee's personal estate is not chargeable except in the last resort. The case is obviously different where the terms of the contract of sale render it incumbent on the purchaser to exonerate the mortgagor, by discharging the bond, and if he then enters into a covenant with the mortgagee in pursuance of this obligation, it is not easy to see why his personal assets should not be accountable for a debt which has in every sense become his own, *ante*.

Whatever doubt may exist under other circumstances, there can be none that when the purchaser gives a bond or covenant which is accepted in satisfaction of the original obligation, the debt is his, and must be paid as such by his executors; *Gould v. Winthrop*, 5 Rhode Island, 319; see *Mansell's Estate*.

The authorities concur that here, as in other cases, it belongs to the testator to determine what disposition shall be made of his estate, and if the will discloses a plain intention that a mortgage debt contracted by a former owner shall be discharged out of the personal assets, it will be carried into effect; *Andrews v. Bishop*, 5 Allen, 490; *Thompson v. Thompson*, 4 Ohio, N. S. 333.

The land is now the primary fund by statute in England and New York, for the payment of debts secured by mortgage. See *Rogers*

v. Rogers, 1 Paige, Ch. 188; vol. 1, 909; *Wright v. Holbrook*, 32 New York, 587.

But this rule does not extend in New York to a vendor's lien for unpaid purchase-money, and the heir or devisee of the vendee may consequently require the executor to pay the amount due on the contract of sale; *Wright v. Holbrook*.

LEGACIES WHEN CHARGED ON LAND.

The personal estate is not only the primary, but *prima facie* the exclusive fund for the payment of legacies, and this conclusion cannot be repelled by showing that the testator had no personal estate when the will was executed, and must therefore have intended that the legacies should come out of the real estate. Where one dies without leaving sufficient personal estate for the payment of his bequests, they are adeemed wholly or *pro tanto*, unless there is something more than the mere gift of the bequest to denote an intention that it should be paid out of the land. Legacies may, nevertheless, like debts, be charged on the real estate, by any language which sufficiently denotes that such is the testator's design, because the property is his, and it belongs to him to say what disposition shall be made of it after his death. The question confessedly is what the testator intended, but to this his will must be the guide, and the courts will not impute an intention which he has not expressed to dispose of the real estate, because an intention to dispose of the personal estate is expressed, and will be

abortive unless the legacy is paid out of the land. In *Lupton v. Lupton*, 2 Johnson's Ch. 618, Chancellor Kent observed: "The real estate is not as of course charged with the payment of legacies. It is never charged unless the testator intended it should be, and that intention must be either expressly declared, or fairly or satisfactorily inferrible from the language and dispositions of the will." The remarks of Rainy, J., in *Clyde v. Simpson*, 4 Ohio, N. S. 445, are to the same effect, and that there must be a clearer manifestation of intention to impose a charge of legacies than of debts. Still it is not requisite that the intention to create the charge should be declared in terms, and it may be deduced inferentially from the general tenor of the will, or a comparison of two or more clauses which would not warrant such an inference, if they were considered separately; *Kelsey v. Deyo*, 3 Cowen, 133; *Leavett v. Wooster*, 16 New Hampshire, 364; *Clery's Appeal*, 11 Casey, 54.

It is said in *Hill on Trustees*, 360, that "when a testator gives several legacies, and then, without creating any express trust for their payment, makes a general residuary disposition of the whole estate, blending the realty and personalty together in one fund, the real estate will be charged with the legacies; for in such a case the 'residue' can only mean what remains after satisfying the previous gifts;" see *Mirehouse v. Scaife*, 3 Mylne & Craig, 690; and *Lewis v. Dar-*

ling, 16 Howard, 60, where the rule as thus stated was adopted by the Supreme Court of the United States.

The rule is generally recognized in the United States, although the authorities differ as to its extent, and the grounds on which it rests; *Lewis v. Darling*, 16 Howard, 60; *Gallagher's Appeal*, 12 Wright, 211; *Becker v. Kehr*, 13 Id. 223; *M'Glaughlin v. M'Glaughlin*, 12 Harris, 20; *Buckley v. Buckley*, 11 Barb. 43, 77; *Shulters v. Johnson*, 38 Id. 80; *Carter v. Balfour*, 19 Alabama, 815; *Derby v. Derby*, 4 Rhode Island, 414, 431; *Clyde v. Simpson*, 4 Ohio, N. S. 445, 459; *Bane v. Beckwith*, 14 Id. 505. In *Lupton v. Lupton*, the testator, after making a specific devise, and giving various pecuniary legacies, bequeathed all the rest and residue of his real and personal property; and it was held that there was no sufficient reason for inferring that the legacies were charged on the land. The chancellor said, that "if a residuary clause created such a charge, the charge would exist in almost every case; for it is the usual clause, and a kind of *formula* in wills. It means only when taken distributively, *reddendo singula singulis*, that the rest of the personal estate, not before bequeathed is given to the residuary legatees, and that the remainder of the real estate, not before devised, is in like manner disposed of. It means that the testator does not intend to die intestate as to any part of his property, and it generally

means nothing more." A similar view was taken in *Canfield v. Westwick*, 21 Conn. 550.

The weight of authority is in conformity with this opinion, that when a charge cannot be deduced from the association of the real and personal estate in a residuary general bequest, without some other evidence that the devisee is likely to have what, if anything, may remain after the debts and legacies have been paid out of the land; see *Swift v. Edson*, 5 Conn. 531; *Gridley v. Andrews*, Id. 1; *Stevens v. Grigg*, 10 Ill. & J. 143. An intention to charge the realty may be indicated by declaring that the debts and legacies shall "first be paid," and then bequeathing the rest and residue of the estate, or by a devise of the rest and residue after the payment of debts and legacies; *Reynolds v. Reynolds*, 16 New York; *Buckley v. Buckley*; but not from the gift of a pecuniary legacy followed by such a devise, unless it is the only one, and the will contains no other disposition of the real estate.

Agreeably to this view of the law, it is essential to the application of the rule that the bequest could be in terms residuary, and that it should not be preceded by a devise of any portion of the real estate. It must be in terms residuary, for else it will not sufficiently appear that the legacies are to be subtracted from the land; *Reynolds v. Reynolds* 16 New York, 257; although the substitution of an equivalent word or "residue" will not vary the

result; *Rafferty v. Clarke*, 11 Bradford, 173; and in *The Church v. Wachter*, 42 Barb. 43, a pecuniary bequest followed by a devise of the "balance" of the estate, was held to render the legacy a charge on the land. The residuary bequest must embrace all the real estate, because where the testator makes a partial devise, and then gives the residue, he will be supposed to intend that portion of the land which has not been already given, and not what will remain after land has been appropriated to the payment of the debts and legacies; *Paxon v. Potts*, 2 Green's Ch. 313; *Myers v. Eddy*, 42 Barb. 26; *Gridley v. Andrews*, 8 Conn. 5.

In *Reynolds v. Reynolds*, the testator bequeathed a legacy of \$1,200 to a son, and directed that it should be paid within one year after his decease without saying by whom, or out of what fund. He then devised all his real and personal estate to his other sons, and made them his executors. The court held, that as the devise was general, and the direction to pay the legacies was not addressed to the executors, the will did not contain anything to charge the land.

The courts have, notwithstanding, held, in other instances, that blending the real and personal estate in a residuary bequest, indicates that both are to stand at the same level and contribute equally to debts and legacies, although it does not appear from the bequest itself, or from the general tenor of

the will, that what the bequest refers to is that residue which will subsist after all the pecuniary demands on the estate are satisfied. See *Nichols v. Postlethwaite*, 2 Dallas, 131; *Hassenclever v. Tucker*, 2 Binney, 525; *Witman v. Norton*, 6 Binney, 395; *M' Lanahan v. Wynant*, 1 Penna. R. 111; *Downman v. Rust*, 6 Rand. 587; *M'Glaughlin v. M'Glaughlin*, 12 Harris; *Lewis v. Darling*, 16 Howard, 60; *Adams v. Brackett*, 5 Metcalf, 289; *Wallace v. Wallace*, 3 Foster, 149; *Tracy v. Tracy*, 15 Barbour, 503; *Gallagher's Appeal*, 12 Wright, 211; *Becker v. Kehr*, 13 Id. 223. Such, at least, is the language held in many of the cases, although it will be found on examination that most of them are within the rule as deduced above.

The authorities may be classed under three heads. Agreeably to the cases in New York and Connecticut, a pecuniary bequest, followed by a devise of the realty, or of the real and personal estate, is not impliedly charged on the land, unless it appear from the will that while the devise is residuary in terms, it would be in effect a gift of all the testator's real estate, if it were not subject to the legacies. On this condition a charge will be implied, in order that each word may have its appropriate effect. See *Gridley v. Andrews*, 8 Conn. 1; *Canfield v. Bostwick*, 21 Id. 550; *Lupton v. Lupton*, 2 Johnson Ch. 418; *Myers v. Eddy*, 47 Barb. 263; *Shulters v. Johnson*, 38 Id. 80; *Reynolds v. Reynolds*,

16 New York, 257; *Rafferty v. Clark*, 1 Bradford, 473. The rule as thus defined, does not include any case where the devise is not possessedly residuary, or of so much only as has not been already disposed of by the will; *Reynolds v. Reynolds*, 16 New York, 257, and excludes cases where a residuary devise of the real and personal estate is preceded by a partial devise of the land. See *Myers v. Eddy*; *Johnson v. Shulters*. The case of *Tracy v. Tracy*, 15 Barb. 503, may be reconciled on this ground with *Lupton v. Lupton*, although the point was not adverted to in either instance.

On the other hand, it is well settled in Pennsylvania, and as it would seem, in Massachusetts, that where the real and personal estate are blended in a gift to the same person, which though not residuary, is so worded as to render them one fund, it will be inferred, that whatever is a charge on the personal is also intended to be a charge on the real assets, and the land will be liable both to the debts and legacies; *Adams v. Brackett*, 5 Metcalf, 280, 282; *Tucker v. Hassenclever*, 3 Yeates, 294; 2 Binney, 525; *Fury's Appeal*, 19 P. F. Smith, 173; *Snyder v. Warbasse*, 3 Stockton, 463, 473; *McLanachan v. McLanachan*, 1 Penrose & Watts, 96; *Towers' Appropriation*, 9 W. & S. 103; *Mellon's Appeal*, 10 Wright, 163. See *Elliot v. Carter*, 9 Grattan, 541. But such a charge will not result from distinct or separate bequests of the real and personal estate, al-

though contained in the same clause; *Adams v. Brackett*, 5 Metalf, 282.

An intermediate view prevails in New Jersey, where the union of real and personal property in the same devise is evidence of an intention to charge the land and with debts and legacies, which though not sufficient if standing alone, may amount to proof if corroborated by other circumstances, such as the manifest inadequacy of the personal estate, and the duty of the testator to provide for a wife or child who would otherwise be without the means of support. See vol. 1, notes to *Ancaster v. Mayer*; *Van Winkle v. Van Houton*, 2 Green Ch. 172; *Snyder v. Warbasse*, 3 Stockton, 463, 473; *Leigh v. Savage*, 1 C. E. Green, 125; *Corwine v. Corwine*, 8 C. E. Green, 368; *Dey v. Dey*, 4 Id. 137; *Massaker v. Massaker*, 2 Beasley, 264.

It has been held, said Chancellor Zabriskie, in *Dey v. Dey*, in several cases in the English Court of Chancery, "that a gift of all the residue and remainder of real and personal estate in a will that has given pecuniary legacies, charges such legacies on the real estate and authorizes the executors to sell it for that purpose; *Hassel v. Hassel*, 2 Dick. 527; *Newma v. Johnston*, 1 Vernon, 45; *Trott v. Vernon*, 2 Vernon, 708; *Cole v. Turner*, 4 Russ. 376; *Mirehouse v. Scaife*, 2 Mylne & C. 695; *Bench v. Biles*, 4 Madd. 187; *Brundell v. Boughton*, 2 Atk. 268.

There are other cases in the same courts, in which it has been

held, that a mere gift of the residue of the real and personal estate, after giving legacies, will not make the legacies a charge upon the real estate; *Davis v. Gardiner*, 1 P. Wms. 187; *Keeling v. Brown*, 5 Ves. 358. Chancellor Kent, in *Lupton v. Lupton*, 2 John. Ch. Rep. 614, held, that such devises did not charge legacies upon real estate.

In *Rafferty v. Clark*, 1 Bradf. 473, where the real and personal estate were blended in one fund, and the words not hereinbefore disposed of, were added, these words were held sufficient to charge the land with legacies.

In this court, in the case of *Van Winkle v. Van Houten*, 2 Green's Ch. Rep. 172, Chancellor Vroom held that a general residuary clause alone was not full evidence of the testator's intention to charge the legacies on the land, but that it was some evidence, and in connection with some other circumstances in the will, and extrinsic to it, he decided it to be sufficient to charge the lands. In *Paxson v. Potts' Adm'rs*, Ib. 313, the same chancellor held that a general gift to testator's two sons, of all his real and personal estate, except the portions mentioned in the second and third items of the will, which had given pecuniary and specific legacies, and devised real estate, was not sufficient to charge the real estate with the legacies, although the two sons were executors in the will. He held, that the blending of the real and personal estate in the residuary gift was not sufficient, and distinguished this from

cases in which the real and personal estate had been blended into one fund for the other purposes of the will."

In *Legh v. Savidge*, 1 M'Carter, 124, the testator gave his wife \$2,000 and also his homestead for life, and gave other legacies amounting to \$4,150, and directed that at the death of his wife, the homestead should be sold, and the money divided between four legatees named. By a subsequent clause, he appointed two executors, "investing them with all power necessary to execute that ample trust." The personal estate was insufficient to pay the legacies, and the testator was an alien, having no inheritable blood, whose land would escheat to the State, if it did not go to pay the legacies, and it was determined that these circumstances were as a whole enough to justify an inference that he intended to charge the land. So in *Dey v. Dey*, 4 C. E. Green, 137, a gift of all the residue of the estate, not hereinbefore disposed of, would not have sufficed to render the pecuniary legacies a charge on the land, if the testator's personal property had been adequate to pay them when he made the will, but as this was not the case, it might reasonably be presumed that he intended that the deficit should be supplied from the real estate. See vol. 1, 930.

Where land is devised to one, who by the same or another clause of the will is directed to pay a legacy, or where a devise is made on condition, that such payment

shall be made by the devisee, the legacy will not merely be a charge upon, but primarily payable out of the land devised; *Harris v. Fly*, 4 Paige, 421; *Aubry v. Middleton*, 2 Eq. Cases, Abr. 479; *Simpson v. Clyde*, 4 Ohio, N. S. 445. Such a purpose appears indisputably where the will is express, that the legacy shall be paid out of the land; *Loomis' Appeals*, 10 Barr, 387; *Hallowell's Estate*, 11 Harris, 223; *Hoover v. Hoover*, 5 Barr, 351; *Swope's Appeal*, 3 Casey, 58, and will be implied from a devise of the land to a person who is directed to pay the legacy; *Cox v. Corkendall*, 2 Beasley, 138; *Van Winkle v. Van Houton*, 2 Green Ch. 132; *Harris v. Fly*; *Aubry v. Middleton*. It does not matter as it regards the application of this rule, that the devisee is also an executor, and it would be incumbent on him to pay the legacy although no such direction had been given; *Simpson v. Clyde*; and in the case last cited the court held, that the burden went with the land into the hands of a purchaser with notice, and might be enforced against him.

In *Cox v. Corkendall*, the testator after bequeathing various legacies, and directing that they should be paid out of his estate, devised all his real and personal property remaining after the payment of his debts, to his sons whom he also named as his executors, and it was held, that the legacies were charged on the land.

A general direction that the legacies shall be paid without saying by whom, followed by a devise to the executor for his own use,

and not in his official capacity, does not create a charge on the real estate; *Reynolds v. Reynolds*, 10 New York, 257.

It is as true with regard to legacies as it is of debts, that charging the realty does not exonerate the personalty which still remains the primary fund, and must be exhausted before recourse is had to the land; *Hoes v. Van Hoesen*, 1 Comstock, 120; *Hoye v. Brewer*, 3 Gill & Johnson, 153; *Goff's Appeal*, 9 Wright, 379; *Towner v. Tooty*, 38 Barb. 598. If the personal estate is sufficient to pay the debts and legacies, the land is discharged, and the fraud or negligence of the executor in misappropriating the assets, will not vary the rule, or entitle the legatees and creditors to be indemnified out of the real estate; *Sims v. Sims*, 2 Stockton Ch. 158; *Hannah's Appeal*, 7 Casey, 57; *Barr v. Keller*, 3 Grant, 143. The subject is, nevertheless, one over which the testator has the entire control, and the real estate may be required to contribute equally, or rendered the primary or exclusive fund by an express or implied direction to that effect in the will. See *Halliday v. Somerville*, 3 Penna. 553; *Hoover v. Hoover*, 5 Barr, 351; *Elliott v. Carter*, 9 Grattan, 541; *Clery's Appeal*, 11 Casey, 54. Thus, where land is devised, subject to the payment of a sum of money, and these are the only words of gift to the legatee, the sole recourse is to the land; see *Hoover v. Hoover*. In *Clery's Appeal*, the testator bequeathed various legacies, to be paid after

the decease of his wife, devised his real estate to her for life, and gave her all the rest and residue of his personal estate. The court held that the legacies were primarily payable out of the reversionary interest in the real estate, because a different interpretation would postpone the settlement of personal estate until after the decease of the widow.

Whether land which is blended with the personal estate in a bequest, must contribute equally, or only in case the personal estate proves insufficient, is not clear under the authorities; see *Lewis v. Darling*, 16 Howard, 10; *Buckley v. Buckley*, 11 Barb. 43; *Hassencleer v. Tucker*, 2 Binney, 525. In *Lewis v. Darling*, the judges seems to have inclined to the former view, but the question can hardly be said to have been before the court, because the defendant was equally answerable in either aspect.

In general, the amount of the testator's personal property, or its sufficiency for the payment of debts and legacies cannot be taken into view, in determining whether they shall be thrown on the land, or in what order legacies shall rank as among themselves, vol. 1, 930. It has, notwithstanding, been held, that one who bequeaths all his personal estate specifically, and then gives a general pecuniary legacy, will be presumed to have meant that it should be payable out of the specific bequests, because the legatee would otherwise be mocked; *Sayer v. Sayer*, Prec. in Ch. 393; *Biddle v. Carraway*,

6 Jones Eq. 194. But the weight of authority seems to be that such an inference cannot be drawn from a specific bequest of the greater part of the personal property, although followed by a pecuniary legacy, which the remaining assets are not adequate to pay. See *White v. Beatty*, 1 Dev. Eq. 87, 320; *Biddle v. Carraway*,

6 Jones Eq. 95, 104. Where, however, the testator makes various specific bequests, which together constitute the bulk of his estate, and then bequeaths a pecuniary legacy out of his estate, it may be regarded as demonstrative, and a charge on the specific bequests. See *Biddle v. Carraway*, 6 Jones Eq. 95.

*SILK v. PRIME.¹

[*111]

16 AND 17 JUNE, 1766.—MARCH 8, 1768.

REPORTED 1 BRO. C. C. 138, NOTE.

EQUITABLE ASSETS.]—*A devise of lands for payment of, or charged with, debts, although the persons to whom they are devised, or who are directed to sell them, are executors, makes these lands assets in equity, to be distributed among creditors pari passu.*

CHRISTOPHER THOMSON, by his will, dated 27th December, 1759, gave specific parts of his personal estate to his wife and two daughters; and after reciting that he had, previously to his intermarriage with his wife, settled the reversion of his farm-house, and lands, and premises in Outnewton, in the county of York, after the decease of his mother, to the use of his wife for life, in case she should survive him, with remainders over, and that the mother was then living; therefore he gave to his said wife, in case of his death in the lifetime of his mother, an annuity of 60*l.* during the mother's life, to be paid by his executors, and he charged his messuages and premises wherein he dwelt, and his messuage, staith, and premises in the High street, in Kingston-upon-Hull, and all his estate there, with the payment thereof; and declared, that, on the death of his mother, the annuity should cease. And he devised all his lands, and premises purchased by him in Outnewton, to his mother, her heirs, and assigns; and he *ordered and directed that all his just debts should be paid*; and in case his personal estate should, on account of any losses, be reu-dered not sufficient to pay all his just debts, *he charged all his messuages, and premises, and real estate whatever* (except the lands in Outnewton, settled on his marriage, and the lands devised *to his mother), *with the payment of all his just debts.* And [*112] in case his personal estate (save what he had thereby given to his wife and daughters) should fall short in payment of all his

¹ S. C., 1 Dick. 384.

just debts, *he directed that the defendants Prime and Moxon, or the survivor of them, or his heirs, should sell all his messuages and estate in Kingston-upon-Hull, charged as aforesaid, with his messuages in Wincomely, and his close in Beverley, and all other his real estate (except as aforesaid), or such other part or parts thereof as should, with his personal estate, be sufficient to pay all his just debts, and to apply the money arising therefrom, together with the money arising from his personal estate, for the payment of all his just debts.* He gave all the surplus money arising as well from the sale of all or any part of his real estate, as also from his personal estate, to his wife and two daughters, and devised to them all his estate which should not be sold for payment of his debts, *and appointed Prime and Moxon executors.*

This cause was first heard at the Rolls, 16th and 17th June, 1766,¹ when the late Sir Thomas Sewel, M. R., determined that the assets arising from the sale of the estate were to be considered as equitable assets, upon the ground that the devise was to the executors and their heirs, observing, at the same time, that it would be otherwise if the devise had been merely to the executors. He said, by this devise the descent was broken at law, and the only special circumstance was, that of the trustees and their heirs taking the real together with the personal estate. From this decree there was an appeal to the Lord Chancellor, who, on the 8th of March, 1768, affirmed the same, and delivered a very elaborate argument, to the following purport, of which the reporter² has been so fortunate as to obtain a very accurate note.

LORD CHANCELLOR CAMDEN.—When this appeal was argued, I thought the question depended so much upon the general doctrine of legal and equitable assets, that I desired time to look into the [*113] cases, to see what general *rules had been established upon that subject; for all doubtful points are decided by an application of general principles to the particular case.

Where trustees for the payment of debts are made executors, the printed cases had ruled the assets to be legal.³ This caused me to doubt, because I had always understood the doctrine of this Court was the reverse, and, therefore, I thought it necessary to look back to the origin of this business, and to fix the principle.

Where an estate is devised to trustees for the payment of debts generally, it has long been the constant practice of the court to pay all the debts *pari passu*. This is declared in the case of *Wolestoncroft v. Long*, 1 Ch. Ca. 32. And the same is again laid down in *Anon.*, 2 Ch. Ca. 54.

As the money, in these cases, never reaches the hands of the executors, no action lay: and the creditor was obliged to come into this Court for satisfaction. Where upon equity, not being tied down to the rule of law, introduced a new method of administration. And seeing the testator had made no distinction be-

¹ See the decree, 2 Coll. 509.

² Mr. Brown.

³ These cases, it will be seen, are overruled.

tween the difference of securities given for the payment of debts, the Court conceived that the testator meant to do equal justice to all his creditors. Nor did the Court, in this respect do any injury to specialty creditors. For, though real estates are assets at law, to pay such debts, yet the creditor might be defeated by the debtor's will, or the heir's alienation. So that, where the will had set aside the law, equity would have forgot its own principle of equality, by giving a priority, which the testator had not done; —*all debts being equal in conscience*. Upon this ground, the Statute of Fraudulent Devises¹ allowed devises for the payment of debts to be good, though the act annulled every other devise to the prejudice of specialty creditors. This, I consider, as a Parliamentary approbation of equitable assets, which, standing as it does upon such ground of justice, the testator's intention, the rule of equality, and the sanction of the legislature, *ought [*114] always to preponderate, in a doubtful case; and Sir Joseph Jekyll's opinion, in *Cox's case*, 3 P. Wms. 344, should be always remembered, who said, "he would always do his utmost to extend the rule."

Where the trustee is not executor, the case is clear.

Where the land is charged with the debts it is clear likewise.² But, where the testator put the trust into the executor's hands, there was a considerable doubt how to distinguish the capacities of the two characters; as executor, the assets were legal; as trustee, they were equitable.

The law had determined, that where the land was devised to be sold by executors, or devised to executors to be sold, in both cases the assets were legal. In this respect, the law made no difference between the interest and the power, and that is evident. Any person who will peruse Co. Litt. 112 b., 113 a., with any attention, will be of that opinion, and all the cases in Roll. Abr. (tit. "Power and Interest"), under that head, speak the same language.

These kind of devises had been so frequent at law, and the determination so uniform, that they seemed, for a time, to have overpowered the Courts of equity; for I find that almost all the printed cases followed this rule, and made the assets legal.

So is *Girling v. Lee*, 1 Vern. 63; *Anon.*, 2 Vern. 133; *Greaves and Powell*, 2 Vern. 248. Two strong cases in Prec. Ch.; *Cutterback v. Smith*, Prec. Ch. 127; *Bickham v. Freeman*, Prec. Ch. 136; and *Lord Masham v. Harding*, Bunb. 339.

Lord King, in the case of *Walker and Meager*, Mos. 204,³ which I don't well understand, avoided the point.

These authorities did perplex me exceedingly, for I had, all my time, taken it for granted that the rule here was otherwise. At last I find this note in Mr. Tracey's book, *Lewin v. Okley*, 2 Atk. 50, July 26th, 1740:—"Devise to trustees for payment of debts,

¹ 3 & 4 Will. & M. c. 14.

² *Bailey v. Elkins*, 7 Ves. 319; *Shiphard v. Lutwidge*, 8 Ves. 26.

³ *S. C.*, 2 P. Wms. 550.

and the same persons are made executors. The assets, said the Court, shall, notwithstanding, be equitable and not *legal. [*115] There are cases in Vernon where it is held, that debts in such cases shall be paid in a course of administration, but the modern resolutions have been otherwise."

I sent to the Register's book, and find that was the very point of the cause; and, upon the Master's report, Lord Hardwicke determined, that the simple contract and the specialty debts should be paid *pari passu*. The words of the will were: Testator devised his estate to A. and B. and their heirs, in trust to sell the same, and thereout, in the first place, to pay his debts, and appointed them executors. And now, I think, the whole rule is overthrown, and that, *wherever the land itself is devised to the same persons, who are executors, the assets will be equitable.*

And I hold the case to be the same whenever the land is devised to them or to them and their heirs; for in both cases they are equitable trustees. The descent is broken,¹ and the specialty creditors have lost their fund.

And I can hardly now suggest a case where the assets would be legal, but where the executors had a naked power to sell *qua* executors.²

What I have said shows that this Court has justly a partiality and predilection to equitable assets, which ought to turn the scale in all cases where the matter hangs in equal balance.

This disposition is, therefore, not improper, though it must be admitted, that, in the present case, the trustees and executors have no more than a naked power; for nothing is devised to them, and, therefore, the doctrine I have laid down is not directly applicable to this case; but two rules are obtained.

1st. It is a good rule of expounding wills, to make them speak in favour of equitable assets, if it may be done.

2nd. That, if you can lodge the assets in the hands of the trustees, the Court will never put them in the hands of the executors, and when one person is invested with both characters, the trustee shall be preferred.

*To come to the case:—

[*116] 1st. The testator's will does most emphatically direct the payment of all his just debts.

I can never think, that a man who does, repeatedly, and so anxiously, provide for the payment of *all*, could ever mean by legal preference to pay some, and leave the rest unpaid.

2nd. The power is lodged, not in executors solely, but in them or *their heirs*; and it is clear that the money could never be assets in the hands of the executors' heir, nor could the creditor ever maintain his action against such heir. Nor is it any answer to

¹ It would be more accurate to say, that it must appear upon the will *that the testator meant* the descent to be broken; per Lord Eldon, 7 Ves. 323. It is, however, now clearly immaterial whether the descent be broken or not. See note to this case, post.

² Even in this case the assets would be equitable. See note, post.

this objection, to say, that the word heir is inserted by mistake, or to be resembled to those cases where personal estate is given to a man and his heirs, or real estate to a man and his executors. In those cases the subject-matter of the devise points out the proper succession, and the literal will is nonsense; but here the word heirs has a useful and proper meaning, for it converts the executor into a trustee, and makes the assets equitable, which is a favourite point in this Court.

But it has been said, that the testator has here united both funds together in the hands of his trustees and executors, and therefore both must be one consolidated fund to follow the same course of administration. For the words are, "that they shall apply money arising from the real estate, together with the monies arising from his personal estate, to pay, &c." The answer is, that in all cases where the trustee and executor is one person, the funds are consolidated in the same manner, for, out of both, he is to pay all his debts; but the course of administration is different, and by that very method it is, that the Court is enabled to pay all the debts without distinction, as far as the assets will go, and by marshalling both kinds of assets, makes them amicably combine to answer the full intention of the testator.

3rd. This is the case of a charge upon the lands. They are devised to the testator's wife and daughters, subject to this charge. In this respect it is a trust, and no more is *to be sold than what is necessary for this purpose. The [*117] power then to sell is merely consequential; the testator having named the executor for this purpose, the Court would have compelled the devisees. Whoever sells to satisfy a charge must be a trustee, because a charge is a trust.

To make this still clearer, the rents and profits in the hands of the devisees are assets before the sale. Legal assets they cannot be, for the executors have no right to receive them. They must, therefore, be equitable assets. And if it be once admitted that any one part of the land is equitable assets, the whole must be the same, for the trust is one and the same trust throughout.

Decree affirmed.¹

Silk v. Prime, (one of the few judgments of Lord Camden, as Chancellor, which have come down to us well reported,) is a leading authority on the doctrine of *equitable assets*—a doctrine certainly not now so beneficial as it was previous to the enactments rendering all lands liable to debts by simple contract, yet still of some importance, in the administration of the estate of any person who has died previous to the 1st of January, 1870, where there are debts both by specialty and simple contract, and the assets are not sufficient to pay all the creditors in full; for there it becomes necessary to determine whether the assets are legal

¹ See 2 Coll. 511.

or equitable, as, in the former case, specialty creditors are entitled to priority; in the latter case, they will only be paid *pari passu* with simple contract creditors.

But now, by 32 & 33 Vict. c. 46, as will be hereafter more fully shown, in the administration of the estate of any person who has died on or after the 1st of January, 1870, debts by specialty and simple contract are payable out of legal and equitable assets *pari passu*.

Distinction between Legal and Equitable Assets.—The property of a deceased person, which is available at common law for the purpose of satisfying his creditors, is commonly termed *legal assets*, and will be applied, both at law and in equity, in the ordinary course of administration, which gives debts of a certain nature a priority over others; where, however, the assets are such as are available only in a Court of equity, they are termed *equitable assets*, and according to the well-known *maxim that *equality is equity*, will, after satisfying those [*118] who have liens on any specific property, be distributed amongst the creditors of all grades *pari passu*, without any regard to legal priority.

Much difficulty has however arisen in determining the precise distinction between legal and equitable assets. The principle however by which they may be distinguished has in a well-considered case been furnished by Sir R. T. Kindersley, V. C. "The general proposition," observes his Honor, "is clear enough, that when assets may be made available in a Court of law, they are legal assets; and when they can only be made available through a Court of equity, they are equitable assets. This proposition does not, however, refer to the question whether the assets can be recovered by the executor in a Court of law or in a Court of equity. The distinction *refers to the remedies of the creditor, and not to the nature of the property*. The question is not whether the testator's interest was legal or equitable, but whether a creditor of the testator, seeking to get paid out of such assets, can obtain payment thereout from a Court of law, or can only obtain it through a Court of equity. This, I apprehend, is the true distinction. If a creditor brings an action at law against the executor, and the executor pleads *plene administravit*, the truth of the plea must be tried by ascertaining what assets the executor has received; and whatever assets the Court of law, in trying that question, would charge the executor with, must be regarded as legal assets; all others would be equitable assets. Supposing, however, that distinction to be well founded, there still remains the question, what property come to the hands of the executor would a Court of law consider property to be taken into account as assets, in trying the truth of the plea *plene administravit*. I think the general principle is, that a Court of law would treat as assets every item of property come to the hands of the executor which he has recovered, or had a right to recover, merely virtute

ficii, *i. e.* which he would have had a right to recover if the testator had merely appointed him executor, without saying anything about his property or the application thereof:" *Cook v. Gregson*, 3 Drew. 549.

Legal Assets.—Legal assets, then, are such parts of the property of a deceased person as may be reached or made available by an executor, *namely virtute officii*.

There is no doubt that personal estate, including leasehold property, legal assets.

Since the question whether assets are legal or equitable, depends upon this, not whether the property of which they consist is legal or equitable, but whether an executor can recover them *virtute officii*, it has been held that an equity of redemption of a sum of money charged on land is legal assets: *Cook v. Gregson*, 3 Drew. 549.

Upon the same principle, in the recent case of *Shee v. French*, (3 Drew. 716,) where a reversionary annuity granted to the wife of the testator in consideration of an assignment of his business and stock in trade, had been determined by the Lord Chancellor to be assets for payment of his creditors, the transaction coming within the statute 13 Eliz. 5, (see *French v. French*, 6 De G. Mac. & G. 95,) it was held by Sir T. Kindersley, V. C., that such annuity was *legal assets* in the hands of the wife, who was executrix, for the payment of the creditors. What," said his Honor, "was the effect on the death of the testator? No doubt the annuity was payable to the wife; but if it was not paid, how could she sue the grantor of the annuity at law? If the wife had not been herself executrix, an action on the agreement must have been brought in the name of the executor; the legal right to recover was in the executrix *qua* executor. It appears then to me, that what the Lord Chancellor has decided has this effect, that though the grant of the annuity is valid, it is to be regarded as a settlement by the testator on his wife, and to that extent it is absolutely void, and her beneficial interest is gone, as if it had never been given; then, after the death of the testator, the legal right to recover it vested in his executrix *qua* executrix; and when it has been determined that the grant of the beneficial interest is avoided, it remained vested in the executrix for the benefit of the testator's creditors." See also *Mutlow v. Mutlow*, 4 De G. & Jo. 539.

By the common law, real estates descended (except copyholds); and by 29 Car. 2, c. 3, s. 10, trust estates in the hands of the heir of cestui que trust, were liable as legal assets to debts by specialty, but not to debts by simple contract. Copyholds were not liable even to specialty debts. And with regard to other real estates, if the heir aliened before action brought, or if they were devised, unless for payment of debts, they were not liable even to specialty debts. A person, therefore, however large

his landed possessions were, might have defrauded his creditors by devising his property away from his heir.

The injustice wrought by this state of the law was at length, in the year 1691, in part remedied by 3 Will. & M. c. 14, commonly called the Statute of Fraudulent Devises, which enacted, that devises, *unless for payment of debts*, should be treated as fraudulent and void as against *specialty* creditors; that the devisee should be liable jointly with the [*120] heir on a specialty recoverable *by action of debt; and that, if descended real estate were aliened by the heir, he should be liable to the extent of its value.

To Sir Samuel Romilly the country is indebted for another Act, tending further to improve the state of the law, viz. 47 Geo. 3, c. 74, which rendered the freehold estates of a person who, at the time of his death was subject to the bankrupt laws, liable to simple contract debts; *Hitchon v. Bennett*, 4 Madd. 180. These Acts were repealed, and, with some modifications, re-enacted by 1 Will. 4, c. 47; but it was not until of late years that the Legislature, conceding the full measure of justice sought by Sir Samuel Romilly, enacted by 3 & 4 Will. 4, c. 104 (commonly called Lord Romilly's Act, which received the Royal assent the 29th of August, 1833), that from and after the passing of the Act, when any person should die seised of or entitled to *any estate or interest in land*, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, *which he shall not by his last will have charged with or devised, subject to the payment of his debts*, the same shall be assets to be administered in Courts of equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs-at-law, customary heir or heirs, devisee or devisees of such debtor, shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs-at-law, devisee or devisees of any person or persons who died seized of freehold estates, was, or were before the passing of the Act, liable to in respect of such freehold estates, at the suit of creditors by specialty in which the heirs were bound: Provided always, that, in the administration of assets by Courts of equity under and by virtue of the Act, all creditors by specialty, in which *the heirs are bound*, shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty in which the heirs are not bound, shall be paid any part of their demands. And see 11 & 12 Vict. c. 87.

It has been held that this Act of itself makes the equity of redemption of a mortgage in fee, both of freeholds and copyholds, legal assets; *Foster v. Handley*, 1 Sim. N. S. 200; 15 Jur. 73. *In re Burrell*, 9 L. R. Eq. 443.

And real estate of a person who has died without heirs is, against the

d claiming by escheat, assets for payment of his debts, although not urged with debts by will; See *Evans v. Brown*, 5 Beav. 114; *Hughes Wells*, 9 Hare, 749.

It will also be observed, that *the Act retains the priority [*121] of such creditors by specialty in which the heirs were bound, had they been those in which they were not bound; *Richardson v. Jenkins*, 1 Drew. 477.

Ordinary course of Administrator of Legal Assets.—After the payment of funeral and testamentary expenses (Wms. Exors. 890, 5th ed.), and of a creditor's suit, if the assets are administered in equity (*Lewett v. Jessop*, Jac. 240), debts will be payable at law and in equity *the assets are legal*, in the following order (see Wms. Exors. 893, et seq., 5th ed.):—

1. Debts due to the Crown by record or specialty, which are entitled to precedence over debts of whatever nature, as well of a prior as of a subsequent date: Magna Charta, c. 18; 2 Inst. 32; *Littleton v. Hibbins*, 10 Eliz. 793; Swimb. Pt. 6, s. 16; Com. Dig. "Admon." (C. 2.)

2. Debts to which particular statutes give priority, as money due to a parish by overseers of the poor (17 Geo. 2, c. 38, s. 3); or by the officers of a friendly society to the society. See sect. 23 of 18 & 19 Vict. c. 63, which repeals and consolidates amongst former friendly society acts, 33 Geo. 3, c. 54, repealed by 10 Geo. 4, c. 56; 4 & 5 Will. 4, c. 40; certain expenses and debts incurred and owing by an officer or soldier dying on service, 26 & 27 Vict. c. 57, sect. 4, repealing 58 Geo. 3, c. 73, ss. 1 & 2. See also 2 & 3 Will. 4, c. 53; 27 & 28 Vict. c. 36, as to army prize money; debts due from a deceased treasurer or collector of paving commissioners under 57 Geo. 3, c. 29, s. 51.

3. Judgments in Courts of record, and decrees in equity rateably, except judgments obtained against executors which are payable according to their priorities *inter se* (*Dolland v. Johnson*, 2 Sm. & G. 301; *Revell v. Revell*, 5 Ir. Ch. Rep. 284; *Burke v. Killikelly*, 1 Ir. Ch. Rep. 1); and judgments against executors and administrators need not be registered in the Common Pleas, under 23 & 24 Vict. c. 38, in order to retain their preference in the administration of estates; *Gaunt Taylor*, 3 Man. & Gr. 886; *Jennings v. Rigby*, 33 Beav. 198.

4. Recognizances and statutes.

5. Debts by special contract, as on bonds, covenants, and other instruments under seal, for valuable consideration: *Pinchon's case*, 9 Co. 116. b. As to what amounts to a specialty debt under such instruments, see *Gifford v. Manley*, Ca. t. Talb. 109; *Turner v. Wardle*, 7 Sim. 80; *Simmins v. Cummins*, 3 J. & L. 64; *Richardson v. Jenkins*, 1 Drew. 477; *Wood v. Hardisty*, 2 Coll. 542; *Musson v. May*, 3 V. & B. 194; *Thomas v. Wright*, 2 My. & K. 769; *In re Dickson*, 12 L. R. Eq. 154; *Murtney v. Taylor*, 7 Scott, N. R. 749; 6 Man. & G. 851; *Adey v.*

[*122] *Arnold*, 2 De G. M. & G. 432; **Marryat v. Marryat*, 28 Beav. 224; *Wynch v. Grant*, 2 Drew. 312; *Saunders v. Milsome*, 2 L. R. Eq. 573; *Yates v. Aston*, 4 Q. B. 182; *Holland v. Holland*, 4 L. R. Ch. App. 449. A debt for rent ranks in the same degree as a debt by obligation, or other instrument under seal (Com. Dig. "Admon." (C. 2.): see also *Thompson v. Thompson*, 9 Price, 464, 471; *Clough v. French*, 2 Coll. 277; and as to arrears of rent, see *Kidd v. Boone*, 12 L. R. Eq. 89), except where it is claimed for lands out of England: *Vincent v. Godson*, 4 De G. Mac. & G. 546; *Barker v. Damer*, Carthew, 182; and the liability of a contributory to pay calls made since a winding up, has been held to be a debt by specialty having priority over simple contract creditors: *Buck v. Robson*, 10 L. R. Eq. 629.

6. Debts by simple contract, as on bills or notes, and contracts not under seal, on verbal promises, or on promises implied at law, and unregistered judgments which only rank *pari passu* with debts by simple contract: *Re Turner*, 12 W. R. (V. C. W.), 337; *Kemp v. Waddingham*, 14 W. R. (Q. B.) 390; 23 & 24 Vict. c. 38.

In the administration, however, of the estate of any person who should die *on* or *after* the 1st day of January, 1870, specialty and simple contract debts are payable *pari passu* out of legal assets: 32 & 33 Vict. c. 46, s. 1.

7. A claim by an incumbent against the representatives of his predecessor for dilapidations: *Bryan v. Clay*, 1 Ell. & Bl. 38; and see *Crampton v. Marshall*, 2 I. R. Eq. 316.

8. Voluntary bonds (*Ramsden v. Jackson*, 1 Atk. 294); but in the administration of assets, a voluntary bond is to be preferred to interest upon debts not by law carrying interest, payable under the 46th Order of August, 1841: *Garrard v. Lord Dinorben*, 5 Hare, 213; but if a voluntary bond is assigned for value at any rate in the life of the obligor, it will in the administration of assets stand upon the same footing as a bond originally given for value: *Payne v. Mortimer*, 4 De G. & Jo. 447, 452.

As to the arrangement of priorities between simple contract creditors coming in within the time limited by the advertisements in an administration suit, and bond creditors coming in subsequently, see *Brown v. Lake*, 1 De G. & Sm. 144.

Liabilities and powers of executors or administrators in paying debts.—If an executor or administrator having notice of a superior debt voluntarily pays one of an inferior nature, he is liable on a deficiency of assets to make it good out of his own estate (Toller on Executors, 292); but if he has no notice of a superior debt, he will not be liable for paying an inferior debt first (*Hawkins v. Day*, 1 Amb. 160; *Harman v. Harman*, 2 Show. 492; *Nosotti v. *Jefferson*, [*123] 3 De G. Jo. & S. 570, unless he do so, so soon after the death of the person whom he represents as would afford evidence of fraud

oller, 192; *Nosotti v. Jefferson*, 3 De G. Jo. & S. 570; 11 W. R. (L. 1842). He was at common law presumed to have notice of debts of record as judgments entered up against the deceased (*Littleton v. Hibbs*, Cro. Eliz. 793). To remedy this injustice, 4 & 5 Will. & Mary, 20, was passed, which enacted that no judgment which was not docketed and entered in books kept for that purpose should have any preference against heirs, executors, or administrators in the administration of assets. And it seems that where a judgment debt was not docketed pursuant to the statute, it would rank only as a simple contract debt: *Hall v. Tapper*, 3 B. & Ad. 655. Then came the Act for the Abolition of Imprisonment for Debt (1 & 2 Vict. c. 110), which enacts that no judgment shall by virtue of that Act affect any lands "as to purchasers, mortgagees, or creditors," unless and until a memorandum, in the form prescribed, shall have been left with the Senior Master of the Common Pleas. But the Act does not use the words used in the statute of 4 Will. & Mary, or words to that effect, namely, that it shall not until docketed, have preference against an heir, executor, or administrator over any other debts in the administration of assets. In that state of the law the old law remained untouched. By 2 & 3 Vict. c. 11, dockets being put an end to, the old common law was restored, and it is held accordingly that an administrator had committed a devastavit in paying a simple contract debt before a judgment debt, even although he had no actual notice of the latter, *Fuller v. Redman*, 26 Beav. 600. It was thought a great hardship, and accordingly after the decision in *Fuller v. Redman*, Lord St. Leonards procured 23 & 24 Vict. c. 38, to be passed, in order to restore the law as it existed under the 4 & 5 Will. & Mary, c. 20, as regards judgments against testators or their estates: *Kemp v. Waddingham*, 1 L. R. (Q. B.) 355; 14 W. R. (Q. B.) 390.

In like manner, executors and administrators were presumed to have notice of decrees in equity; an executor or administrator, therefore, could not pay simple contract debts in preference to a debt due upon a decree obtained against the deceased, of which he had no actual notice, and was liable to pay it out of his own estate: *Searle v. Lane*, Freem. Ch. Rep. 104; 2 Vern. 89; *Sorrell v. Carpenter*, 2 P. Wms. 483. However, 23 & 24 Vict. c. 38, applies to registered decrees and orders of the Courts of equity and bankruptcy as well as to judgments.

With regard to other debts, an executor must have actual notice of them, otherwise he will not be liable for paying debts of an inferior degree in priority to them: *Brooking v. Jennings*, 1 [*124] Ad. 175; *Oxenham v. Clapp*, 2 B. & Ad. 312.

Among creditors of equal degree, an executor or administrator may pay one in preference to another (*Littleton v. Cross*, 3 B. & C. 322); may clear his debt by a sale (*Hepworth v. Heslop*, 6 Hare, 561; *Earl Vane v. Rigden*, 5 Lr. Ch. App. 668, per Lord Hatherley, C.); or

mortgage (*Earl Vane v. Rigden*, 5 Lr. Ch. App. 663) of part of the assets.

Equitable assets.—Equitable assets are of two kinds—the first are created by the act of the testator by charging or devising his land for payment of debts. The second are such as are not attainable by the executor *virtute officii*, and are solely available in equity.

As to the first kind of Equitable Assets.—It was held by Lord Camden, in the principal case, contrary to what was formerly supposed to be the case, that lands, although devised to executors as trustees, in payment of debts, were equitable, and not legal assets; and see *Newton v. Bennet*, 1 Bro. C. C. 135, 138; *Lowe v. Peskett*, 16 C. B. 500.

And although at one time it appears to have been considered necessary that the descent should be broken by a devise from the heir (*Freemoult v. Dedire*, 1 P. Wms. 430; *Plunket v. Penson*, 2 Atk. 293), it has been clearly established, that whether lands are devised to the heir (in which case he formerly took by descent) charged with debts, or whether they descend to him so charged, in either case they are equitable assets; See *Hargrave v. Tindal*, 1 Bro. C. C. 136, n.; *Batson v. Lindegreen*, 2 Bro. C. C. 94; *Bailey v. Ekins*, 7 Ves. 319, 322; *Ship-hard v. Lutwidge*, 8 Ves. 26. Lord Camden, in the principal case, seems to have thought that the assets would be legal, where the executor had a naked power to sell *qua* executor. It is, however, now clearly settled, that they would be equitable. See note by Sanders, 1 Atk. 420, and cases there cited. *Ross v. Barclay*, 6 Harris, 179, 184.

There is, however, an important distinction between an express devise or appropriation of lands for the payment of debts, and a mere charge of debts; for, in the first case, they will be applicable in payment of debts before lands descended; but, in the second case, they are applicable only after the assets arising from lands expressly devised for payment of debts, and lands descended not charged with debts, have been exhausted: *Harmood v. Oglander*, 8 Ves. 124, 125; *Donne v. Lewis*, 2 Bro. C. C. 257.

Where moreover there is a mere charge for payment of debts, [*125] *the operation of the Statute of Limitation (3 & 4 Will. 4, c. 27) will not be thereby prevented; *Dickinson v. Teasdale*, 1 De G. Jo. & Sm. 52; 31 Beav. 511; but it will where there is an express trust for that purpose. Thus in *Jacquet v. Jacquet*, 27 Beav. 332, a testator charged his real estates with his debts, and devised his C. plantation in trust to pay his debts. He died in 1834, and the produce arising from the sale of the plantation being in Court, it was held by Sir J. Romilly, M. R., in the year 1859, that the creditors were not barred as to the fund in Court, a trust having been created in their favour, but that they were barred as to the other real estate, they having a mere charge thereon. See also *Phillippo v. Munnings*, 2 My. & Cr. 309; *Toft v. Stephenson*, 7 Hare, 1; *Francis v. Grover*, 5 Hare, 39;

dge v. Churchward, 16 Sim. 71; *Hughes v. Kelly*, 3 Dru. & War. 1; *Harrisson v. Duignan*, 2 Dru. & War. 295; *Snow v. Booth*, 2 K. L. 132; 8 De G. Mac. & G. 69.

A devise of part of a testator's estate for payment of debts will be within the benefit of the proviso in the Statute of Fraudulent Devises, if that part prove sufficient for the purpose; but it will be fraudulent and void as against specialty creditors, if it be insufficient. See *Hughes v. Doublin*, 2 Cox, 170, where Lord Thurlow observed, that whenever such a case came before him, he would refer it to the Master to state to him whether according to the mode prescribed by the testator, the debts could be paid; and if the Master told him that the debts could not be paid by that mode, he would consider that as a fraudulent devise, and that he was controlled by the House of Lords: *S. C.*, 2 Bro. C. C. 614. A devise will be fraudulent if it be not for payment of *all* debts. Thus, where R. had devised a great part of his real estate in trust for the payment of all his debts, *except* such as he had contracted by being bound as surety for H., Lord Hardwicke held, that, as the devise was not for the payment of all the testator's debts generally, the case was not within the benefit of the proviso of the Statute of Fraudulent Devises: *Vernon v. Vaudrey*, Barnard. Ch. Rep. 280, 304. See, however, *Att v. Atkinson*, Willes R. 524; and *Richardson v. Horton*, 7 Beav. 123. So, if a person devises one estate to A. B. in fee, charged with payment of one-fifth of his debts, and another to C. D. in fee, charged with the payment of the other four-fifths, such devises are not within the proviso of the Statute of Fraudulent Devises; that is to say, they are not such a provision for the payment of debts as to make the devised estates wholly or partially equitable assets: *Lyon v. Colville*, 1 Coll. 473. But a direction in a will, to pay simple contract debts before specialty creditors, is within the proviso in the Statute [*126]

Fraudulent Devises, the words of the proviso being satisfied by the direction being for the payment of all debts: *Millar v. Horton*, G. 45.

The remedy given to specialty creditors by 3 Will. & M. c. 14, was held to be confined to cases in which an action of debt lay upon specialties securing a sum certain, due in the testator's lifetime: *Wilson v. Aubrey*, 7 East, 128; *Farley v. Briant*, 5 N. & M. 42; but see *Jenkins v. Briant*, 6 Sim. 603. This deficiency was supplied by 1 Will. 4, c. 47; and, independently of this Act, Courts of equity held, that a charge of debts would comprise damages for a breach of a covenant after the testator's death: *Lomas v. Wright*, 2 My. & K. 775; *Morse v. Tucker*, 5 Are, 79; *Eardley v. Owen*, 10 Beav. 572; *Coope v. Cresswell*, 2 L. R. 1. App. 112.

A direction that the produce of real estate shall form part of the personal estate, will not in cases within the exception of the statute, convert it into legal assets. This seems to have been the opinion of Lord

Camden, in the principal case, and in *Soames v. Robinson*, 1 My. & K. 500, where a testator devised his real estate to trustees and their heirs, upon trust to sell, and after declaring his will to be that the clear money arising from such sale should sink into and become part of his personal estate, he gave and bequeathed the same, and all his stock, crops, goods, and effects whatsoever, to the same trustees, their executors and administrators, upon trust, after converting the same into money, and paying all his debts, funeral and testamentary expenses, to pay legacies, and dispose of the residue. It was held by Sir John Leach, M. R., that this was substantially a devise of the real estate for the payment of all debts, and was, by the 4th section of the Statute of Fraudulent Devises, good against the specialty creditors, and converted the produce into equitable assets. See also *Shakels v. Richardson*, 2 Coll. 31.

Where, however, the sale for payment of debts is directed not by the testator, but by the Court, although the purchase-money is paid into Court, it will be legal assets. See *Lovegrove v. Cooper*, 2 Sm. & Giff. 271; but see the remarks in *Bain v. Sadler*, 12 L. R. Eq. 573.

It may be remarked, that the Act of 3 & 4 Will. 4, c. 104, applies only to estates which the testator *has not charged with, or devised subject to, the payment of his debts*; the distinction, therefore, between estates subjected to the payment of debts by the will of the debtor, [*127] and estates subject to debts by the operation of law, *remained precisely as it was before the Act. Thus, although all the real estates of a person were by law (the specialty debts being prior to 32 & 33 Vict. c. 46, entitled to priority) liable to his debts by specialty and simple contract, yet, if he *devised them for, or charged them with*, the payment of his debts, they would still *be equitable assets*, and, as such, distributable among his creditors *pari passu*. See *Ball v. Harris*, 4 My. & Cr. 268, 269, where a typographical error in *Mirehouse v. Scaife*, 2 My. & Cr. 708, is corrected.

In a former edition of this work it was said, "It seems difficult to conceive upon what principle the order in which the specialty and simple contract creditors are to be paid should in any case now depend upon the will of the debtor. If specialty creditors ought in justice to be paid before simple contract creditors, why should it be left in his power to put them both upon a level? If, on the other hand, they ought to be paid *pari passu*, why was it not at once so enacted, and their position rendered independent of accident or caprice? Under the old law, as observed by Lord Camden, in the principal case, no injury was done by the Court to specialty creditors; for though real estates were assets at law to pay such debts, yet they might then be defeated by the debtor's will, or the heir's alienation. So that where the will set aside the law, equity would have forgotten its own principle of equality, by giving a priority, which the testator had not done, all debts being

ial in conscience. This reasoning, however, is not applicable under the new law, where real estates, although devised, are liable to debts both by specialty and simple contract." 2 L. C. Eq. 3rd ed., p. 110. See *Bull v. Bull*, 8 B. Monroe, 352. In *M'Candlish v. Keene*, 13 Attan, 615, 634, the court held on the authority of *Charlton v. Wright*, 12 Simons, 274, that land charged with debts by will, is equitable assets, although it would be liable under the statute law, if no such charge had been imposed.)

Recently, by 32 & 33 Vict. c. 46 (which does not extend to Scotland,) after reciting that it was expedient to abolish the distinction which then existed between specialty and simple contract debts of deceased persons, it is enacted that, "in the administration of the estate of every person who shall die *on or after* the 1st day of January, 1870, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under bond, deed, or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of such person, as to all specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person; whether such assets are legal or equitable, any statute or other law to the contrary notwithstanding: *Provided* always, that this act shall not prejudice or affect any *lien, charge, or other security [128] which any creditor may hold or be entitled to for the payment of his debt:" Sect. 1.

Real estates in the West Indies cannot, since statute 5 Geo. 2, c. 7, (which made real estates in the West Indies legal assets), be deemed so as to make them equitable assets. See *Turner v. Cox*, 8 Moo. C. C. 288, overruling *Charlton v. Wright*, 12 Sim. 274.

Right of Retainer.—The order in which assets are administered may be affected by the right of retainer, about which a few observations may not be misplaced, showing in what cases and in what manner it may be exercised. An executor or administrator among creditors of equal degree may pay one in preference to another, and he has a right to *draw out of legal assets* to retain for his own debt due to him from the deceased, whether it be legal (2 Wms. Ex. 936, 8th ed., citing *Edward v. Lord Darcy*, Plowd. 184; *Dyer*, 2 a. *in marg.*; *Warner v. Wainford*, Hob. 127; *Bond v. Green*, 1 Brownl. 75; *S. C.*, Godb. 310, pl. 310) or equitable (*Cockcroft v. Blank*, 2 P. Wms. 298; *Franks v. Cooper*, 4 Ves. 763; *Loomes v. Stotherd*, 1 Sim. & Stu. 461); and the right of retainer for an equitable debt is recognised even at law (*Roskelley v. Godolphin*, Sir T. Raym. 583; *S. C.*, nom. *Boskellet v. Godolphin*, Skinn. 214; *S. C.*, nom. *Roskelley v. Godolphin*, 2 Show. 411; *Marriott v. Thompson*, Willes, 186; *Loane v. Casey*, 2 Wm. Bl. 965; *Thompson v. Thompson*, 9 Price, 464, 473), except in

cases where an account of it cannot be taken by a jury (*De Tastet v. Shaw*, 1 B. & Ald. 664; *Loane v. Casey*, 2 Wm. Black. 965, 967.)

The right of retainer cannot, however, be enforced as against creditors of superior degree. Com. Dig. "Admon." (C. 2), 1 Saund. 333, note to *Hancock v. Prowd*. This right will not be lost by payment of the assets into Court in a creditor's suit (*Nunn v. Barlow*, 1 S. & S. 588; *Hall v. Macdonald*, 14 Sim. 1; but see the remarks of Sir J. Wickens, V. C., in *Bain v. Sadler*, 12 L. R. Eq. 573), and will prevail even against the plaintiff's costs of the suit: *Chissum v. Dewes*, 5 Russ. 29; *Langton v. Higgs*, 5 Sim. 228; *Tipping v. Power*, 1 Hare, 105.

An administrator durante minoritate (*Roskelley v. Godolphin*, T. Raym. 483, Com. Dig. "Admon." (F.); *Franks v. Cooper*, 4 Ves. 764; an administrator durante dementia (*Franks v. Cooper*, 4 Ves. 663), an executor of an executor (*Hopton v. Dryden*, Prec. Ch. 180; *Thompson v. Grant*, 1 Russ. 540, n.), or administrator (*Weeks v. Gore*, 3 P. Wms. 184, n.) may retain not only for their own debts, but also for that of the infant, or lunatic, executor or administrator. But an executor of one of several executors, one or more of whom *is still living, [*129] cannot retain; *Hopton v. Dryden*, Prec. Ch. 181; nor can an executor or administrator retain his own debt against his co-executors or co-administrators, being also creditors of the deceased (*Chapman v. Turner*, 11 Vin. Ab. 72, tit. Exors (D). 2; *S. C.*, 9 Mod. 268); but he may retain out of a balance found to be due from himself and his co-executor to the estate (*Kent v. Pickering*, 2 Keen, 1).

A creditor, to whom administration is granted, may retain as against the rightful administrator, although the letters of administration be afterwards repealed at the suit of the next of kin (*Blackborough v. Davis*, 1 Salk. 38), unless on taking out the letters of administration he entered into articles to pay debts equal in degree to his own, in equal proportions: 2 Wms. Ex. 943, 5th ed.; and see *Spicer v. James*, 2 My. & K. 387; *Thompson v. Cooper*, 1 Coll. 81.

A husband may, if executor, retain for a debt due from the testator to his wife dum sola (*Atkinson v. Rawson*, 1 Mod. 208; 2 Mod. 51, nom. *Prince v. Rowson*), and if his wife be executrix, he may retain for a debt due by the testator to himself or to his wife dum sola: Toll. 359.

A person being representative of the creditor and debtor, has a right to retain for the debt of the one out of the assets of the other (*Burnet v. Dixe*, 1 Roll. Abr. 922, Exors. (L.); 2 *Burdet v. Pix*, 2 Brownl. 50; *Fryer v. Gildridge*, Hob. 10; *Thompson v. Cooper*, 1 Coll. 85), and in a recent case where the same individual was administrator of the estates of the debtor and creditor which were being administered in Court, it was held not only that he was entitled, but that he *was bound* at the instance of the parties interested in the creditor's estate, to retain the

debt out of the debtor's estate in preference to his other creditors (*For v. Garrett*, 28 Beav. 16).

An executor, to whom jointly with his partner a debt was due by the testator, may retain it (*Burge v. Brutton*, 2 Hare, 373), but if the executor dies, so that the interest in the debt wholly devolves on his surviving partner, the right of retainer ceases and cannot be exercised by the representative of the executor (*Burge v. Brutton*, 2 Hare, 373). As to the right of an obligee made executor to one of two joint and several obligors to retain, see *Crosse v. Cocke*, 3 Keb. 116; *Cock v. Cross*, 2 Lev. 73; *S. C.*, 2 Freem. 44, 50; 3 Bac. Ab. 10, tit. Exors. A. 9. As to how far a surety executor of principal can retain, see *Anon.*, Godb. 149, pl. 194; 4 Leon. 236, pl. 362; *Bathurst v. De la Zouch*, 2 Dick. 460. See *S. C.*, nom. *Bathurst v. De la Touche*, 34 Beav. 9, n., and *Boyd v. Brooks*, 34 Beav. 7.

*As an executor or administrator may pay a debt proved to be justly due by his testator, although barred by the Statute of [*130] Limitations, so he may retain for his own just debt, although barred by the statute; *Hopkinson v. Leach*, Madd. Ch. Pr. 583, 2nd ed.; *Stahlschmidt v. Lett*, 1 Sm. & Giff. 415; and see *Sharmam v. Rudd*, 4 Jur. (N. S.) 527.

Where the assets are equitable, an executor cannot retain the whole of the debt due to him from the testator, but only a proportionable part with the other creditors. *Anon.*, 2 Ch. Ca. 54; *Hopton v. Dryden*, Prec. Ch. 181. "The rule of the Court in cases of retainer," said the Hon. J. Verney, M. R., "is, unless the party can show a legal right to retain, we never give it to him; if he can show a legal right, we never take it away from him" (*Chapman v. Turner*, Vin. Ab. Exors. (D. 2) pl. 2).

Where there are legal as well as equitable assets, if the executor retains the legal assets in part payment of his debt, he cannot claim to be paid a proportionate part with the other creditors out of the equitable assets, until they have received thereout as much as he has retained out of the legal assets: *Baily v. Ploughman*, Mos. 95; *Chambers v. Harvest*, Ib. 123; *Hall v. Kendall*, Ib. 328.

What amounts to a Charge of Debts.—In order to prevent the injustice which, previously to the late enactments, would have resulted to creditors, in consequence of a testator neglecting to charge his debts upon his real estate, Courts of equity have, by straining the ordinary mode of construction, laid it down as a rule, that a mere general direction by a testator, that his debts should be paid, effectually charges them upon his real estate. A leading case upon this subject is *Legh v. Earl of Warrington*, 1 Bro. P. C. 511, Toml. ed., in which a testator commenced his will thus:—"As to my worldly estate which it hath pleased God to bestow upon me, I give and dispose thereof in manner following: (that is to say), *Imprimis*, I will that all my debts which I shall

owe at the time of my decease, be discharged and paid out of my estate;" and he then disposed of his real and personal estate, charging the former with an annuity. It was contended, that these were merely introductory words, and did not indicate an intention to charge the real estate. But the House of Lords, affirming a decree of Lord King, held the real estate to be charged; see also *Earl of Godolphin v. Penneck*, 2 Ves. 271; *Kentish v. Kentish*, 3 Bro. C. C. 257; *Kightley v. Kightley*, 2 Ves. jun. 328; *Shallcross v. Finden*, 3 Ves. 738; *Williams v. Chitty*, 3 Ves. 545; *Clifford v. Lewis*, 6 Madd. 33; *Ball v. Harris*, 8 Sim. 485; *S. C.*, 4 My. & Cr. 264; **Shaw v. Borrer*, 1 Kee. [131] 559; *Parker v. Marchant*, 1 Y. & C. C. C. 290; *Harding v. Grady*, 1 D. & War. 430; *Gosling v. Carter*, 1 Coll. 644.

In *Clifford v. Lewis*, 6 Madd. 33, Sir John Leach considered it to be of importance that the expression with which a testator commences his will, should import a general and primary purpose that the payment of his debts should precede the subsequent dispositions which he makes of his property, as in *Finch v. Hattersley* (cited 7 Ves. 211, stated 3 Russ. 345, n.), where the will begins, "First, I direct my debts to be paid;" and in *Legh v. Earl of Warrington*, 1 Bro. P. C. 511, Toml. ed., "Imprimis, I direct my debts to be paid." And see *Douce v. Lady Torrington*, 2 My. & K. 600, and *Ronalds v. Feltham*, 1 T. & R. 418; but in *Graves v. Graves*, 8 Sim. 55, the correct view appears to be taken by Sir L. Shadwell, V. C. "I do not think," observed his Honor, "that the charge is made to rest on the mere circumstance, that the testator has used the words 'imprimis,' or 'in the first place;' for if a testator directs his debts to be paid, is it not, in effect, a direction that his debts shall be paid in the first instance?" And see *Irvin v. Ironmonger*, 2 Russ. & My. 531.

And even where there is no devise or mention of realty, it will, nevertheless, in the hands of the heir be converted into equitable assets by a general charge of debts. "I am very clearly of opinion," says Lord Avonley, "that wherever a testator says his debts shall be paid, that will ride over every disposition, either as against his heir-at-law or devisee:" *Shallcross v. Finden*, 3 Ves. 739.

There appear, however, to be two exceptions to the rule: first, where the testator, after a general direction for payment of his debts, has specified a particular fund for the purpose; "because the general charge by implication is controlled by the specific charge made in the subsequent part of the will:" *Thomas v. Britnell*, 2 Ves. 313; *Palmer v. Graves*, 1 Kee. 545.

But the general charge will not be affected by a subsequent charge on the *residuary personal estate*, as the presumption in favour of charges for the benefit of creditors cannot be repelled by anything short of clear and manifest evidence of a contrary intention: *Price v. North*, 1 Ph. 85; *Graves v. Graves*, 8 Sim. 43. See also *Taylor v.*

Taylor, 6 Sim. 246; *Forster v. Thompson*, 4 D. & War. 303; *Cross v. Kennington*, 9 Beav. 150; *Dormay v. Borradaile*, 10 Beav. 263.

An express charge, however, will not be affected by the appropriation of particular lands for the purpose of paying debts (*Ellison v. Airey*, 2 Ves. 568; *Coxe v. Bassett*, 3 Ves. 155); or a qualified *charge in the same will (*Crallan v. Oulton*, 3 Beav. 1; *Jones* [*132] v. *Williams*, 1 Coll. 156, 160).

The second exception seems to be, where the debts are directed to be paid by executors; for, in that case, it will be presumed, unless land be devised to them, that the debts are to be paid exclusively out of the assets which come to them as executors; *Brydges v. Landen*, cited 3 Ves. 550; 3 Russ. 345, n.; *Keeling v. Brown*, 5 Ves. 359; *Powell v. Robins*, 7 Ves. 209; *Willan v. Lancaster*, 3 Russ. 108; *Braithwaite v. Britain*, 1 Kee, 206; *Wisden v. Wisden*, 2 Sm. & Giff. 396; *Cook v. Dawson*, 29 Beav. 123; 3 D. G. F. & Jo. 127. *Gaw v. Hoffman*, 12 Grattan, 628, 634.

Where, however, the executors are devisees of the real estate, that resumption does not arise, and the lands devised to them will be equitable assets (*Finch v. Hattersley*, 3 Russ. 345, n.; *Aubrey v. Middleton*, 2 Eq. Ca. ab. 497, pl. 16; *Alcock v. Sparhawk*, 2 Vern. 228; *Barker v. Duke of Devonshire*, 3 Mer. 310; *Henvell v. Whitaker*, 3 Russ. 343; *Dover v. Gregory*, 10 Sim. 396, 399; *Dormay v. Borradaile*, 10 Beav. 263; *Cross v. Kennington*, 9 Beav. 150; *Harris v. Watkins*, Kay, 438; *Gallimore v. Gill*, 2 Sm. & Giff. 158; *Hartland v. Murrell*, 27 Beav. 204; overruling *Parker v. Fearnley*, 2 S. & S. 592). *Secus*, where after a general direction that the debts should be paid to the executors there is a devise of real estate to one of them only (*Keeling v. Brown*, 5 Ves. 359; *Warren v. Davies*, 2 My. & K. 49; *Wasse v. Heslington*, 3 My. & K. 495), unless the testator otherwise shows his intention that the real estate should be charged, as were the devise to one of the executors after a general charge of debts is made "subject as aforesaid:" *Dowling v. Hudson*, 17 Beav. 248.

Where the charge of debts is a mere matter of form, inserted without any view to the regulation of the enjoyment or distribution of the testator's property, and it is manifest from the whole will, that the testator did not intend to subject the real estate given to his executors to debts, it will not be equitable assets: *Symons v. James*, 2 Y. & C. C. 301. See remarks on this case in *Harris v. Watkins*, Kay, 447.

As to whether the expressions which are sufficient to charge real estate with debts will also charge legacies, see *Davis v. Gardiner*, 2 P. Wms. 187; *Kightley v. Kightley*, 2 Ves. jun. 328; *Williams v. Chitty*, 3 Ves. 551; *Keeling v. Brown*, 5 Ves. 361; *Smith v. Butler*, 1 J. & L. 692; *Cole v. Turner*, 4 Russ. 376; *Mirehouse v. Scaife*, 2 My. & Cr. 695; *Nyssen v. Gretton*, 2 Y. & C. Exch. Ca. 222; *Francis v. Cleemow*,

Kay, 435; *Harris v. Watkins*, Ib. 438; *Gallimore v. Gill*, 2 Sm. & Giff. 158. *Ante*, 346, notes to *Aldrich v. Cooper*.

[*133] A direction to raise money for *payment of debts out of rents and profits of real estate, will be an effectual charge of debts within the provision of the Statute of Fraudulent Devises, as it will authorize the sale and mortgage of the estate for that purpose. "I have understood it," observed Lord Eldon, "to be a settled rule, that where a term is created for the purpose of raising money out of the rents and profits, if the trusts of the will require that a gross sum should be raised, the expression 'rents and profits' will not confine the power to the mere annual rents, but the trustees are to raise it out of the estate itself, by sale or mortgage." *Boottle v. Blundell*, 1 Mer. 232.

A charge by a testator of debts which he has contracted, will also include those which he owes at the time of his death: *Bridgeman v. Dove*, 3 Atk. 201; *Brudenell v. Boughton*, 2 Atk. 274.

Where a person has a direct lien upon the land, as mortgagee or otherwise (*Wolestoncroft v. Long*, 1 Ch. Ca. 32; *Anon.*, 2 Ch. Ca. 54; *Child v. Stephens*, 1 Vern. 101, 103); or as judgment creditor (1 & 2 Vict. c. 110), his right of priority will not be affected by a charge of debts.

Neither debts by specialty, in which the heirs are bound, nor simple contract debts, even since the 3 & 4 Will. 4, c. 104, constitute a lien or charge upon the land, either in the hands of the debtor or of his heir or devisee. Notwithstanding the existence of such debts, the debtor himself may alienate the land. By taking proper proceedings, the creditors, both by specialty and simple contract, may obtain payment out of the descended or devised real estates in the hands of the heir or devisee; but if such proceedings are not taken, the heir or devisee may alienate, and in the hands of the alienee, whether upon a common purchase or on a settlement, even with notice that there are debts unpaid, the land is not liable, though the heir or devisee remains *personally* liable, to the extent of the value of the land alienated: *Richardson v. Horton*, 7 Beav. 112, 123; 4 My. & Cr. 268, 269; *Spackman v. Timbrell*, 8 Sim. 259, 260; *Dilkes v. Broadmead*, 2 Giff. 113; but a mere deposit of the deeds of an estate (*Carter v. Sanders*, 2 Drew. 248), or a covenant to settle it by (*Pimm v. Insall*, 7 Hare, 487; 1 Hall & T. 487; 1 Mac. & G. 448), or a judgment entered up against the heir or devisee (*Kinderley v. Jervis*, 22 Beav. 1), will not amount to such an alienation as will defeat the creditors of the ancestor or deviser. See *Morley v. Morley*, 5 De G. Mac. & G. 610.

As to the second kind of Equitable Assets.—Where the property is not recoverable by the executors *virtute officii*, it will be equitable assets: Under the old law, the equity of redemption of an estate [*134] *in fee simple, or of a trust estate in fee simple, would have been equitable, and not legal assets (*Solley v. Gower*, 2 Vern. 61

Plunket v. Penson, 2 Atk. 290); but, even under the old law, if there had been a mortgage for a term of years, and the reversion in fee was left to the mortgagor, it would have been legal assets, because a bond creditor might have had judgment against the heir of the obligor, and a cesset executio till the reversion came into possession; but where it was a mortgage of the whole inheritance, a bond creditor could have had no remedy to make it assets at law; and if the specialty creditor had brought an action against the heir, he might have pleaded riens per descent: *Plunket v. Penson*, 2 Atk. 308. The equity of redemption, however, of a mortgage in fee, both of freeholds and copyholds, is made legal assets by 3 & 4 Will. 4, c. 104. See *Foster v. Handley*, 1 Sim. N. S. 200; 15 Jur. 73; *In re Burrell*, 9 L. R. Eq. 443.

The equity of redemption of a term of years, after forfeiture at law, was, it seems, formerly considered equitable assets. In *The case of the Creditors of Sir Charles Cox*, 3 P. Wms. 342, Sir Joseph Jekyll, M. R., held, that a mere right of redemption of a term being barely an equitable interest, it was reasonable to construe it equitable assets, and consequently distributable amongst all the creditors pro ratâ, without having respect to the degree or quality of their debts; all debts being in a conscientious regard equal, and equality the highest equity; and see *Hartwell v. Chitters*, Amb. 308, decided upon the authority of that case. However, Mr. Cox, in his note to *The case of the Creditors of Sir Charles Cox*, 3 P. Wms. 344, says, that upon looking into the Master's report, it appeared that the only two creditors being in equal degree, the Master declined to distinguish which were legal and which were equitable assets, so that the point was not in fact determined, and that *Hartwell v. Chitters* rested upon the authority of that case. "On the other hand," Mr. Cox observes, "it has been decided that chattels, whether real or personal, mortgaged or pledged by the testator, and redeemed by the executor, shall be assets at law in the hands of the executor, for so much as they are worth beyond the sum paid for their redemption, though recoverable only in equity." And in proof of this he cites *Hawkins v. Lawes*, 1 Leon. 155; *Harcourt v. Wrenham*, or *Harwood v. Wrayman*, Moore, 858; 1 Roll. Rep. 56; 1 Brownl. 76; 1 Roll. Abr. 920; *Alexander v. Lady Graham*, 1 Lean. 225: but see the judgment of Bayley, J., in *Clay v. Willis*, 1 B. & C. 372, and that of Lord Tenterden, C. J., in *Barker v. May*, 9 B. & C. 493, where the doctrine laid down in *The case of the Creditors of Sir Charles Cox*, and *Hartwell v. Chitters*, viz., that the equity of redemption of a term of years [*135] is equitable assets, is recognised and approved of.

It has moreover been decided that trusts of a chattel, as a mere equitable interest in a term, not being affected, as trusts of inheritance, by 29 Car. 2, c. 3, s. 10, are equitable assets: *Scott v. Scholey*, 8 East, 467; *Metcalf v. Scholey*, 2 New. Rep. 461. See also *In re Duke of Newcastle*, 8 L. R. Eq. 700.

In the case, however, of *Cook v. Gregson* (3 Drew. 547), it was held by Sir R. T. Kindersley, V. C., that the equity of redemption of a sum of money charged on land is legal assets in the hands of the executor. "The general principle," said his Honor, "is that a court of law would treat as assets every item of property come to the hands of the executor which he has recovered, or had a right to recover, merely *virtute officii*, i. e., which he would have had a right to recover if the testator had merely appointed him executor, without saying anything about his property or the application thereof. That I think is the test which, upon principle, a Court of law would apply. Assuming that to be the true principle, suppose first, that the testator was at his death entitled to a sum of money equitably charged on land; as the executor could recover this merely *virtute officii*, as executor, I apprehend that, when received by the executor, it would be legal assets in his hands. Next, let the same principle be applied to an equity of redemption. When the time fixed for payment of the mortgage-money has passed, what is the right of the mortgagor? It is suggested that it is merely a right to re-purchase; that certainly is not the view taken of the law in modern times; the unvarying tendency of modern decisions is to treat a mortgage merely as a security, and to treat the mortgagor as being still the real owner. And I think the view which Wentworth takes in the passage referred to by the learned counsel for the plaintiff, (*Ib.* p. 186,) must be considered as much effected by the different light in which the position of the mortgagor was regarded in former times. An equity of redemption is not now considered as a matter of indulgence; it is now a matter of absolute right. And is it not merely by virtue of his office that the executor of a mortgagor who has mortgaged a chattel, comes to this Court to redeem? I think it clearly is. If there were nothing in the will but the appointment of executor, would not the executor be entitled simply *virtute officii* to ask for redemption? Clearly he would. A mere administrator might demand it. If so, I confess it appears to me that the general principle, as I have stated it, applies to an equity

[*136] *of redemption of a chattel interest, whether real or personal; and that such an equity of redemption would be legal assets. Now whether those cases which have been cited with respect to the equity of redemption of a *mortgaged term of years* are to be considered an exception, it is not absolutely necessary for me to determine. If I were called upon to do so, I should say that, in my opinion, those cases are not sustainable, and ought not at this day to be followed. In this case, it is an equity of redemption of an equitable charge of a sum of money on real estate, which the executor has clearly in my opinion a right, in his mere character of executor, first to redeem, and then to enforce payment of. It is said it is a sort of double-distilled equity; first, there is a mere equity on a charge, and then there is a mortgage of that, and the testator's interest consists of the equity of redemption

of that mortgaged equity. That does not, as it appears to me, at all prevent the executor being entitled, *virtute officii*, to redeem and recover the sum charged; and I am therefore of opinion that the assets here recovered are legal." See also *Mutlow v. Mutlow*, 4 De G. & Jo. 539.

So in *Christy v. Courtenay*, 26 Beav. 140, the surplus produce of the sale, under the Court, of leaseholds for lives mortgaged by the testator, were held to be legal and not equitable assets.

But a judgment-creditor will be paid out of an equity of redemption before simple contract creditors, because he has a right to redeem: *Sharpe v. The Earl of Scarborough*, 4 Ves. 538.

The creditors of a married woman dying possessed of separate property, will be paid out of it *pari passu*, because they can only affect her property in a Court of equity, and their debts, having no existence at law, are considered equal in equity. See *Bruere v. Pemberton*, cited as *Anon.*, 18 Ves. 258; where in a contest between the specialty and simple contract creditors, Sir Wm. Grant, M. R., held that the circumstance of a debt contracted by a married woman having separate estate, being secured by a bond, did not give the creditor any priority, the bond, considered merely as a bond, being void, and therefore all the debts must be paid equally; see 7 Jur. N. S. 280: *Murray v. Barlee*, 3 My. & K. 209, and *Owens v. Dickinson*, Cr. & Ph. 48, 53, where a married woman by will charged her debts upon her separate property; and see ante, Vol. 1, p. 511; *Johnson v. Gallagher*, 30 L. J. (N. S.) Ch. 298; *Gregory v. Lockyer*, 6 Madd. 90. But see *Shattock v. Shattock*, 2 L. R. Eq. 182. For decrees for the administration of the separate personal and real estate of a feme covert, see Seton on Decrees, 151, 152, 232, 233, 3rd edit.

*Order in which Equitable Assets *are administered.*] Where there are only equitable assets, debts by specialty and simple [*137] contract are payable thereout *pari passu* (see Lord Camden's judgment in the principal case, ante, p. 113), and the law remains unaltered by 32 & 33 Vict. c. 46; and a claim of an incumbent against the representatives of his predecessor for dilapidations, will be paid out of equitable assets *pari passu* with other creditors (*Bisset v. Burgess*, 23 Beav. 278, 281), though at law it would be postponed to simple contract creditors: *Bryan v. Clay*, 1 Ell. & Bl. 38.

And where a debt is contracted by an Englishman in a foreign country, the provisions of the *lex loci contractus* do not avail to entitle the creditor to payment of his debt out of equitable assets administered in this country in priority to other creditors: *Pardo v. Bingham*, 6 L. R. Eq. 485.

The maxim, that *Equality is equity*, applies only to those persons whose equities are equal as creditors among themselves, and it will not be extended to legatees jointly with creditors. Thus, although land

may be devised in trust for or charged with the payment of debts *and* legacies, the debts will have the precedence of the legacies, upon the ground that a man ought to be just before he is generous; "for a man may not give but what is his own, but what he hath ultra æs alienum:" *Hixon v. Wytham*, 1 Ch. Ca. 248; *S. C.*, 1 Freem. Ch. Rep. 305; Sir *John Bowles' case*, cited by Hutchins, Lord Commissioner, in *Greaves v. Powell*, 2 Vern. 248; *Walker v. Meager*, 2 P. Wms. 551; and *Petre v. Bruen*, there cited; *Kidney v. Coussmaker*, 12 Ves. 154; overruling some of the old decisions and dicta, in which it was considered, that, as in such cases neither the creditor nor legatees could make any claim of strict right, but merely from the bounty of the testator, they ought, therefore, to be paid *pari passu*, without any distinction.

Order in which Assets, partly Legal and partly Equitable, are administered.—1st. The personal estate not specifically bequeathed (*Davies v. Topp*, 1 Bro. C. C. 526), unless exempted by declaration plain, or inference as plain (*Manning v. Spooner*, 3 Ves. 117; *Milnes v. Slater*, 8 Ves. 305; and see *Ancaster v. Mayer*, Vol. 1, p. 630 and note); and this being *legal assets*, will be applied in a course of administration in payment of debts, according to their legal priorities.

In the case of persons who died before the 1st of January, 1870, specialty debts will be paid in priority to simple contract debts; in the case of persons dying on or after the 1st of January, 1870, specialty debts and simple contract debts will be paid *pari passu* out of such personal estate.

2nd. Real estates, devised or *ordered to be sold for payment [*138] of debts, not merely charged with payment of debts; *Davies v. Topp*, 1 Bro. C. C. 527; *Harmood v. Oglander*, 8 Ves. 125; *Manning v. Spooner*, 3 Ves. 117; *Phillips v. Parry*, 22 Beav. 279.

These, however, will be equitable assets, and in cases both before and coming within the operation of 32 & 33 Vict. c. 46, applicable in payment of debts by specialty and simple contract *pari passu*. *Newby v. Skinner*, 1 Dev. & Bat. Eq. 488; *Nagle's Appeal*, 1 Harris, 260, 264; *Hoover v. Hoover*, 5 Barr. 356.

3rd. Real estates descended, but not charged with debts (*Davies v. Topp*; *Harmood v. Oglander*; *Manning v. Spooner*; and see *Row v. Row*, 7 L. R. Eq. 414, as to costs of administration suit), whether in the possession of the devisor at the date of his will or subsequently acquired (*Milnes v. Slater*, 8 Ves. 304). These are legal assets liable to debts by specialty, but not before 47 Geo. 3, c. 74, and 3 & 4 Will. 4, c. 104, to debts by simple contract. If, however, in the course of administration, the specialty creditors had been paid out of the personal estate, these assets, as remarked in a former note, even before the statutes, just referred to, have been marshalled in favour of simple contract creditors; but in cases coming under the operation of 32 & 33 Vict. c.

46, debts by specialty and by simple contract will be payable *pari passu* out of real estate descended.

4th. Real estate devised, *charged* with payment of debts (*Davies v. Topp*, *Harmood v. Oglander*, *Manning v. Spooner*, *Barnewell v. Lord Cawdor*, 3 Madd. 453); and these being equitable assets, specialty and simple contract debts, in cases both before and coming within the operation of 32 & 33 Vict. c. 46, are payable out of them *pari passu*.

5th. General pecuniary legacies *pro rata*.

6th. Real estate devised not charged with debts (*Davies v. Topp*, *Manning v. Spooner*), including real estate comprised in a residuary devise: *Pearmain v. Twiss*, 2 Giff. 130; *Hensman v. Fryer*, 3 L. R. Ch. App. 420; *Gibbins v. Eyden*, 7 L. R. Eq. 371; *Collins v. Lewis*, 8 L. R. Eq. 708, overruling *Dady v. Hartridge*, 1 Dr. & Sm. 236; *Cogswell v. Armstrong*, 2 K. & J. 227; *Dyer v. Bessonett*, 4 Ir. Ch. R. 382; *Barnwell v. Iremonger*, 1 Dr. & Sm. 242; *Rodhouse v. Mold*, 13 W. R. (V. C. K.) 854; 35 L. J. (Ch.) 67; *Rotheram v. Rotheram*, 26 Beav. 465; *Bethell v. Green*, 34 Beav. 302; *Hensman v. Fryer*, 2 L. R. Eq. 627; *West v. Lawday*, 1 I. R. Eq. 478; and personal estate specifically bequeathed, each contributing rateably (*Long v. Short*, 1 P. Wms. 403; *Tombs v. Roch*, 2 Colt. 490; *Weir v. Chamley*, 1 Ir. Ch. Rep. 295; *Gervis v. Gervis*, 14 Sim. 654, overruling *Cornewall v. Cornewall*, 12 Sim. 298; and see *Young v. Hassard*, 1 J. & L. 472; *Jackson v. Hamilton*, 3 J. & L. 711; *and *Bateman v. Hotchkin*, 10 Beav. 426; *Fielding v. Preston*, 1 De G. & Jo. 438; *Evans v. Wyatt*, 31 [*139] Beav. 217); unless one is made primarily liable (*Bateman v. Hotchkin*, 10 Beav. 426); the former species of property, previous to the statutes rendering real estates liable to debts by simple contract, would only be liable to debts by specialty; but if the specialty creditors had been paid out of the personal assets, the simple contract creditors by marshalling, would be entitled to satisfaction out of the real estates devised *pro tanto*. *Ante*, 326.

Where a sum given by will and charged on real estate specifically devised is a primary charge upon it, specific legacies, and the specifically devised estate, must contribute rateably towards payment of debts, before recourse is had to the sum so charged. See *Raikes v. Boulton*, 29 Beav. 41: there the testator devised real estate to one for life, with remainder to trustees for a term to raise the clear sum of 10,000*l.* for his younger son; and *subject thereto* he devised the estate in strict settlement. The personal estate not specifically bequeathed, was insufficient to pay the debts, and thereupon the devised estates and specific legacies became liable to contribute rateably towards the deficiency. It was held by Sir John Romilly, M. R., that, as between the youngest son and the persons taking the estate subject to the term, the whole amount of contribution of the real estate must be borne by the latter.

7th. Where a person has a *general* power of appointment over per-

sonal estate, and he actually exercises his power in favour of volunteers by deed or will, the property appointed will in equity form part of his assets, so as to be subject to the demands of his creditors in preference to the claims of his legatees or appointees (*Thompson v. Towne*, 2 Vern. 319; *Lassels v. Lord Cornwallis*, Ib. 465; Prec. Ch. 232; *Hinton v. Toye*, 1 Atk. 465; *Shirley v. Ferrars*, 2 Atk. 172; 2 Ves. 2, 8, 9; *Bainton v. Ward*, 2 Atk. 172; *Townshend v. Windham*, 2 Ves. 1; *Pack v. Bathurst*, 3 Atk. 269; *Troughton v. Troughton*, 3 Atk. 656; *Jenney v. Andrews*, 6 Madd. 264; *Petre v. Petre*, 14 Beav. 197; *Williams v. Lomas*, 16 Beav. 1; *Brewer v. Swirles*, 2 Sm. & Giff. 219; *In re Davies' Trusts*, 13 L. R. Eq. 163). But as a Court of equity never aids the non-execution of a power, the power must be actually executed in order that equity may thus interpose in favour of creditors; *Holmes v. Coghill*, 7 Ves. 499; 12 Ves. 206; *Talmadge v. Sill*, 21 Barb. 34; *Johnson v. Cushing*, 15 New Hamp. 313.

And since Lord Romilly's Act (3 & 4 Will. 4, c. 104), it has been held that freehold estates, over which a testator has a general power of appointment, and which he appoints by his will, are assets for the payment of his *debts even by simple contract: *Fleming v. Buchanan*, 3 De G. Mac. & G. 976; *Talmadge v. Sill*; *Johnson v. Cushing*.

(The soundness of this doctrine was denied in *The Commonwealth v. Duffield*, 2 Jones (Penn.) 246. Gibson, C. J., said that the appointee's title is derived from the donor of the power and not from the donee, and that the donee is a mere instrument for determining who shall profit by the donor's bounty. It followed that the donee's creditors had no equity to require that the benefit which he destined for another, should be appropriated to the payment of his debts.)

But whether it be real or personal estate which has been appointed so as to become assets for payment of the appointor's creditors, it will be only applicable in aid of the assets which are really his property. See *Bainton v. Ward*, 2 Atk. 172, and the decree in that case set out in the note to *Holmes v. Coghill*, 7 Ves. 502; *Daubenny v. Cockburn*, 1 Mer. 639. And see *Fleming v. Buchanan*, 3 De G. Mac. & G. 976, where it was held that the personal and real estates of the appointor, including property specifically devised and bequeathed, were applicable in payment of his debts, before the appointed estate.

But if an appointee under a general power of appointment, were to sell the property to a bonâ fide purchaser for valuable consideration, the purchaser having a better equity would be preferred to the creditors of the appointor, since they have no specific charge upon the property: *Hart v. Middlehurst*, 3 Atk. 377; *George v. Milbanke*, 9 Ves. 190; and it has been said by Sir W. Grant, M. R., that where a person has executed an appointment of property over which he has a power unlimited as to objects, he who pays a consideration to the voluntary appointee

may constructively be held to be in the same situation as if he had in the first instance paid it to him by whom the estate has been granted : in *Daubenny v. Cockburn*, 1 Mer. 638.

Where however a feme covert has a general power to appoint property by deed or will, and executes it by will in favour of a legatee, the appointed property does not, as in the case of a similar appointment made by a man, become assets for the payment of her debts (*Hobday v. Peters* (No. 2), 28 Beav. 354) ; but the case is otherwise where the feme covert has practised a fraud in her contracts, for in such case the appointed property is liable : *Hobday v. Peters*, 28 Beav. 354 ; *Vaughan v. Vanderstegen*, 2 Drew. 165, ante, Vol. 1, p. 495 ; and see and consider *Laing v. Cowan*, 24 Beav. 112.

A lapsed share of real and personal estate, as between the heir-at-law, the next of kin, and the residuary devisees and legatees, ought to be applied in the same order as if the person entitled to such share under the will had survived, and the heir-at-law and next of kin become respectively entitled to what remains after such application : *Fisher v. Fisher*, 2 Keen. 610 ; see, also, *Peacock v. Peacock*, 13 W. R. 516.

Where real estate was devised, subject to debts to one for life with remainder to three persons as tenants in common, and one of the shares lapsed, it was held by Sir John Stuart, V. C., that the *lapsed [*141] share was applicable for payment of debts in the same order as the devised estates, and not till after the real estates which had descended : *Wood v. Ordish*, 3 Sm. & Giff. 125 ; and see *Ryves v. Ryves*, 11 L. R. Eq. 539.

Where assets are partly legal, and partly equitable, though equity cannot take away the legal preference on legal assets, yet, if one creditor has been partly paid out of such legal assets, when satisfaction comes to be made out of equitable assets the Court will postpone him till there is an equality in satisfaction to all the other creditors, out of the equitable assets, proportionable to so much as the legal creditor has been satisfied out of the legal assets ; *Morrice v. Bank of England*, Ca. t. Talb. 220 ; *Sheppard v. Kent*, 2 Vern. 435 ; *Deg v. Deg*, 2 P. Wms. 416 ; *Haslewood v. Pope*, 3 P. Wms. 323 ; *Wride v. Clark*, 1 Dick. 382 ; *Baily v. Ploughman*, Mos. 95 ; *Soames v. Robinson*, 1 My. & K. 500 ; *Chapman v. Esgar*, 1 Sm. & Giff. 575 ; and see the decree in *Plunket v. Penson*, 2 Atk. 294.

Upon the same principle, where a trustee of land for the payment of debts, whether he be executor or not, retains out of legal assets a sum of money in payment of a debt due to him from the testator, he will not be allowed to share with the other creditors the equitable assets, until they have received thereout payments proportionable to that which he has already retained. See *Bain v. Sadler*, 12 L. R. Eq. 570 ; there, an executor, who was also trustee for sale of an estate for payment of debts, was a creditor of his testator, and had received personal estate which

he retained as part satisfaction of his debt. The real estate was sold, a portion before the time, when a creditor's suit was instituted, and the remainder under the decree, and the proceeds, as to part, were in the executor's hands and the remainder in Court. It was held by Sir J. Wickens, V. C., that the money arising from the sale of the real property being equitable assets, the other creditors must be paid thereout to an equality with the executor, and that then there must be a rateable distribution of the rest.

This doctrine is founded upon the well-known maxim, that he *who seeks equity shall do equity*, the Court refusing its aid to a creditor who has taken advantage of his legal rights, to the exclusion of other creditors, who, in the eyes of equity, are equally meritorious, until they were placed upon an equal footing with him.

In cases, however, where the person whose estate is in the course of administration, died on or after the 1st of January, 1870, this interposition of equity is rendered less necessary, as specialty and simple contract creditors are *payable *pari passu*, both out of legal and equitable assets, 32 & 33 Vict. c. 46.

It may be here mentioned that whatever may be the order which the Court observes in distributing the assets of a testator, it does not alter the legal rights of the creditor. Hence the mere circumstance that the personal estate was more than sufficient to pay all his debts, funeral and testamentary expenses, and discharge all his liabilities, is not, even with the additional fact that the personalty specifically bequeathed has been assigned and delivered by the executors to the specific legatee, sufficient to discharge the specifically bequeathed property from the demands of the testator's creditors. See *Davies v. Nicholson*, 2 De G. & Jo. 693; there an executor assigned a leasehold to a person to whom it was specifically bequeathed, and allowed the residuary legatee to take possession of the rest of the property, including another leasehold. After this, the rent of the second leasehold fell into arrear, and the landlord, being unable to obtain payment from the residuary legatee, filed a bill for the administration of the testator's estate. It was held by the Lords Justices of the Court of Appeal, that he was entitled to have the arrears paid in full out of the specifically bequeathed leasehold, whatever the rights of the specific legatee might be as against the executor or the residuary legatee.

But where a creditor is in default for not having come in under a decree, and the Court has distributed the assets, the creditor will only be allowed to impugn what has been done, by coming to the Court and submitting to such equitable terms as the Court may think fit to impose, as, for instance, that the creditor shall recover from each party that sum only which, as between himself and the other persons interested in the estate, that party was liable to pay; *Gillespie v. Alexander*, 3 Russ. 130; *Greig v. Somerville*, 1 Russ. & My. 338.

Administration of the Assets of a deceased Partner.—With regard to the administration of assets in the case of partnership as between joint and separate creditors, the following rules have been laid down.

In the administration of the assets of a deceased partner, *where both partners are solvent*, there is no distinction between joint and separate creditors; they are all paid *pari passu*. And in taking the partnership accounts, the joint debts thus paid will be allowed in account as so much paid on behalf of the firm (*Ridgway v. Clare*, 19 Beav. 116). If the estate of the deceased partner is insolvent, but the estate of the surviving partner is solvent, it is clear that the joint creditors would *then proceed against the solvent partner, who would then [*143] become a creditor against the separate estate of the deceased partner, in respect of what has been paid by him beyond his proportion (*Ib.*).

In case the surviving partner is insolvent or bankrupt, in the administration of the estate of the deceased partner the joint creditors in the first instance must resort to the joint fund, and can only come against so much of the separate estate as will remain after paying the separate creditors; *Gray v. Chiswell*, 3 Ves. 566.

The same rule applies to the case where both the partners have died before the administration takes place; *Ridgway v. Clare*, 19 Beav. 111, 117.

Where, in the administration of the separate assets of a deceased partner, it appears that both his estate and the estate of his surviving partner are insolvent, the separate creditors of the deceased partner have a priority over the joint creditors; *Wittingstall v. Grover*, 10 W. R. (M. R.) 53. And the fact that the deceased partner has by his will devised his estates, subject to the payment of all his debts in respect of the partnership concern, or otherwise, is not sufficient to place the two classes of creditors on an equal footing; *Wittingstall v. Grover*, 10 W. R. (M. R.) 53.

Equitable assets are those which, from their own nature, or the character which has been impressed upon them by the testator, cannot be reached or administered in the ordinary course of law, and which consequently fall within the exclusive jurisdiction of chancery, *ante*, 364; *Cornish v. Wilson*, 6 Gill. 299. The mere change of the forum in which assets are administered will not vary their character or affect

the order of distribution. In administering legal assets equity follows the law and respects legal priorities; *Tenant v. Stoney*, 1 Richardson's Eq. 221, 261; *Purdy v. Doyle*, 1 Paige, 558; *Wilder v. Keeler*, 3 Id. 167; *ante*, 358. But where assets are the growth of equitable jurisdiction, or can only be reached through the aid of a chancellor, they will be so distributed that if there is not enough to satisfy all

demands, each shall be paid ratably; *Gibbs v. Finlay*, 4 Maryland Ch. 75; *Codwise v. Gelstone*, 10 Johnson, 522; *The Atlas Bank v. The Nahant Bank*, 3 Metcalf, 581; *Robinson v. The Bank*, 18 Georgia, 65. Hence, although a bond creditor was entitled to a preference over a debtor by simple contract in the distribution of legal assets, which would be respected and enforced by a court of chancery, yet when he sought to subject property which was beyond the reach of an execution, he was obliged to take equally with simple contract creditors. So when equitable assets, as, for instance, the proceeds of an equity of redemption in real estate or chattels, or of land devised for the payment of debts were in question, an executor could not retain for his own debt, nor could specialty creditors claim a preference over debts due by simple contract, but the whole was distributable ratably among all the claimants; *Jones v. Lackland*, 2 Gratian, 81; *Lowe v. Peskett*, 16 C. B. 500. In like manner, where land was devised, although for the payment of debts, there was no remedy at common law for the specialty creditors against the devisee, and their sole redress lay in equity, which only afforded it on the terms of placing all the demands against the estate on the same footing; *Ross v. Barclay*, 6 Harris, 179, 184. For although the stat. 3 & 4 Will. & Mary, c. 14, rendered lands devised liable for the specialty debts of the deviser, yet as it excepted devises for the payment of debts, these were held

to remain equitable assets as they had been before the statute; *Benson v. Le Roy*, 4 Johns. Ch. 651. In like manner, the appointment of a creditor as the executor of a will which imposes a charge of debts on the land, followed by a sale of the land and a receipt of the proceeds, will not extinguish his demand or sustain a traverse of a plea of *plene administravit*, because a court of law cannot take jurisdiction of a fund which is exclusively cognizable by chancery, and it must be distributed ratably among all the persons having demands on the estate. See *Lowe v. Pesket*, 16 C. B. 500; *ante*, 369.

The principle that debts have the same moral obligation, and should, therefore, be paid *pari passu*, is recognized in American, as well as English jurisprudence; and it is not less well established that all the property that one has should be appropriated to the discharge of his liabilities. But these principles have lost much of their importance as distinct heads of equitable jurisdiction, by their incorporation with the body of the law. It is no longer requisite to go into chancery to subject real estate to the payment of debts, or to secure equality of distribution among specialty and simple contract creditors. The whole estate of a decedent is now answerable for the fulfilment of his obligations. It is, consequently, legal assets, and to be distributed as the law prescribes; *Bull v. Bull*, 8 B. Monroe, 352. And in many of the states all debts except those due

for rent or medical attendance during the last illness, and for menial services, have been placed by statute on the same footing, and are to be paid alike. See *Sperry's Estate*, 1 Ashmead, 344; *Nagle's Appeal*, 1 Harris, 260, 264. These enactments enlarge and apply rather than supercede the principles on which a court of equity proceeds in the distribution of equitable assets; *Torr's Estate*, 2 Rawle, 250. Agreeably to that doctrine as administered under the statute 3 & 4 W. & M. c. 14; *ante*, 363; a chancellor could not deviate from a provision in a devise for the payment of debts that a particular debt, or a class of debts, should be preferred, *ante*, 365. *Miller v. Horton*, G. Cooper, 45; *Henderson v. Barton*, 3 Ir. Eq. 257. But where all debts are by the statute law to be paid ratably in proportion to their amount, a will providing that certain debts shall be paid in the first instance is invalid, because the legislature will be presumed to have intended to give the principle that equality is equity, the force of a positive rule; *Bull v. Bull*, 8 B. Monroe, 352.

The doctrine that land devised to be sold for the payment of debts or charged with debts by will is equitable assets, and to be administered as such, still prevails in Virginia, North Carolina and Kentucky, and is an important feature in the jurisprudence in those States; *Speed v. Morris*, 8 B. Monroe, 499, 504; *Bull v. Bull*, *Ib.* 352; *M'Candlish v. Keene*, 13 Gratten, 615, 634; *Gaw v. Huffman*, 12 Id. 620; *Morris v. Mor-*

ris, 4 Id. 293; *Henderson v. Benton*, 3 Iredell's Eq. 257; *Backhouse v. Patton*, 5 Peters, 160.

A similar view is taken in Kentucky, although the devisor will not be allowed to create a preference contrary to the manifest intention of the legislature, that all debts shall be paid ratably; *Bull v. Bull*, 8 B. Monroe. The doctrine of equitable assets has been superceded in Pennsylvania by the statutes regulating the administration of estates after death; *Sperry's Estate*, 1 Ashmead, 347. A trust for the payment of debts may, nevertheless, be created by will in that state, and a sale by the devisee will confer a valid title, although the personal estate in the hands of the executor is not exhausted, and ought to have been applied to exonerate the land; *Cadbury v. Duval*, 10 Barr, 267; see vol. 1. In *Alexander v. M'Murray*, 8 Watts, 303; and *Baldy v. Brady*, 3 Harris, 103, the court held that such a devise will stop the running of statute of limitations, and prevent the lien of debts from expiring through the lapse of time; but it seems that this result will not ensue from a charge of debts, or power to sell, nor unless the debts are specified or enumerated in the will. See *Agnew v. Fetterman*, 1 Harris, 56, 62; *Trinity Church v. Watson*, 14 Wright, 518.

It is well settled that a bequest of personal property for the payment of debts is invalid, and will not prevent the bar of the statute; *Lewis v. Bacon*, 3 Henning & Mumford, 89, 106; *Haines v.*

Spinell, 2 Dev. & Bat. Eq. 93; *Carrington v. Manning*, 13 Alabama, 611; *Jones v. Scott*, 1 Russell & Mylne, 255; 4 Cl. & F. 398; and it has been held in some instances, that since real estate is now assets and may be administered by the executor, land can no more be devised for such a purpose than goods or chattels; *Carrington v. Manning*; *Hall v. Binstead*, 20 Pickering 2. See *Trinity Church v. Watson*; *Cornish v. Wilson*, 6 Gill, 315. In *Cornish v. Wilson*, the court said that a charge of debts on real estate was inoperative in Maryland under the acts of Assembly, rendering the real estate answerable for debts in aid of the personal.

Another occasion for applying the doctrine of equitable assets may grow out of the dissolution of a partnership by death. It is well settled that on the decease of a member of a firm, his liability for the joint debts becomes extinct, and the law casts the obligation exclusively on the surviving partners. Not only, therefore, must the assets of the deceased partner be applied to the discharge of his individual liabilities, but the joint creditors can have no recourse to any surplus that may remain in the hands of the administrator, except through the intervention of a chancellor. It is consequently equitable assets as it regards them, whether it did or did not possess that character in the first instance, and a joint creditor who has received part of his debt from the firm property, will not be allowed to touch such

a fund until the creditors who have received nothing have been paid enough to put all on an equal footing; *Wilder v. Keeler*, 3 Paige 167.

The case is essentially different where the assets in the hands of the administrator are equitable in their origin as proceeding from a charge imposed by will, or the sale of property, which could not be reached in the ordinary course of process. Under these circumstances there is no legal rule prohibiting the application of the cardinal principle that equality is equity. Hence, it is generally conceded that if there are no joint assets, the partnership creditors may come in *pari passu* with the separate creditors; *Wilder v. Keeler*, 3 Paige, 167. And the more logical conclusion seems to be that the existence of a joint fund makes no difference, except that the separate assets should be so distributed among the partnership and several creditors, that each may receive a ratable proportion of his demand; *Morris v. Morris*, 4 Grattan, 293; *Torr's Estate*, 2 Rawle, 250, 253.

It results from the same principle, that a joint attaching creditor who asks the aid of a court of equity to set aside an attachment which has been laid by a separate creditor on the property of the firm, must do equity by waiving the lien which he has himself acquired, and suffering the assets to be distributed ratably among all the partnership creditors; *Washburn v. The Bank of Bellow's Fall*, 19 Vermont. 278.

The doctrine of equitable assets was considered in *Benton v. Le Roy*, 4 Johnson, Ch. 651. The testator there devised all his estate, real and personal, in trust to pay his debts, and then distribute the residue. After his death, judgments were obtained against his estate, on various demands, which had been assigned to his widow. A creditor's bill having been filed to enforce the trust and stay proceedings on the judgments, it was contended that these were entitled to priority, notwithstanding the devise, under the provisions of the New York statute, which declared all devises of land void, as against creditors, without excepting those for the payment of debts. The court was of opinion that this exception was implied, and held that the devise rendered the land equitable assets, and placed all the creditors of the testator on a level which could not be disturbed by judgments obtained after his death.

The chancellor said: "The testator in this case devised all his estate, real and personal, to four trustees (of whom three were made executors), in fee, and in trust, to pay his debts, and then to distribute the residue. Such a devise in trust places the assets under the jurisdiction of this court. A court of law does not take cognizance of a trust, but the notice of it belongs peculiarly and exclusively to this court.

"Before the statute of 3 W. & M., if the testator devised his lands for the payment of his debts, all the creditors were to

be paid *pari passu*, or in ratable portions; for it was to be presumed that the testator meant to do equal justice to all. Thus, in a case before Lord Nottingham, in 1681, (*Anon.*, 2 Ch. Ca. 54), the testator devised his lands to trustees to pay debts, and the trustees being themselves creditors, paid themselves in full, and left other creditors unsatisfied, who then filed their bill for ratable payment. The chancellor held, that under that devise, all creditors were to be paid equally, and that the trustees could not give themselves a preference.

"The statute of W. & M. did not interfere with this doctrine of equitable assets, but rather gave it, as it has been said, a parliamentary sanction. That statute (3 W. & M. c. 14), was made *for a relief of creditors against fraudulent devises*; and so the preamble to it, as well as the title, expressly declares. It does not apply to the case of a devise to trustees for the payment of debts, for such a devise is in furtherance of justice, and of the avowed policy and purpose of the statute. To mark that policy the more distinctly, the 4th section of the statute expressly excepted from its operation devises of lands for the payment of debts or children's portions. The omission of this proviso in our statute cannot make the least alteration in its construction. It must have been omitted, because it was unnecessary, and was doubtless inserted in the English statute for greater caution. It is impossible to suppose that an honest

devise for payment of debts could be affected by a statute made on purpose to protect creditors against fraudulent devises. The devisees intended by the statute were those who took a beneficial interest under the will, to the injury of creditors. The statute does not apply to cases of trusts created by will to pay debts. This we cannot, for a moment, suppose. The general provisions in the English, and in our statute (which are the same), apply only to suits at law against heirs and devisees claiming the entire interest for themselves, and against whom judgment and execution may be awarded, for the lands which have come to their hands; but a judgment and execution at law against a naked trustee holding lands in trust for others, could not affect the rights of the *cestui que trust*.

"It is observed in Fonblanque (b. 1, c. 4, sec. 14, note), in a passage referred to by the counsel, that bond creditors are liable to be 'prejudiced' by the power to devise for the payment of debts reserved by the statute of 3 W. & M., because that under such a devise, simple contract creditors are to be paid *pari passu*, and bond creditors will thus lose their legal priority. But that is a prejudice, if it can be so called, that the statute never intended to remove, because, as I observed before, the whole object of it was to defeat *fraudulent* devises; and the payment of debts by a just and equal distribution of the debtor's fund, is not a hardship, and much less a fraudulent provision towards any person.

It is an act of such justice and pure equity, that the legislature has always been solicitous to encourage it. Thus the statute provides (1 N. R. L. 452), that when real estate is sold by order of the Court of Probates, or of a surrogate, for the payment of debts, the proceeds are to be distributed among the creditors, in proportion to their debts, without giving preference to specialties. The assignees of insolvent debtors are also directed, by another statute (1 N. R. L. 469), to make a distribution equally among creditors, without giving preference to specialties. The same rule is also directed, by another statute, to be observed (1 N. R. L. 161) by trustees of absent or absconding debtors. And we may safely conclude, that though the fourth section or proviso in the English statute of W. & M. was omitted in our statute, the omission could not have been intended to perpetuate the common law doctrine of preferences between creditors, in case such a trust should be created by will. Such a devise in trust must be a valid devise, and subject to equity distribution. That will not be disputed. It must follow, then, of course, without some express statute provision to the contrary, that the fund is to be regarded as equitable assets.

"In *Freemoult v. Dedire* (1 P. Wms. 429), it was admitted, that if lands be devised for the payment of debts, they were to be considered as equitable assets, and bonds and simple contract debts were to be paid equally. In *Deg v. Deg*

(2 P. Wms. 412), a distinction seemed to be made between a devise to executors, and a devise to strangers to pay debts; but in that case, it was admitted, that if the devise was to executors, *and to a third person*, (as was the case in the present instance,) the same conclusion followed. But this distinction has been since exploded, and the law of the court on the subject was fully discussed and settled by Lord Camden, in *Silk v. Prime* (1 Bro. 138, note; Dickens), 384. The testator, in that case, charged all his real estate with the payment of his debts, and directed his executors, and *their heirs*, to sell it if wanted for that purpose. The master of the rolls decreed that the assets arising from the sale were to be considered equitable assets, on the ground, that, the devise was to the executors and their heirs, by which means the descent to the heir was broken. This decree was affirmed on appeal, in 1768, by Lord Camden, and he observed, that the assets did not come to the executors in their character as executors, and the rule was settled, that the assets were not legal, unless the executors took them qua executors. A devise to executors, and their heirs, made them *trustees*; and though the real and personal estate were made one fund by the will, yet Lord Camden did not regard that objection, but said that chancery marshalled the assets. The charge in that case, was considered as amounting to a trust, and being a trust, equity directed the execution of it upon equitable principles.

"In *Newton v. Bennet* (1 Bro. 135), Lord Thurlow referred to the former case, and said, that an estate devised to an executor to sell, was equitable assets; and from some correct notes of this case (7 Vesey, 321, 322; 8 Id. 30), it appears, that he did not consider it to be requisite that the descent should even be broken by the devise, to render the assets equitable. It has since been repeatedly held (*Bailey v. Ekins*, 7 Vesey, 319; *Shepherd v. Lutwidge*, 8 Id. 26,) that a mere charge of the debts upon the real estate by will, makes it equitable assets, even though the descent be not broken. It is sufficient that the estate be devised upon trust to pay debts; and a charge of the debts upon the real estate, is, in substance and effect, a devise *pro tanto*. This was the doctrine of Lord Eldon in those cases; and he made this clear and pertinent observation, that a provision by will, effectual in law or equity for payment of creditors, was not a fraudulent devise within the statute. And I may add, that such a devise is equally valid and innocent, and commendable with us, as it would be under the protection of the proviso in the English statute.

"The case now before me steers clear of every difficulty. It comes within all the cases, ancient and modern. Here the descent is broken, and here is a devise in fee, and to a stranger, as well as to the executors.

"Seeing, then, that here has been a trust created by will, for the payment of debts, this

court is bound to take care that the trust is executed; and to interpose, if necessary, against a proceeding at law intended to defeat it. Lord Eldon admitted this consequence in *Shepherd v. Lutwidge*. The widow of the testator has been purchasing in debts due from the estate, and suing them at law, with the avowed purpose of gaining, by her diligence, a legal preference over other creditors. This has been done with knowledge of the provisions in the will, in which she had a personal interest, and with full notice of the trust. Her acts have tended to defeat the trust, and to prevent this court from causing it to be executed by a fair and equal distribution of the fund ratably among the creditors. In such a case a race of legal diligence cannot be permitted, nor can such a creditor, and more especially a voluntary purchaser of debts, who was a party under the will, and had due notice of its provision, be suffered to change the character of the assets, and turn them from equitable into legal. This would be to wrest the trust from the jurisdiction of this court, and destroy the rights of the *cestui que trusts*, who are the creditors at large."

The principle that land charged with debts by will is equitable assets prevails in the United States where it has not been superceded by local enactments; *Henderson v. Barton*, 3 Iredell, Ch. 257; *Morris v. Morris*, 4 Grattan, 396; *M'Candlish v. Keene*, 13 Id. 615; *Helm v. Darby's Adm'r*, 3 Dana, 186; *Cloudas's Executrix v. Adams*, 4

Dana, 603; *Speed's Ex'or v. Nelson's Ex'or*, 8 B. Monroe, 499; *Backhouse v. Patton*, 5 Peters, 160; and in *M'Candless v. Keene*, the court held that it is not less applicable because a remedy has been conferred on the creditor by statute, through which the land may be converted into money and applied to the payment of his demand. Lee, J., said: "Wherever real estate is by statute made liable for payment of debts it would appear to constitute legal assets as held in *Goodchild v. Ferrett*, 5 Beavan's Reports, 398; 2 Spence's Eq. Jur. 319; yet where a testator by his will charges his real estate with his debts, the real estate so charged will be equitable assets, notwithstanding the statute would have rendered it liable if there had been no such charge; *Charlton v. Wright*, 12 Simon's Reports, 274; 2 Spence's Eq. Jur. 312."

In administering legal assets, a court of equity follows the law, and respects legal priorities. It will not, therefore, postpone creditors of higher rank to those of inferior degree, although creditors of the same class will be paid ratably. It was indeed held by Chancellor Kent, that a decree for the complainant in a creditor's bill will put all the creditors who come in under the decree on the same level, whatever may be the dignity of their claims, or the nature of the fund, and the same rule was applied in *Moses v. Murgatroyd*, 1 Johnson's Ch. 119. But this doctrine was pointedly questioned in *Wilder v. Keeller*, and

the true principle seems to have been laid down in *Purdy v. Doyle*, 1 Paige, 558, where the point arose in the distribution of a fund arising from the sale of real estate under a decree in a creditor's bill, and it was held, that as the decree did not render the assets equitable, judgment creditors were entitled to a preference so far as the legal title to the estate sold was in the debtor, but that the proceeds of the residue of the land in which he had a mere equity, should be appropriated to the creditors at large, until they stood at the same level with the judgment creditors, and the surplus then distributed ratably among all the claimants. "The first question," said the chancellor, "presented in this case, is whether the fund in court is legal or equitable assets. If it is such property as the judgment creditors could obtain a specific or general lien on at law, they are entitled to the fruits of their superior vigilance, so far as they have succeeded in getting such lien. But if the property was in such a situation that it could not be reached by a judgment at law, and the fund is raised by a decree of this court, and the creditors are obliged to come here to avail themselves of it, they will be paid upon the footing of equity only (*Codwise v. Gelston*, 10 Johnson Rep. 507). It clearly appears by the affidavits before me in this case, that as to one-half of the property out of which the fund in court was raised, the legal title never was in the ancestor, and of course did not at

law descend to the heirs. The first section of the act for the relief of creditors against heirs and devisees, gives an action against the heirs of a debtor, who dies seized of land, &c. At law, a contract to purchase, and payment of the purchase-money does not give the purchaser a legal seisin of the land. In this court it is otherwise; and on the equity of that statute, this court would give to the creditors, satisfaction out of the equitable interest in the land descended to the heirs. But when the creditors come here for the purpose of reaching the equitable right of the heirs, they must submit to the equitable rule of this court. In *Morris v. The Bank of England* (Cases, temp. Talb. 218), that rule is stated thus: The rule of this court, with regard to equitable assets, is to put all the creditors on an equal footing; so where the assets are partly legal and partly equitable; and though equity cannot take away the legal preference on legal assets, yet if one creditor has been partly paid out of such legal assets, when satisfaction comes to be made out of the equitable assets, the court will defer him until there is an equality in satisfaction to all the other creditors, out of the equitable assets, proportionable to so much as the legal creditor has been satisfied out of the legal assets."

Whatever may be thought on this head, it is well settled, that in the administration of equitable assets, debts must be paid ratably without regard to class. But in

applying this principle, the court will not lose sight of others of equal moment. Equality is equity, but it is not less well settled, that *qui prior est in tempore, potior est in jure*. A creditor will not, therefore, be denied any advantage which he has obtained through greater foresight or diligence; *The Atlas Bank v. The Nahant Bank*, 3 Metcalf, 581, 584; *M'Dermutt v. Strong*, 4 Johnson Ch. 687; nor will he be compelled to relinquish his lien on another fund as the price of coming in on that which is in the hands of the court for distribution. Full effect will consequently be given to a mortgage, although unrecorded; *M'Candlish v. Keene*, 13 Grattan, 615, 634, or to an equitable assignment or appropriation, notwithstanding a want of the forms that are requisite to pass the legal title. See *M'Dermutt v. Strong*, 4 Johnson Ch. 687; *Averell v. Loucks*, 6 Barb. 470; *Rutledge v. Hazlehurst*, 1 M'Cord Ch. 466. The principle is the same whether the prior lien be legal or equitable, and whether it arises from a preference shown by the debtor, or from the superior diligence of the creditor; and hence the levy of an execution on property lying beyond the reach of legal process, followed by a bill praying for relief in equity, will give the complainant a priority over other claimants who have been more remiss in their efforts to obtain satisfaction; *M'Dermutt v. Strong*, 4 Johnson Ch. 687; *Tenant v. Strong*, 1 Richardson Eq. 221, 225; *Freemoult v. Dedire*, 1 P. Wms. 429; while a

covenant to settle an estate may be specifically enforced, although the result is to frustrate a devise by which the land is charged with the debts of the covenantor, and thereby rendered equitable assets; *Freemoult v. Dedire*.

"In the administration of the assets of a decedent," said Lee, J., in *M'Candlish v. Keene*, "whether legal or equitable, the courts of equity recognize and enforce all antecedent liens, claims and charges *"in rem"* resting upon the property, according to their priorities, whether they are legal or equitable; 2 Lom. Dig. 119; *Freemoult v. Dedire*, 1 P. Wms. 429; *Finch v. Winchelsea*, 1 P. Wms. 278; 1 Story's Eq. Jur. § 553, and cases cited in the note. And as the mortgage, though unrecorded, is valid against the grantor and his heirs, it constitutes such a lien as will be respected by the court of equity in administering the assets of the decedent."

A similar view was taken by the Supreme Court of Massachusetts, in *The Atlas Bank v. The National Bank*. "In distributing the assets of an insolvent debtor between his creditors, the general principle is, that all the creditors are to stand on a footing of equality. But if any one of them, by his superior legal diligence, has acquired a legal right or preference, a court of equity will not divest him of it. The rule is thus laid down in *Codwise v. Gelston*, 10 Johns. 522. "If a fund for the payment of debts be created under an award or decree in chancery, and credi-

tors come in to avail themselves of it, they will be paid *in pari passu*, or upon a footing of equality. But where the law gives priority, equity will not destroy it, and especially where legal assets are created by statute (as in case of judgment liens), they remain so, though the creditors be obliged to go unto equity for assistance. The legal priority will be protected and preserved in chancery."

A different rule prevails in bankruptcy, where a creditor must surrender or deduct his collateral securities on proving the debt, *ante*, 322. This rule is irrespective of the nature of the assets, and is applied in Massachusetts, in the administration of insolvent estates, before and after death. It runs counter to the general principle, that a creditor may prosecute all his remedies until he succeeds in obtaining satisfaction, and should, agreeably to the weight of authority, be confined to the statutory jurisdiction where it originated, *ante*, 258; *Camp v. Grant*, 21 Conn. 41, 63.

It is well settled that the joint and separate creditors of a partner have an equal claim on his separate property during his life, and while his estate remains in his own keeping. There is no legal or logical ground for setting aside a levy for a joint debt on the goods and chattels of a member of a firm, to make way for the demands of his separate creditors. *Meech v. Allen*, 17 New York, 300; *The National Bank v. Sprague*, 5 C. E. Green, 13, 31; *Mason v. Tiffany*, 45 Illinois, 302; *O'Bannon v. Miller*, 4 Bush, 25. This results

from the obvious consideration that the debts of the firm are also his. The inability of the partner, whose effects are taken in execution, to meet his separate engagements, does not alter the rule, or authorize a chancellor to require the joint creditor to proceed in the first instance against the partnership assets unless these are adequate to pay the debt.

The death of a debtor partner varies the case by exonerating his estate from all legal liability for the partnership debts. At law these are as it regards him as if they had never been, and the only recourse of the joint creditors is in chancery, which will not deprive the separate creditors of their legal priority, although it will apply any surplus that remains in the hands of the administrator to the discharge of the joint liabilities, unless there is some countervailing equity; *Ex parte Kendall*, 17 Vesey, 514-519. In *Ex parte Kendall*, Lord Eldon expressed his surprise that courts of equity should have thought themselves entitled to enforce a joint contract, against the representatives of a deceased co-contractor at the instance of one who had omitted to make the obligation joint and several, but the objection is merely technical, and it is now thoroughly well settled that the obligation of the decedent survives in the contemplation of a court of equity, although it will not be enforced to the prejudice of the legal rights of the separate creditors. When, therefore, the separate estate of a deceased partner is brought into

chancery for distribution, his private debts will be first paid, and the residue distributed among the joint creditors as equitable assets; *Hosack v. Rogers*, 8 Paige, 229. The priority of the separate creditors arises not from the nature of the debt as founded on a consideration moving to the firm, but from the form of the contract; and a joint creditor who has taken the precaution to obtain the several obligation of the deceased partner, will stand on the same footing as the separate creditors; *Wilder v. Keeler*, 3 Paige, 167, 176.

The decease of a partner works another change in the relation of the joint and several creditors. As the joint debts cease to be obligatory as it regards him on his decease, so they devolve on the surviving members of the firm.

If A. and B. are partners, and A. dies, the partnership assets and liabilities are cast on B., who is thenceforth as much the sole debtor as if there had been no other; *Egbert v. Woods*, 3 Paige, 517, 526. Hence, while the partnership creditors have no recourse to A.'s separate estate, B.'s separate creditors have now an equal claim with the creditors of the firm on the joint assets which are vested exclusively in him. Such, at least, would be the result on merely legal grounds. But inasmuch as A.'s separate property is equitably liable for the debts of the firm, his administrator and those claiming under him may insist that the partnership creditors shall be paid before any portion of the joint assets is appropriated by B.

to his own use, or to meet his private engagements; *Egbert v. Woods*; *Tillinghast v. Champlin*, 4 Rhode Island, 173, 189; *French v. Lovejoy*, 12 New Hampshire, 458. It was accordingly held in *French v. Lovejoy*, that an assignment by a surviving partner of the partnership property, for the benefit of his separate creditors, is invalid as against an execution issued on a judgment rendered in favor of the creditors of the firm.

The claim of the joint and separate creditors of a firm to the partnership assets depends on different considerations from those which apply where the separate property of the partners is in question. Agreeably to the letter of the common law, a partner is a tenant in common, and may as such dispose absolutely of his share. If a suit against him for his individual debt goes to judgment and execution, the sheriff may not only sell his right, title and interest in the partnership chattels but deliver them to the purchaser. See *Washburn v. The Bank of Bellows Falls*, 19 Vermont, 278; *Witter v. Richards*, 10 Conn. 37; *Jarvis v. Brooks*, 3 Foster, 136; 1 American Lead. Cases, 582, 5 ed. A court of equity regards the matter in a different aspect. A partner is not in the full sense of the word an owner, and is simply entitled to so much of the effects of the firm as may appear to be due to him on a settlement of the partnership accounts. He cannot therefore appropriate the partnership property to his own purposes or to the discharge

of a private debt without the consent of the other members of the firm; *Horton's Appeal*, 1 Harris, 67; *Menagh v. Whitwell*, 52 New York, 146; *French v. Lovejoy*, 12 New Hamp. 458. The partners are individually and collectively entitled to require that the partnership assets shall be applied to the payment of the joint debts, and have an equitable lien on the residue to the extent of their respective interests in the firm. And as the claim of a creditor does not rise higher than that of the debtor, so the separate creditors of the partners must be postponed to the partnership creditors in the distribution of the partnership assets; see *Coover's Appeal*, 5 Casey, 9; *Menagh v. Whitwell*, 52 New York, 146; *Renton v. Chaplain*, 1 Stockton, Ch. 62; *Thompson v. First*, 15 Maryland, 22; *In the matter of Smith*, 16 Johnson, 102; *Duncan v. Fowler*, 2 Paige, 400; *Egbert v. Wood*, 3 Id. 518; *Hutchinson v. Smith*, 7 Id. 26; *The United States v. Hack*, 8 Peters, 271; *Pierce v. Jackson*, 6 Mass. 242; *Christian v. Ellis*, 1 Grattan, 596; *Washburn v. The Bank of Belows Falls*, 19 Vt. 279; *Tappan v. Blaisdale*, 5 New Hampshire, 190; *Jarvis v. Brooks*, 7 Foster, 57; *Shedd v. Wilson*, 1 Williams, 478; *Wilson v. Soper*, 13 B. Monroe, 411; *Benson v. Ela*, 4 Fogg, 402; *White v. The Union Ins. Co.*, 1 Nott & McCord, 556; *Tillinghast v. Champlin*, 4 Rhode Island, 173, 190; 1 American Lead. Cases, 585, 5 ed.

It results from what has been said that the paramount right of

the partnership creditors depends on the equities of the partners; *Hoxie v. Caer*, 1 Sumner, 172; *Wakeman v. Hunt*, 2 Rhode Island, 298; *Glen v. Gill*, 2 Maryland, 16; *Ladd v. Griswold*, 4 Gilman, 25; *Doner v. Stauffer*, 1 Penna. 198. Hence an argument that the partners may renounce a right given for their benefit, and appropriate the joint assets to the payment of their private debts; *Givin v. Selby*, 5 Ohio, N. S. 96. The contention is just if the firm are not indebted, and as it regards a transfer which is not calculated to hinder and delay their creditors; *Smith v. Howard* 2 New York; *Day v. Wetherby*, 29 Wisconsin, 363, 375. This results from the *jus disponendi* incident to ownership, which may be exercised with the same effect by a firm as by an individual; *Jones v. Lusk*, 2 Metcalf, Ky. 356. If the members of a solvent firm agree for a sufficient consideration to appropriate part of the assets to a separate debt, there is no legal policy which forbids the contract; *Snodgrass' Appeal*, 4 Harris, 471. But although the partners collectively have all the powers of a sole owner, they have no more, and are not free from any restraint that would be binding on him. The law will not tolerate any act on the part of a debtor having a direct or necessary tendency to preclude the fulfilment of his obligations; and it is no answer that the object is to pay the debt of another. This is equally true whether he is a joint owner, or has a several right of property. If A. and B. are pecuniarily embarrassed

and convey goods which they hold in common, in payment of a debt due by B., the transfer is not less voluntary and fraudulent on the part of A. than if he had settled his share on a wife or child. And it is more true of partners than of other joint owners, because a partner has an equitable lien to the full extent of the amount due by the firm. If in the case just supposed, A. and B. are partners, A. is entitled to require that the whole value of the goods shall be appropriated to the discharge of the joint debts, and cannot forego this right in favor of B., or of his separate creditors without a manifest wrong to the creditors of the firm; *Ransom v. Van Deventer*, 41 Barb. 307; *Wilson v. Robertson*, 21 New York, 587; *Menagh v. Whitwell*, 52 Id. 146.

An assignment by an insolvent firm, which puts the separate creditors of the partners on the same level with the partnership creditors, will accordingly be invalid as against the latter; *Wilson v. Robertson*; although the partner whose debts are thus preferred, has contributed the greater part of the partnership stock, and is largely in advance to the firm. In like manner, a levy and sale for a joint debt will pass the right of property in the partnership chattels as against a prior transfer or appropriation for a private debt, which includes so large a proportion of the assets of the firm as to disable them from paying the joint debts; *Menagh v. Whitwell*, *supra*. See *French v. Lovejoy*.

It results from these decisions, that an appropriation of partner-

ship assets to the private debts of a partner, is no less voluntary as it regards the firm, because it is founded on a valuable consideration moving to the person whose debts are paid. The validity of it is, therefore, like that of other gifts, a question of circumstances, depending not so much on the amount bestowed, as on whether enough is left, beyond peradventure, to satisfy the donor's liabilities. A firm worth half a million may obviously devote \$20,000 to a charitable or public use, although owing twice that amount. But a gift which strips a firm of the greater part of their available assets, or leaves them barely enough to pay their debts, is fraudulent and may be set aside by a chancellor at the instance of the partnership creditors. The principle is the same where the money of a firm is bestowed gratuitously on a partner, or appropriated to the payment of his debts; *Ransom v. Van Deventer* 41 Barb. 307; *French v. Lovejoy*, 12 New Hampshire, 458; *Wilson v. Robertson*, 21 New York, 587.

It is a necessary consequence of these principles that, as the right of a creditor does not rise higher than that of the debtor, a levy for a separate debt will yield to a subsequent levy for a debt due by the firm; *Pierce v. Jackson*, 6 Mass. 242; *Rice v. Austin*, 17 Id. 197; *Matlack v. Matlack*, 5 Indiana, 403; *Holland v. Fuller*, 13 Id. 195; *Morrison v. Blodgett*, 8 New Hampshire, 250; *Coover's Appeal*, 5 Casey, 9; *Jarvis v. Brooks*, 3 Foster, 136, 146; *Benson v. Ela*, 4 Foster, 402; *Tappan*

v. *Blaisdell*, 5 New Hampshire, 190; *Hoskins v. Johnson*, 24 Georgia, 625; *Crane v. French*, 1 Wend. 311; *Dunham v. Murdock*, 2 Id. 553; *The Commercial Bank v. Wilkins*, 9 Greenleaf, 28; *Douglass v. Winslow*, 20 Maine, 89; *Trowbridge v. Cushman*, 24 Pick. 310; *Houseall's Estate*, 9 Wright, 484; *Lovejoy v. Bowers*, 11 New Hampshire, 409; *Rainey v. Nance*, 54 Illinois, 29. This results from the well settled rule that an execution creditor is not a purchaser, and takes subject to every equity that could be enforced against the debtor. Such a levy neither authorizes the sheriff to take the goods into his keeping from that of the members of the firm, nor to deliver them to the purchaser, who simply acquires the right, title, and interest of the defendant in the execution, subject to a settlement of the partnership accounts. It does not vary the case that the partnership property is taken in execution for the separate debts of the partners before the joint writ came into the sheriff's hands, because each of the separate levies is subject to the equities of the firm, which consequently remain untouched. Or, to state the principle differently, as the partners cannot severally appropriate the joint assets to the payment of their private debts, so such an appropriation will not be made by the law. The doctrine is equitable in its origin, though now recognized throughout the greater part of the United States by the courts of common law, and was formerly enforced through an in-

junction issued at the instance of the firm, or of the joint creditors; *Witter v. Witter*, 10 Conn. 37; 1 American Leading Cases, 5 ed. It still remains on this footing in Vermont, where relief against a levy for a separate debt, on partnership property, can only be obtained in chancery, and the assets will then be distributed ratably among the joint creditors; *Read v. Sheppardson*, 2 Vermont, 126; *Washburn v. The Bank*, 19 Id. 278; *Shedd v. Wilson*, 1 Williams, 278; *Russ v. Fay*, 3 Id. 191.

The rule that a lien for a partnership debt takes precedence without regard to the order of time, applies whether the property is real or personal; *Jarvis v. Brooks*, 7 Foster, 37; *Peck v. Fisher*, 7 Cushing, 386; *Crooker v. Crooker*, 49 Maine, 250; *Tillinghast v. Champlin*, 4 R. I. 173; *Mallack v. James*, 2 Beasely, 26; and hence a mortgage of land belonging to a firm may be valid, notwithstanding a prior judgment for a separate debt of a partner; *The Lancaster Bank v. Miley*, 1 Harris, 544. See notes to *Lake v. Craddock*, vol. 1.

What has been said may serve to show that if the *jus disponendi* of a firm does not go further than that of an individual, it is not confined within narrower limits. They may squander the partnership assets, or give them away, or appropriate them to the debts of a third person, or of a member of the firm; *Reeves v. Ayres*, 38 Illinois, 418, 423; *Roberts v. Baker*, 11 Florida, 192; *Hoxie v. Carr*, 1 Sumner, 169,

182; *Jones v. Lusk*, 2 Metcalfe, Ky. 356; *The National Bank v. Sprague*, 5 C. E. Greene, 13, 31. It is immaterial in this regard that the firm are indebted, or how much is aliened, if enough be retained to meet their engagements; *Reese v. Bradford*, 13 Alabama, 837. The equity of the joint creditors depends on the equities of the partners, and may be defeated by any act on their part which is not fraudulent, as it regards the partnership creditors: *Wilson v. Soper*, 13 B. Monroe, 411; *Jones v. Lusk*; *Baker's Appeal*, 9 Harris, 76. The creditors have not a *jus in re* or *ad rem*, nor have they a legal or equitable lien; they have but a right to be paid, attended by a corresponding obligation on the part of the debtors to take no step by which that right may be impaired: *Sigler v. The Knox County Bank*, 8 Ohio, N. S. 511; *Allen v. The Center Valley Co.*, 21 Conn. 130; *Bullitt v. The Methodist Church*, 2 Casey, 108; *Wilson v. Soper*, 13 B. Monroe, 411; *Miller v. Estell*, 5 Ohio, N. S. 508; *Ross v. Fuay*, 3 Williams, 381; *Hoskins v. Everett*, 4 Sneed, 531; *Doner v. Stauffer*, 1 Penna. 198; *Snodgrass Appeal*, 1 Harris, 470.

The creditors cannot therefore follow the assets into the hands of one claiming in good faith under the partnership: *Jones v. Lusk*; *National Bank v. Sprague*, 5 C. E. Greene, 13, 31; *Sigler v. The Knox County Bank*, 8 Ohio N. S. 511; *Allen v. The Center Valley Co.*, 21 Conn. 130; *Bullitt v. The Methodist Church*, 2 Casey, 108;

Kimball v. Thompson, 13 Metcalf, 283; *Wilson v. Soper*, 13 B. Monroe, 411, although they are as clearly entitled to avoid any act or transfer by which they are wrongfully hindered or delayed; *Sanderson v. Stockdale*, 11 Maryland, 565; *Flack v. Charon*, 29 Id. 313; *Ferson v. Monroe*, 1 Foster, 462.

In *Jones v. Lusk*, 2 Metcalfe, Ky. 356, the court held that the partners may, like an individual, make any disposition of what belongs to them short of fraud. They may consequently convert the joint property into separate, or apply it to the payment of their private debts, and proof that the firm was insolvent will not invalidate the transfer, or compel the separate creditors to refund, unless it appears that they had notice, and that the payment was made with partnership funds.

The doctrine that the equity of the joint creditors depends on the equities of the partners, and may consequently be defeated by *bona fide* contract or appropriation, was established in *Ex parte Ruffin*, 6 Vesey, 119, and has been repeatedly applied in England and in the United States; *The National Bank v. Sprague*, 5 C. E. Greene, 13, 31; *Ex parte Williams*, 11 Vesey, 3; *Baker's Appeal*, 9 Harris, 66; *Schaeffer v. Fithian*, 17 Indiana, 463; *Sage v. Chollar*, 21 Barb. 596; *Roberts v. Baker*, 11 Florida, 192; *Allen v. The Center Valley Co.*, 21 Conn. 130; *Miller v. Estell*, 5 Ohio, N. S. 508; *Sigler v. The Knox Co. Bank*, 8 Id. 511. In *Sigler v. Chidsey*, 4

Casey, 279, a levy under a judgment which had been confessed by the firm for a separate debt, was preferred to a subsequent levy for a debt of the partnership. In *Snodgrass' Appeal*, 4 Harris, 471, a promise by one of two partners, to pay the amount of an execution which had been levied on the partnership effects under a judgment against the other partner, if the sheriff would forbear, was held to give the separate debt a preference over a subsequent levy for an obligation contracted by the firm. The promise was treated as an agreement to devote the joint property to the separate debt, which precluded the partners and consequently the joint creditors.

In like manner where it appeared that the plaintiff had purchased one-half of the effects of the firm of Ashcroft & Odiorne, from Ashcroft with the consent of Odiorne, and afterwards purchased the other half from Odiorne, it was held that he might maintain replevin against the officer by whom they were subsequently attached for a debt due by the firm: *Kimball v. Thompson*, 13 Metcalf, 283. The transaction here took an unusual form, but it is universally conceded that a sale of the stock in trade and good will of a partnership, does not impose a greater accountability on the purchaser, than if he bought from an individual.

The principle is the same when a partner makes a *bona fide* sale of his interest in the firm to his co-partners; *Reese v. Bradford*, 13 Alabama 387; *Rankin v. Jones*, 2 Jones Eq. 169 *Ladd v. Gris-*

wold, 4 Gilman, 25; *Hubbs v. Bancroft*, 4 Indiana, 388; *Frank v. Peters*, 9 Id. 343; *M'Donald v. Beach*, 2 Blackford, 55; *Dunham v. Hanna*, 18 Indiana, 270; *Wilson v. Soper*, 13 B. Monroe, 411; *Waterman v. Hunt*, 2 Rhode Island, 298; *Hickerson v. M'Fadden*, 1 Swan, 258; *Kimball v. Thompson*, 13 Metcalf, 283; *Bullitt v. The Methodist Episcopal Church*, 2 Casey, 108; *Ketchum v. Durkee*, 1 Barbour Ch. 480; and it does not necessarily afford a conclusive presumption against the validity of such a transaction, that the parties who accept the transfer are insolvent at the time, or that a commission of bankruptcy issues against them soon afterwards, under which the assets are appropriated to their separate debts; *M'Donald v. Beach*; *Frank v. Peters*; *Ex parte Williams*, 11 Vesey, 5; *Wilson v. Soper*, 13 B. Monroe, 411; *Waterman v. Hunt*, 2 Rhode Island, 298; *Hickerson v. M'Faddin*, 1 Swain, 258; *Ketchum v. Durkee*, 1 Barb. Ch. 480; *Baker's Appeal*, 9 Harris, 76. In *Bullitt v. The Methodist Episcopal Church*, 2 Casey, 108, Boswell took all the effects of Boswell, Treadwell & Co., and agreed to pay the debts. He subsequently formed a limited partnership with two other persons, in which he was the general partner. He then transferred certain demands of Boswell, Treadwell & Co., to the plaintiffs as security for a private debt, and finally made a general assignment for the benefit of his creditors. The court held the appropriation to the plaintiffs valid,

as it regarded the creditors of Boswell & Treadwell, although it might have been set aside by the limited partners and those to whom they were indebted. It was in like manner declared in *Mayer v. Clark*, 40 Alabama, 259, that partners may lawfully agree on the dissolution of the firm, that the joint property shall belong to one or more of them, and that such a contract made and executed in good faith determines the paramount right of the partnership creditors as it regards the assets so converted. "It is well settled, said Lewis, C. J., in *Baker's Appeal*, "that the right to confine each partner, or those who claim title under him, to his interest in the surplus after the payment of the partnership debts, is an equity which rests in the other partners alone, and not in the creditors of the firm. The latter have no lien on the property, and must work out their preference in the distribution of the partnership funds, entirely through the medium of the partners whose interest remain undisposed of; Story's Equity, sec. 1253. If they consent to submit to a disposition of the assets, the preference of the creditors is at an end, and they must rely upon the personal responsibility of the partners who contracted the debts. Where one partner sells his interest to another, in consideration of an engagement by the latter to pay the partnership debts, the rule is the same. The engagement to pay them is but a personal contract. It creates no lien on the property. It follows as a necessary conse-

quence, that if the partner who has acquired the interests of his former associates, and in whom resides the right to appropriate the partnership assets to the payment of partnership liabilities, thinks proper to exercise his dominion, and to make a different disposition of them, he has a right to do so; and the preference of the partnership creditors engrafted upon, and deriving its support from his equity, ceases to exist. The scion dies with the stock. These principles are announced in Story on Partnership, sects. 358, 359; Gow on Partnership, ch. 5, sect. 1, and Collyer on Partnership, b. 4, ch. 2, sect. 1; and appear to be fully sustained by *Ex parte Ruffin*, 6 Vesey, Jun. 126; *Taylor v. Fields*, 4 Id. 396; *Kelly's Appeal*, 4 Harris, 59; 11 Vesey, Jun. 3; 10 Id. 347; *Doner v. Stauffer*, 1 Penn. R. 198; *Campbell v. Mullett*, 2 Swanst, 552, and other authorities. Lord Eldon, in *Ex parte Ruffin*, seemed to think that if the right to dispose of the assets did not exist in the partners, "no partnership could ever arrange its affairs."

The rule that a sale by a partner of his interest in the common stock to his co-partners, defeats the equity of the joint creditors, is not less applicable because the consideration is wholly or in part of an agreement by the remaining members of the firm to pay the partnership debts; *Griffith v. Burk*, 14 Maryland, 102. Such a stipulation cannot be enforced specifically without impairing the control of the assets which the

transaction is intended to confer; *Bullitt v. The Methodist Episcopal Church*, 2 Casey, 108; *Baker's Appeal*, 9 Harris, 76; *Reese v. Bradford*, 13 Alabama, 837; *Ran-kin v. Jones*, 2 Jones' Equity, 169; *Sage v. Chollar*, 21 Barb.; *Miller v. Estell*. "One partner" said Dargan, J., in *Reese v. Bradford*, "may sell to his co-partner, and if the sale is fair, it will vest the exclusive title in his co-partner. See Story on Part. 510; *Ex parte Ruffin*, 6 Vesey, 119, 126; 11 Vesey, 3, 5, 8. If the consideration of the transfer be, that the partner buying, shall pay the debts, this will not, by force of the contract, raise a trust in favor of the creditors, because they (the creditors) derive their lien from, or through the partners; and if the retiring partner parts with his lien, by the terms of the contract, and takes the personal security of the other to pay the debts, it would be difficult to maintain the proposition, that a creditor could assert a lien through the retiring partner, by virtue of an act that extinguished the lien of the partner himself." In *Robb v. Mudge*, 14 Gray, 334, the partnership creditors contended that they were entitled to enforce an agreement by the remaining partners to take the partnership assets and pay the joint debts, as one made for their benefit; but the court overruled this argument on the ground that they were not parties to the contract, and had not ratified it, except by bringing suit.

The interest of an outgoing partner may, nevertheless, be transferred in a way that will give rise

to a trust; as where the remaining partners agree to apply the assets specifically, or the proceeds of them, to the joint debt; and the partnership creditors may, under these circumstances, compel a specific performance by a bill in equity without first going to judgment; see *Ex parte Fell*, 10 Vesey, 348; *Wildes v. Chapman*, 4 Edwards Ch. 669; *Sedam v. Williams*, 4 M'Lean, 51; *Miller v. Estell*, 5 Ohio, N. S. 508, 517; *Ex parte Rowlandson*, 1 Rose, 416; *Ex parte Barrow*, 2 Id. 252; *Deveau v. Fowler*, 2 Paige, 400.

It has been held to follow for like reasons, that where the contract or co-partnership is of such a nature that the partners have no lien on the partnership effects for the payment of the partnership liabilities, no such preference can be claimed by the creditors. See *The York County Bank's Appeal*, 8 Casey, 446. In *Rice v. Barnard*, 20 Vermont, 479, this result was deduced from a long continued course of dealing, which showed that the partners regarded the stock in trade as several, and not as joint property. But in *Elliott v. Stevens*, 38 New Hamp. 311, the court was clearly of opinion that a contract between partners, that the assets shall not be partnership property or primarily liable for the joint debts, is invalid as against the creditors of the firm. A mortgage by one of two such partners to the other, of his share as security for an individual debt, was accordingly set aside in favor of an attachment issued by a joint creditor. But

there is no doubt that two or more persons may agree to unite in a common enterprise, and share the proceeds without becoming partners, if there be no joint agency or ownership; see 1 Smith's Leading Cases, 1308, 7 Am. ed.; *Holmes v. The Old Colony Railroad*, 5 Gray, 58; *Berthold v. Goldsmith*, 24 Howard, 536, and as under these circumstances the parties have no equitable lien among themselves, so none will exist in favor of their joint creditors. See *Glen v. Gill*, 2 Maryland, 16; *Ex parte Hamper*, 17 Vesey, 403.

Another exception to the paramount equity of the joint creditors exists in the case of a dormant partner, and the separate creditors of the acting partner then stand on the same footing as the partnership creditors, and may in the event of bankruptcy elect in which capacity they will prove. The equity of the dormant partner is secret, and will not be enforced against one who had no notice of its existence. See *Ex parte Norfolk*, 19 Vesey, 458; *Baldwin v. Lord*, 6 Pick. 348; *Cammack v. Johnson*, 1 Green. Ch. 163; *Van Valen v. Russel*, 13 Barb. 590; *Brown's Appeal*, 5 Harris, 480.

It is said in *Snodgrass' Appeal*, 1 Harris Penn. Reports, 471, "that to entitle a joint debt, arising from the joint undertaking of the members of a firm, to a preference over a separate debt of one of them, it must appear affirmatively that the contract was made on the partnership account." This inference is questionable, because all that a partner can appropriate to his in-

dividual debts is the proportion which would result to him on a settlement of the partnership accounts, and an attempt on his part, or of one holding under him as a separate creditor, to do more, is a fraud which equity should enjoin. When, therefore, the corpus of the partnership property is taken in execution for a joint debt, though not contracted in the course of the business of the firm, a creditor who has levied for a separate debt, can have no greater right than that of the defendant in whose shoes he stands.

The conversion of the property of the firm into the separate property of one or more of the partners, does not necessarily hinder or delay the partnership creditors; *Mayer v. Clark*, 40 Alabama, 259. They may still take the property in execution, or it may be sold by the party who has acquired the title, and the proceeds appropriated to the joint debts. But the partnership creditors may be prejudiced by such a change, because the purchasers may apply the property to the payment of their separate debts, and because such an appropriation will be made by the law if a commission of bankruptcy issues against them; *Ex parte Ruffin*, 6 Vesey, 119; *Miller v. Estell*, 5 Ohio, N. S. 508. The transfer will consequently be invalid unless characterized by good faith; *Ex parte Williams*, 11 Vesey, 3.

Good faith is in this, as in most other cases, a question of intention as deduced from circumstances which do not readily admit of classification; see *Ex parte Wil-*

liams; *Ex parte Mayou*, 11 Jurist, N. S. 433; *Ex parte Peake*, 1 Maddock, 346. The presumption in favor of a sale for value, and in the course of business is not rebutted by the insolvency of the vendors, whether they act individually or as a firm. Such a sale may afford the means of paying the partnership debts, or retrieving the fortunes of the concern; *M'Donald v. Beach*, 2 Blackford, 55; *Frank v. Peters*, 9 Indiana, 343. In *M'Donald v. Beach* and *Frank v. Peters*, such considerations were, with less reason, held to justify a member of an insolvent firm in transferring his interest to the others. Whatever may be thought on this head, it is clear that a transfer tending by a natural consequence, to divert partnership effects to the separate creditors, without leaving enough to pay the joint debts, is constructively fraudulent as it regards the partnership creditors, and may be set aside by them, unless the assets are received in satisfaction without notice, or have passed into the hands of a *bona fide* purchaser; *Sanderson v. Stockdale*, 11 Maryland, 563; *Flack v. Charron*, 29 Id. 34; *Collins v. Hood*, 4 M'Lean, 186; *Ferson v. Monroe*, 1 Foster, 462; *Burtus v. Tisdell*, 4 Barb. 571; *Anderson v. Maltby*, 4 Brown Ch.; 2 Vesey, Id. 244; *Ex parte Mayou*, 11 Jurist, N. S. 463. As the members of an insolvent firm cannot apply the partnership assets to their private debts consistently with the faith due to the partnership creditors, so they cannot effect such a purpose indirectly by distributing the assets among them-

selves, and then making the appropriation; *Ransom v. Van Deventer*, 21 Barb.; *Burtus v. Tisdell*. Such indirection is an additional badge of fraud.

It should nevertheless be observed that a distribution of the partnership assets among the partners, or a sale by one of the partners to the others of his interest in the firm, passes the right of property as between the parties, and against all the world except the partnership creditors, and can only be impeached by them by obtaining judgment and proceeding to execution, or filing a bill in equity; *Jones v. Lusk*, 2 Metcalfe, Ky. 356; *Sage v. Choller*, 21 Barb. 496. A creditor at large has no standing in either jurisdiction, because his right is not ascertained, and because he has not exhausted his legal remedy. The objection is technical and may be removed by the legislature, and a partnership or other creditor may come at once into chancery, under the statute law of Maryland, for relief against a transaction by which he is prejudiced; *Sanderson v. Stockdale*; *Flack v. Charron*.

In the determination of such questions, regard must be had to the actual, rather than the nominal resources of the firm. It is immaterial that the accounts show a balance in their favor, if it is made up of demands that are stale, or cannot be collected within a reasonable time; see *Flack v. Charron*, 29 Maryland, 311. So a transaction which hinders the firm from meeting their engagements, may be fraudulent, although they

are not actually insolvent; *Deveau v. Fowler*, 2 Paige, 400; *Crooker v. Crooker*, 46 Maine, 250. On the other hand, it will not readily be presumed that a partner whose private means are incontestably adequate to pay all his debts, is guilty of a fraud in disposing of his joint property to the other members of the firm, and such an arrangement may consequently be sustained, notwithstanding their insolvency and that of the firm; see *Ex parte Peake*, 1 Maddox, 347; see *Ex parte Ruffin*, 6 Vesey, 119; *Ex parte Williams*, 11 Id. 3; *Baker's Appeal*, 9 Harris, 66.

It is proper to observe that a sale of the interest of a partner to the other members of the firm, is more open to exception in England than in the states which follow the original doctrine of chancery, that the conversion of joint into separate property determines the paramount equity of the partnership creditors, without postponing them to the separate creditors of the partners.

The principle is clearly stated in *Wilson v. Robertson*, 21 New York, 592. "It is conceded that the creditors of the firm are, legally and equitably, first entitled to the partnership effects. Such creditors have a claim upon the joint effects prior to every other person, which the court will enforce and protect alike against the individual partners and their creditors. Indeed, the partnership property must be exhausted in satisfying partnership demands before resort can be had to the individual property of the members of the

firm. The firm is not liable for the private debts of one of its members, nor is there any liability resting upon the other members in respect to those debts. An appropriation of the firm property to pay the individual debt of one of the partners is, in effect, a gift from the firm to the partner—a reservation for the benefit of such partner, or his creditors, to the direct injury of the firm creditors. Can it be reasonably doubted that when an insolvent firm assign their effects for the payment of the private debts of a member, for which neither the firm nor the other members, nor the firm assets, nor the interest of the other members therein, are liable, such an assignment and appropriation are a direct fraud upon the joint creditors of the assignors? An insolvent co-partner, says the late chancellor, who was unable to pay the debts which the firm owed, would be guilty of a fraud upon the joint creditors, if he authorized his share of the property of the firm, to be applied to the payment of a debt for which neither he nor his property was liable at law or in equity; *Kirby v. Schoonmaker*, 3 Barb. Ch. R. 48; *Buchan v. Sumner*, 2 Id. 207."

The rule that one who is unable to pay his debts, cannot justly allow property belonging to him, or on which he has a lien, to be appropriated to the payment of a debt, which is not his (*ante*, 394), has sometimes been overlooked by the courts from the desire to uphold transactions which though tending to postpone the joint creditors

were yet free from actual fraud. In *Sigler v. The Knox County Bank*, 8 Ohio, N. S., a transfer by an insolvent firm was sustained against a levy for a partnership debt, although the consideration was for the greater part the individual debt of a partner, and the insolvency of the firm was known to all concerned. In *Allen v. The Carter Valley Railroad Co.*, 21 Conn. 130, sundry articles belonging to an insolvent firm were sold by them, and paid for in the stock of a manufacturing company, which was transferred to the partners individually, and soon afterwards attached by their separate creditors. The court held the attachments and the whole transaction valid against the creditors of the firm. It was said that while the business of a partnership was carried on, insolvency did not preclude the right to convert joint property into separate, or to distribute the partnership funds among the members of the firm.

From the right of the firm to the partnership assets, results the duty to see that they are appropriated to the payment of the joint debts. For this purpose, each member of the firm has an equitable lien extending to the whole of the common stock, to which the partnership creditors may be subrogated as against the partners individually and their separate creditors; *Matlack v. James*, 2 Beaseley, 126; *M'Nutt v. Strayhorn*, 3 Wright, 269; *Backus v. Murphy*, Ib. 397; *Dean v. Phillips*, 17 Indiana, 406; *Dunham v. Hanna*, 18 Id. 270; *Talbot*

v. Pierce, 14 B. Monroe, 195; *Barron v. Miller*, 4 Bush. 25; *Black v. Black*, 7 B. Monroe, 210; *Washburn v. The Bank of Belows' Falls*, 19 Vermont, 278. This equity is ordinarily subject to the control of the firm, but may become indefeasible, through the lien of a judgment or execution, or on the conversion of the assets into a fund, by an assignment in bankruptcy or insolvency, or by the death of the last surviving partner; see *Tillinghast v. Champlin*, 4 Rhode Island, 173; *Hoskins v. Everett*, 4 Sneed. 531; *Thompson v. Frist*, 15 Maryland, 24; *Hawkeye Mills v. Conklin*, 26 Iowa, 422; *Gwin v. Selby*, 5 Ohio, N. S. 96; *Miller v. Estell*, Id. 508, 517; *Wilson v. Soper*, 13 B. Monroe, 411; *Baker's Appeal*, 9 Harris, 76; *Pherrman v. Koch*, 1 Cincinnati, 460.

It is not essential to the vindication of the equity of the partnership creditors, that the assets should have passed from the hands of the firm into those of an administrator or assignee, and a chancellor may on proof of insolvency, and that there is good reason for believing that the partnership property has been, or will be misappropriated, award an injunction at the instance of a judgment creditor, and appoint a receiver to wind up the business of the firm; see *Collins v. Hood*, 4 M'Lean, 186; *Jones v. Lusk*, 23 Metcalf, Ky. 356; *Allen v. The Center Valley Co.*, 21 Conn. 130; *Bardwell v. Perry*, 19 Vermont, 202; *Washburn v. The Bank of Belows' Falls*, Ib. 278; *Burtus v.*

Tisdell, 4 Barb. 572; *Tillinghast v. Champlin*, 4 Rhode Island, 174, 189. But such relief will not be granted at the suit of a creditor at large, whose right has not been ascertained by a judgment; see *Jones v. Lusk*; *Sage v. Chollar*, 21 Barb. 496; *Hoxie v. Carr*; *Sanderson v. Stockdale*, 17 Maryland; *Black v. Bush*, 7 B. Monroe, 211; *ante*, 401.

In *Jones v. Lusk*, 2 Metcalf, Ky. 356, 361, the court held, that "the only insolvency that will authorize a chancellor "to decree priority of payment in favor of partnership debts, is that which is ascertained and established by a judgment, execution and return of no property against one or more of the partners." "An allegation that the firm or the partners composing it are unable to pay their debts, does not constitute a ground of equitable jurisdiction." Such is no doubt the rule where the right to come before a chancellor for a remedy is in question, *ante*, 401, but it may be thought, that the court went too far in holding that an appropriation of the assets to a separate partner is valid although the creditor has notice of the insolvency of the firm, unless this has been established by a return of *nulla bona*.

The authorities in Vermont and Iowa take the more reasonable ground, that a *prima facie* case of insolvency alleged in pleading, and substantiated by any sufficient means of proof, will authorize the court to enjoin a levy on the joint assets for a separate debt; and it may be inferred that an injunction

will also be awarded when there is just cause to apprehend such a misappropriation by the firm. See *Washburn v. The Bank of Bellows*, 19 Vermont, 278; *Hubbard v. Curtis*, 8 Iowa, 13.

In *Thompson v. Frist*, 15 Maryland, 24, a levy for a separate debt on the partnership property, was held to be a sufficient ground for a bill by the co-partners praying for an injunction and the appointment of a receiver to wind up the business of the firm and distribute the assets among the joint creditors; and such, also, seems to be the rule in Mississippi; *Sanders v. Young*, 31 Mississippi, 111.

The dissolution of a firm does not extinguish the equities of the partners, or preclude the right to require that the assets shall be applied to the joint liabilities; *Menagh v. Whitwell*, 52 New York, 146, 166; *Benson v. Ela*, 4 Fogg, 402; *Bearcroft v. Beaver*, 1 Coldwell, 430; *Smith v. Haviland*, cited 2 Paige, Ch. 400; *Wilson v. Soper*, 13 B. Monroe, 411, 418. And as such a result does not ensue where all retire, so it will not follow from the death or withdrawal of one; *Benson v. Ela*. It is well settled, that on the decease of a member of a firm, his administrator may insist that his estate shall be exonerated at the expense of the assets in the hands of the surviving partners. A release or assignment by the administrator, will not vary the case unless it is so worded as to pass the *corpus* of the partnership property, as distinguished from the interest of the decedent in the surplus after the

payment of the partnership debts; *Smith v. Haviland*. The principle is the same where a partner withdraws, and the remaining partners agree to take charge of the stock and effects, and pay the debts; *Deveau v. Fowler*, 2 Paige, 400. Such a stipulation is implied wherever a partner undertakes to liquidate or wind up the business of the concern, and fortifies, rather than extinguishes the interest of the outgoing partner in the due administration of the assets; *Deveau v. Fowler*, 2 Paige, 400.

But an absolute assignment by a retiring partner not only defeats the equity of the joint creditors, but may, in the course of events, postpone them to the obligations incurred by the remaining members of the firm. That A. has parted with his share in the concern to B. and C. is no reason why an execution should not be levied on the assets in their hands for an antecedent obligation of the three; see *Menagh v. Whitwell*, 52 New York, 150, 156, 167; but as A.'s equity is at an end, neither he nor a creditor claiming through him, can insist that the execution shall prevail over a prior levy for a debt incurred by B. and C., or an assignment for the benefit of their separate creditors; *Dimon v. Hazard*, 32 New York, 65. The control of the partnership property now belongs to the remaining members of the firm, and they may say whether it shall be appropriated to the obligations of the former firm, or of the new; *Frow, Jacob & Co.'s Estate*, 23 P. F. Smith, 45;

Howe v. Lawrence, 9 Cushing, 553; *Robb v. Mudge*, 14 Grey, 534. A suggestion to the contrary in *Menagh v. Whitwell*, 52 New York, is not in accordance with the authorities, and is at variance with the letter and spirit of such transfers, which are that the remaining partners shall have the absolute power of disposition which results from ownership. It is the equity of the remaining partners, and not of the partner who has sold out, which gives the debts for which they are jointly liable with him, priority over the private debts of the members of the firm. The principle is the same where the administrator of a deceased partner sells his share of the partnership stock absolutely to the surviving members of the firm; *Wilson v. Soper*, 13 B. Monroe, 411.

The difference between such a sale and that of the interest of a partner in the residuum after the payment of the firm debts, was clearly pointed out in *Wilson v. Soper*. Simpson, J., said: "There is a marked distinction between this and the case of *Smith v. Haviland*, referred to by Chancellor Walworth, in the decision of the case of *Deveau v. Fowler*, 2 Paige Chancery Reports, 400. There the administrator of a deceased partner assigned all his *interest* in the partnership effects to the survivor, under an agreement that the latter should pay and discharge all the debts of the firm, and it was decided, that the agreement only transferred the interest of the administrator in the surplus, after the payment of debts, and conse-

quently did not destroy his lien or equity to have so much of the partnership property applied to the payment of the debts as was necessary for that purpose. The ground of that decision was evident. The *interest* of the administrator in the partnership effects was all that was sold. It was the same interest which his intestate had, and which, if assigned by him in his lifetime, would only have invested the purchaser with the assignor's share of the surplus, if any there should be, after the partnership affairs were fully wound up. But in this case the administrator sold to the survivor one-half of the goods specifically, not subject to the payment of debts, but for their full value and without any reservation. By the purchase, the goods became the sole property of the purchaser, and the proceeds of the sale were assets in the hands of the administrator. It does not appear that the parties made any arrangement for the payment of the debts, but it may be inferred from their conduct, that they regarded the debts due to the firm as sufficient to discharge all its liabilities, and that the administrator relied upon that portion of the assets of the firm as sufficient for the payment of its debts."

It results from what is here said that a release by an outgoing partner does not necessarily extinguish his equity or that of the joint creditors. The question is not so much what he transfers, as the effect on the obligation of the remaining partners, which depends on the contract with them as a

whole. If they are to wind up the business of the firm and apply the assets to the partnership debts, it is immaterial as it regards the creditors, that no part of what remains will belong to the retiring partner; see *Deveau v. Fowler*, 2 Paige, 400. But an express or implied agreement that the remaining partners shall employ the partnership capital or stock in trade, in business on their own account, divests the lien of the retiring partner by giving birth to new rights and liabilities.

The withdrawal of a member of a firm attended with an absolute release or transfer of his interest in the partnership effects, does not vary the equities of the remaining partners to insist that the assets shall not be appropriated to the private debts of any one or more of them, to the prejudice of their joint obligations, whether contracted before or since the dissolution of the pre-existing firm; and as this equity belongs to them, so it may be enforced for the protection of the joint creditors. See *Menagh v. Whitwell*, 52 New York, 146. The right of property and disposition devolves on the newly constituted firm, who may prefer the joint debts which are exclusively their own, or postpone them to the debts which they owe in common with the retiring partner. See *Frow, Jacobs & Co.'s Estate*, 23 P. F. Smith, 45; *Howe v. Lawrence*, 9 Cushing, 553; *Robb v. Mudge*, 14 Gray, 534.

The principle is the same where one of two co-partners sells his

share of the common stock to the other, although the application of it is so far different that all the debts of the remaining partner now stand at the same level, and he may prefer his private creditors, or postpone them to the creditors of the firm. See *Dimon v. Hazard*, 32 New York, 65. In *Dimon v. Hazard*, the court held that where one of two partners retires from the firm, relinquishing all his title to the partnership property to the other, the latter acquires the same dominion over it, as if he had always been the sole owner, and may consequently appropriate it to the payment of his separate debts. Conversely the separate creditors cannot object to an appropriation of his assets to the debts of the firm.

The insolvency or bankruptcy of the remaining partner, followed by the appointment of an assignee, may, however, vary the case by bringing the fund within the operation of the arbitrary rule that the separate estate of a bankrupt is to be applied in the first instance to the payment of his separate debts, and that the joint creditors have no claim until these are satisfied. *Ex parte Ruffin*, 6 Vesey, 119; *Ladd v. Griswold*, 4 Gilman, 25; *Robb v. Mudge*, 14 Gray, 534; *Howe v. Lawrence*, 9 Cushing, 553, *post*.

The doctrine that the equities of the partners, and consequently of the joint creditors are not affected by a dissolution of the firm was applied in *Benson v. Ela*, 4 Fogg, 402, under the following circumstances. The machinery of a

cotton mill, belonged to the firm of Briggs & Brothers, consisting of Joshua, John and James Briggs, and John Andrews. Joshua Briggs, died on the first day of October, 1846, and John Briggs in February, 1848. In both cases the surviving members of the firm continued the business as co-partners—the three survivors under the firm name of James Briggs & Brothers, and the two under that of James Briggs & Brother. The machinery was used by the successive co-partnerships in their business as manufacturers, until October, 1851, when the firm of James Briggs & Brother became insolvent. Attachments were then laid on the machinery by the creditors of that firm, by the creditors of James Briggs & Brothers, and by the creditors of the original firm of Briggs & Brothers. It was held that on the death of Joshua Briggs, his administrators succeeded to his right to have the partnership assets applied to the payment of the joint debts. A similar equity accrued on the death of John Briggs to his personal representatives, which, though inferior to that of the creditors of the original firm, was yet good relatively to the debts incurred by the survivors. It followed that the proceeds of the machinery were to be applied in the first instance to the payment of the debts of the first firm, then to those contracted by the second, and the surplus would finally go to the creditors of the surviving partners. Such at least would be the result as it regarded the attaching creditors who

had alleged the cause of action as originating in the contract of the firm as originally constituted, and then deduced the obligation regularly to the survivors. But the creditors who had declared against the defendants, not as survivors of the antecedent partnership, but on a contract to which they were set forth as being the only parties, were estopped by the record, and could not go behind the judgment for the purpose of showing that the deceased partners were also bound by the obligation.

If we now turn from the power of the firm to that of the partners individually, it will appear that a sale by a partner or under an execution against him for his separate debt, can confer no greater interest than he has himself, to wit, his share of the assets after the payment of the partnership debts: *Menagh v. Whitwell*, 52 New York, 146; *Nicoll v. Mumford*, 4 Johnson Ch. 522. The purchaser does not acquire a right of possession; *Horton's Appeal*, 1 Harris, 61; and is merely entitled to what may prove to be due to him on a settlement of the partnership accounts, which will be nothing unless the partnership effects exceed the liabilities. See *Christian v. Ellis*, 1 Grattan, 396; *Renton v. Chaplin*, 1 Stockton Ch. 62; *In the matter of Smith*, 16 Johnson, 162; *Neall v. Mumford*, 528; *Holmes v. Murtze*, 4 A. & E. 127; *Garrett v. Veale*, 5 Q. B. 408; *Johnson v. Evans*, 7 M. & G. 240; *Deal v. Bogue*, 8 Harris, 228; *Peck v. Fisher*, 7 Cushing, 586;

Book v. McIntyre, 31 Ala. 532; *Barnwell v. Springfield*, 15 Id. 273; *Sanders v. Young*, 31 Missouri, 111; *Smith v. Barker*, 10 Maine, 458; *Crooker v. Crooker*, 46 Id. 250, 265; *Thompson v. First*, 15 Maryland, 24; *Newman v. Bean*, 21 New Hamp. 93; *Morrison v. Blodgett*, 8 Id. 250; *Gibson v. Stevens*, 7 Id. 352. The right of custody and control remains in the partnership, and the assignee may be enjoined from withdrawing the effects or any part of them; *Horton's Appeal*.

The equities of the members of the firm including the assignor stand as they did before, and may be enforced at the instance of the joint creditors. A levy and sale for a partnership debt will consequently pass the title as against a mortgage or transfer by a member of the firm, for his individual debt, or out of the course of the partnership business: *Menagh v. Whitwell*; *Smith v. Anderson*, 49 Illinois, 48. The principle is the same whether the transfer is the act of the party, or the act of the law; *Taylor v. McDonald*, 4 Vesey, 396; *Menagh v. Whitwell*, 52 New York, 146, 166; and is not less applicable to an assignment in bankruptcy, or a sale under an execution for a separate debt, than it is to a voluntary assignment for the benefit of the creditors, or to a sale made by the partner individually in the ordinary course of business. The doctrine was clearly enunciated in *Taylor v. Fields*, 4 Vesey, 396. "The corpus of the partnership effects is joint property, and neither partner has sepa-

rately anything in that *corpus*, but the interest of each is only his share of what remains after the partnership accounts are taken. In law there are three relations: first, if a person chooses for valuable consideration to sell his interest in the partnership trade; for it comes to that; or if his next of kin or executors take it upon his death; or if a creditor takes it in execution, or the assignees under a commission of bankruptcy. The mode makes no difference; but in all those cases the application takes place of the rule, that the party coming in the right of the partner comes into nothing more than an interest in the partnership, which cannot be tangible, cannot be made available, or be delivered, but under an account between the partnership and the partner; and it is an *item* in the account, that enough must be left for the partnership debts."

It is an equitable consequence of these principles that a levy for a separate debt on the assets of the firm, must be confined to the right, title and interest of the defendant. The sheriff cannot take the goods into his possession to the exclusion of the firm, or even of the debtor partner, nor can he deliver the goods to the purchaser without becoming liable as a trespasser; *Reinheimer v. Hemingway*, 11 Casey, 432; *Gibson v. Stevens*, 7 New Hamp. 352; *Morrison v. Blodgett*, 8 Id. 238; *Newman v. Bean*, 21 Id. 93; *Hill v. Wiggin*, 31 Id. 292; *Treadwell v. Brown*, 43 Id. 290; *Jarvis v. Brooks*, 23 Id. 136; *Crockett v.*

Crane, 33 Id. 548. *In the matter of Smith*, 16 Johnson, 432.

In like manner, trover or replevin will lie against the purchaser if he receives the goods, although from the hands of the sheriff, and carries them away or converts them to his own use; *Newman v. Bean*; *Garvin v. Paul*, 47 New Hamp. 158; *Deal v. Bogue*, 8 Harris, 228. His remedy, like that of the defendant, in whose place he stands, is through a bill in equity against the firm; *Rainey v. Nance*, 54 Illinois, 29. In *Deal v. Bogue* the court said that such a levy and sale confers no more right to the chattels and effects of the firm, than does a levy on the stock of a bank or railway company to the property of the corporation.

The right of the separate creditors to proceed to execution against the joint assets is indubitable; *Douglass v. Winslow*, 20 Maine, 89; *Brewster v. Hewitt*, 4 Conn. 541; *Barber v. The Bank*, 9 Id. 407; *Reed v. Sheppardson*, 2 Vermont, 126; and may be exercised, although the firm is insolvent and a sale under the writ will not confer a beneficial interest on the purchaser; See *Snodgrass' Appeal*, 7 Harris, 471, 475; *Moody v. Payne*, 2 Johnson, Ch. 548; *Backus v. Murphy*, 3 Wright, 397; *Doner v. Stauffer*, 1 Penn. 198; *Kelly's Appeal*, 4 Harris, 59; *Cooper's Appeal*, 2 Casey, 262; because the ends of justice are attained by suffering the sheriff to dispose of the right, title and interest of the debtor partner, and then leaving the purchaser to go into equity for

an account; see *Waters v. Taylor*, 2 Vesey & Beames, 301; *The Bank v. Wilkins*, 9 Greenleaf, 28; *Thompson v. Lewis*, 34 Maine, 169; *Siller v. Walker*, 1 Freeman Ch. 77, 1 American Lead. Cases, 579, 5 ed.

The authorities above cited denote two different views of the operation of a levy for a separate debt on the partnership assets. In some of the States the sheriff takes the property into his own keeping, and delivers it to the purchaser, although the latter receives it subject to the equity of the firm, and must account to them or to the joint creditors, if the balance of the partnership accounts proves to be against the partner who is the defendant in the execution; see *Witter v. Richards*, 10 Conn. 37; *White v. Woodward*, 8 B. Monroe, 484; *Newhall v. Buckingham*, 14 Illinois, 405; *Sanders v. Young*, 31 Mississippi, 111. In other States the sheriff levies on the right of the partner, which is to have whatever may be owing to him when the partnership is wound up. The levy is consequently of a demand or chose in action, and not of the chattels of the firm; see *Deal v. Bogue*, 8 Harris, 228, 234; and the sheriff cannot remove them from the keeping of the partners; *In the matter of Smith*, 16 Johnson, 432; *Deal v. Bogue*, ante; *Reinheimer v. Hemingway*, 11 Casey, 432; or deliver them to a purchaser without exceeding his authority. Where the former view prevails the court will stay the levy on due proof of the insolvency of the firm; *Hubbard v. Curtis*, 8

Iowa, 1; *Russ v. Fay*, 3 Williams, 384; *Shedd v. Wilson*, 1 Id. 278; *Washburn v. The Bank of Bel- lows' Falls*, 19 Vermont, 278; *Converse v. M'Kee*, 14 Texas, 20; *Place v. Sweitzer*, 16 Ohio, 143; *Cropper v. Coburn*, 2 Curtis, 473; *Thompson v. Frist*, 15 Maryland, 24; *Sanders v. Young*. Agreeably to the latter view there is no need for such an intervention; see *Cammack v. Johnson*, 1 Green Ch. 163; *Moody v. Payne*, 2 Johnson Ch. 548; and the joint creditors may have an effectual remedy by issuing an execution which will supersede the levy of the separate creditor; *Coovers' Appeal*, 5 Casey, 9; ante, 394; *Rainey v. Nance*, 54 Illinois, 29. In *Rainey v. Nance* the court said that a separate creditor could acquire no lien through his own act or the act of the debtor, that would prevail against a levy for a joint debt. The only effect of a levy for a separate debt, was to give the plaintiff in the execution, a right to what might be due to the debtor under whom he claimed, on a settlement of the partnership accounts.

It may, nevertheless, be observed that under the law of Pennsylvania, the field is open to the joint and separate creditors, and the latter may be first by management and diligence. For if the separate creditors succeed in selling the partnership property under executions against each of the partners, before it is levied on by the joint creditors, the corpus of the partnership property will pass to the purchasers, and the proceeds of

the sale be distributable among the separate creditors, to the exclusion of the joint creditors; see *Vandyke's Appeal*, 7 P. F. Smith, 9; *Doner v. Stauffer*, 1 Penna. 198; *Backus v. Murphy*, 3 Wright, 397. This is the more remarkable, because what each purchaser acquires is the right of the defendant in the execution, which, if the firm be insolvent, is naught; *Rice v. Austin*, 17 Mass. 197; and it is not easy to understand how their interests can when aggregated make up the sum total of the partnership stock.

An execution for a separate debt does not become a nullity when brought into conflict with a levy for a debt due by the firm, because the separate creditor is still entitled to the interest that may result to the defendant in the execution on the winding up of the partnership. A sale under both writs will pass the corpus of the property, which has been taken in execution, and the firm will consequently have an equitable lien on so much of the proceeds, as is not required to pay the joint debt. The proper course therefore is to make a separate sale of the right, title and interest of the debtor partner in the partnership stock as a whole, which will entitle the purchaser to file a bill to ascertain the quantum of the interest which he has acquired; see *The Commercial Bank v. Wilkins*, 9 Greenleaf, 28; *Douglass v. Winslow*, 28 Maine, 89; *Dunham v. Murdock*, 2 Wend. 553; *Trowbridge v. Cushman*, 24 Pick. 310. A different course is pursued in

Pennsylvania where the sheriff sells under both writs, and if the goods bring more than enough to satisfy the joint debt, the surplus is awarded to the separate creditor; see *Backus v. Murphy*, 3 Wright, 397; *Coover's Appeal*, 5 Casey, 9.

The foregoing principles are not less well established under the authorities in Pennsylvania than elsewhere; *Deal v. Bogue*, 8 Harris, 228. In the language of Chief Justice Gibson, a separate execution creditor of the firm sells not the chattels, but the interest of the partner incumbered with the joint debts; "and such is also the effect of a sale by a partner of his interest in the firm. Yet it has been held in that State that a sheriff's sale to the same, or to different persons, under writs issued against each of the members of the firm for debts due by them individually, passes the *corpus* of the partnership property, and not merely the right of the partners individually to what will remain after the partnership is wound up. In like manner, although, a sale by a member of an insolvent firm confers no interest on the purchaser, a series of such sales may pass the title as effectually as if the property were conveyed by the firm.

This doctrine dates from *Doner v. Stouffer*, 1 Penna. 198. There Daniel Howry and Benj. Eshelman, entered into partnership as manufacturers. The firm became insolvent, and the members of it were severally indebted in a considerable amount. An execution issued on the ninth of August,

against Howry for a separate debt, and was levied on the property of the firm, and a similar levy was made on the eleventh of the month, under an execution against Eshelman. The sheriff sold under both writs, and the purchase-money was paid into court. The plaintiff in the writ against Eshelman claimed one-half the fund, but his application was opposed by Howry, who insisted that as the partners individually had no beneficial interest in the property, which was the subject of the sale, so no right could accrue under it to their separate creditors, and that the proceeds should be applied as the property ought to have been, to the joint debts. This argument was overruled by the court, who directed the fund to be distributed *pro rata* between the execution creditors.

It does not appear that the award could have been different consistently with established principles; *Vandike's Appeal*, 7 P. F. Smith, 9; *Fenton v. Folger*, 21 Wend. 676. What the sheriff sold was not the goods of the firm, but the individual interests of the partners. That both executions met in his hands, did not enlarge the effect of either writ, or authorize him to convey a greater right than would have passed by a separate sale under each. The *corpus* of the property consequently still belonged to the partners, and might have been taken in execution by the joint creditors, and the separate creditors were entitled to the purchase-money as the proceeds of the real or supposed interest of the part-

ners. That the purchaser bought under a mistaken impression that this had a value which it did not possess, could not affect the distribution of the fund.

The decision is therefore in an entire accordance with the main current of authority. This can hardly be said of the reasons given by the chief justice. He asked, "what would have been the effect had the sales been made consecutively. The first in the order of time would have passed the interest of the partner, subject to the equity of his co-partner, and the execution creditor would have been entitled to the price. But this equity together with the remaining interest of the other partner would have passed by the succeeding sale, the execution creditor in that instance also taking the proceeds. It made no difference that the sales were simultaneous, instead of consecutive. When the shares of the partners united in the same purchaser, every semblance of partnership equity was at an end."

The incongruity of such a result may be illustrated by an example: A. and B. are in partnership, and the liabilities equal or exceed the assets. A. has no beneficial interest in the joint property, nor has B., and both are subject to the rule that one cannot confer a greater interest than he has. A purchaser from either of them is simply entitled to what would have been due to the vendor on the settlement of the partnership accounts. Yet if A. and B. agree severally to transfer their respective interests,

although each is ignorant of what the other does, the purchasers will acquire a title to the partnership stock, in what proportions is not clearly apparent. See *Menagh v. Whitwell*, 52 New York, 146, 156. It may be inferred from the language held in *Doner v. Stauffer*, that each will take an equal share, and yet it is obvious from the premises, that if two such sales are made successively, the first is virtually inoperative, or becomes effectual only through the second.

The doctrine of *Doner v. Stauffer*, was reiterated in *Kelly's Appeal*, 4 Harris, 62; and *Baker's Appeal*, 9 Harris, 16; where Lewis, C. J., said, "the right of the partners to insist on the application of the joint assets to partnership claims may be waived, and is waived when each partner disposes of all his interest in the partnership, and sales on separate executions against the several partners, have the same effect as sales by the individual partners themselves." But the doctrine was not requisite in any of these instances to the decision of the cause, which depended on other and well established principles.

In *M'Nutt v. Strayhorn*, 3 Wright, 269, the doctrine of *Doner v. Stauffer*, was applied. There Smith and Taylor were engaged in business as partners, and on the 29th of September, 1858, Smith made an assignment of his interest in the firm, as also of his private property, to Strayhorn and Hobson, for the benefit of all his creditors, which was accepted by

them. On the next day, Taylor made a similar assignment to the same assignees, which was also accepted. Thompson, J., said: "If it were necessary to put the case exclusively on the doctrine implied by the remarks of Justice Kennedy, in *Deckert v. Filbert*, 3 W. & S. 454, no doubt could exist but that Smith assented to the assignment of the stock by Taylor to the assignees named by Smith. The inference necessarily exists in the absence of testimony to the contrary. The partners acting together, cognizant of the affairs of the firm, select the same assignees, and make several assignments within one day of each other, and the inference is irresistible that it was assented to as a partnership assignment. But the doctrine of *Doner v. Stauffer*, 1 Penna. Rep. 198, and the same thing, in substance, in *Kelly's Appeal*, 4 Harris, 59; *Baker's Appeal*, 9 Id. 77; *Coover's Appeal*, 5 Casey, 9, establish clearly that the equities of creditors are to be worked out through the equities of the partners, and that sales on separate executions of the firm property, which destroy the dominion of the partners over it, destroy also the equity of creditors whose liens have not actually attached; and the effect by private sales cannot be less. It cannot well be doubted, but that this is a corollary of the first position. If the property be parted with by sales severally made, and neither partner has dominion or possession, there is nothing through which the equi-

ties of the creditors can work, and hence the rule will not apply. But all we have to do with here, is the question of the right of the sheriff to levy after assignment made and accepted. As we are of the opinion that the firm property did vest, we think he had no right to levy, and the judgment must be affirmed."

In *Backus v. Murphy*, 3 Wright, 397, it was held to follow apparently on the same ground, that where partnership property is sold under an execution for a joint debt, and also under another execution for the individual debt of a partner, and the proceeds paid into court, the other partners and the joint creditors have no claim, legal or equitable on the fund, which, after satisfying the joint execution, will be awarded to the separate execution.

It cannot be said of this case, as it may of *Doner v. Stauffer*, that the firm, as such, were strangers to the fund. The corpus of the partnership property was sold, and not the several interests of the partners. The fundamental error seems to have been the sheriff's, in executing two different and inconsistent writs together. If the sales had been separate, the partnership would manifestly have been entitled to the surplus of the joint execution; and no prudent buyer would have given anything for the individual interest of a partner in an insolvent firm. But the incidental association of the writs did not enlarge the right of the separate creditor, or entitle him to more than he would have received if his had been the only execution.

It seems to have been taken for granted in *Doner v. Stauffer*, that a transfer of a partner's interest in the firm, frees the other partners from all responsibility to him, and therefore entitles them to dispose of the assets as they deem fit. It was only on this ground that the second sale, which would confessedly have been invalid as against the firm had it been the first, could be held to bind their right. Such an assumption is hardly reconcilable with the principle enunciated by the chief justice, that "a separate execution creditor sells not the chattels of the partnership, but the interest of the partner incumbered with the partnership debts." So much, therefore, as may be requisite for the discharge of the encumbrance is impliedly excepted from the sale. To this extent the partner is still interested in the due application of the property as a means of discharging obligations for which he is not less answerable than he was originally. He has consequently a clear equitable right to require that the partnership assets shall not be misappropriated, which cannot be defeated by any act or transfer in which he does not concur.

The case is essentially different where a partner conveys the chattels of the firm as such with the consent of his co-partners, and they make a simultaneous or subsequent conveyance of a like kind. Under these circumstances the assignee acquires the things which constitute the common stock, as distinguished from the right of the part-

ner to an account; *The National Bank v. Sprague*, 5 C. E. Green, 13; *Menagh v. Whitwell*, 52 New York, 500; *Kimball v. Thompson*, 13 Metcalf, 283; *Flack v. Charon*, 29 Maryland, 311, *ante*, 405. What two or more persons can do jointly, they may effect severally, in obedience to a common design. So a grant by a partner of the assets of the firm may be valid, if ratified by them. But such a result will not ensue from the several transfers of the partners, unless it appears that each intended to convey his undivided share as a tenant in common, and that all concurred. Still less will it be produced by a court acting on the partners individually through executions issued for their private debts. For as a partner cannot legally appropriate the whole or any part of the partnership property to his private purposes, such a design will not be imputed to him by the law; nor will the knowledge and assent of his co-partners be presumed in the absence of proof. See *Todd v. Lorah*, 25 P. F. Smith, 155; *Noble v. McClintock*, 2 W. & S. 152; *Purdy v. Powers*, 6 Barr, 494. This argument applies with peculiar force where the pecuniary condition of the firm is such that appropriating the assets to a debt which is not common to all the partners, will impair the ability of the partnership to fulfil the obligation which it is under to the joint creditors. See *Menagh v. Whitwell*, 52 New York, 146.

It results from these considerations that the same words may have a different operation when

the interest of a partner is assigned to a stranger, and when it is assigned to the other members of the firm. In the latter case, the assent of the co-partners is apparent, in the former it must be proved. In the one, all will pass that is not expressly reserved, in the other, nothing that the assignor may not lawfully convey. See *Menagh v. Whitwell*; *Wilson v. Soper*, 13 B. Monroe, 411, 415; *ante*, 405.

The question was carefully considered in *Menagh v. Whitwell*, 52 New York, 156. There two out five members of a firm assigned their shares to a third, who subsequently gave the plaintiff a chattel mortgage of his interest in the partnership effects, which amounted to three-fifths; the object being to secure a private debt. There could be little doubt, under the evidence, that the mortgagor intended to pass the *corpus* of the partnership effects, and not merely his right, title, and interest, subject to the payment of the partnership debts; and the assignee found that the mortgage was executed with the assent of all the partners, and that the partnership was largely indebted, though not insolvent. The mortgagee went into possession, and soon afterwards proceeded to a foreclosure and sale, and became the purchasers. The remaining partners then conveyed all their interest in the partnership property to a third person. Finally the sheriff levied on, and sold the mortgaged property, by virtue of an execution, which had been issued for a joint debt, and trover was brought against him by

the mortgagee. The court said that if the mortgage was intended to be a lien on the body of the property, and not merely a lien on the surplus which might result to the mortgagor on a settlement of the partnership accounts, it was fraudulent as to the partnership creditors, as tending to divert the larger part of the partnership assets from the discharge of the joint liabilities. If, however, the mortgage was merely designed to bind the individual interest of the mortgagor in the common stock, it did not affect the right of the joint creditors, which it was the intention of the mortgagor to preserve. In either aspect, the sheriff was justified in taking the property in execution under the judgment which had been rendered for a partnership debt. It had been contended, on the authority of *Doner v. Stauffer*, that if the mortgage was thus limited in its operation when originally made, still when the remaining partner transferred his interest in the property of the firm, all the estate of the partners passed from them, and there was consequently nothing left from which an equity could be deduced in favor of the joint creditors. The fallacy of this argument lay in not considering that a partner could not, by an assignment of his interest, deprive the other partners of their right to have the demands against the partnership satisfied out of its assets. This was equally true, whether each of the partners made such a transfer, or only some of them. In either case, a purchaser

would acquire the right of the vendor as the latter held it, subject to the equities of his co-partners.

Such are the principles as modified by equity which regulate the distribution of the joint and several effects of the members of a firm. The partnership creditors have a paramount right to the joint assets, and the separate creditors no priority as it regards the private property of the partners, except that which they may acquire through greater diligence. A different rule has finally obtained in England, agreeably to which "the debts of a partnership are first paid out of the partnership effects, and afterwards the joint creditors, when the separate creditors are satisfied, may come in upon the separate effects, but not before; and so *vice versa* the separate creditors are to come in first on the separate effects of the partners, and if these are not sufficient, then on the joint effects after the partnership creditors are paid." *Ex parte Rowlandson*, 3 Peere Williams, 405; 2 Eq. Abr. 110, pl. 2; *Fall River Co. v. Borden*, 10 Cushing, 458. This doctrine seems to have been adopted in bankruptcy from convenience, and is now followed analogically when the question arises in the distribution of the estate of a deceased partner by his personal representatives; *Wilder v. Keeler*, 5 Paige, 167; *Ridgway v. Clare*, 19 Beavan, 111. It has a wider scope in this country, and applies in some of the States whenever a levy for a joint debt is brought in conflict

with a levy for the separate debt of a partner. The nice considerations which govern a court of equity are disregarded, and the question is not who has the better right or was first in point of time, but whether credit was given to the partner individually or to the firm. Such a method is confessedly without foundation in principle, but has the merit of saving time and costs by cutting short a number of questions which it might be tedious to unloose. It did not obtain a foothold even in bankruptcy until half a century after it was introduced, having been rejected by Lord Thurlow, re-established by Lord Roslyn, and acquiesced in by Lord Eldon from deference to his predecessor, and that the separate creditors of a partner might not be compelled to await a settlement of the accounts of the firm. See *Bell v. Newman*, 5 S. & R. 78.

It is easier to state the rule than to ascertain the exact foundation on which it rests; see *Lindley on Partnership*, 1093. On one side this may be traced without much difficulty. The paramount right of the joint creditors is generally conceded as resulting from the equitable lien of the firm, and it has been said that this branch of the rule leads by a necessary sequence to the other. As the separate creditors are excluded from the partnership assets, it is only just that they should have a first claim on the separate estates of the partners. So much is due to the theory of equality, which requires that all debts shall be paid

ratably. Where a partner dies in the lifetime of another member of the firm, the joint creditors have no legal claim on his estate, and should not be admitted by a Chancellor to the prejudice of the separate creditors. Although this argument does not apply where the security for the debt is joint and several, nor where the joint and several assets devolve on the administrator of a surviving partner, reason and analogy require that insolvent estates should be administered according to a uniform rule, not varying with the accident of death or the issuing of a commission of bankruptcy; *Murrill v. Neil*, 8 Howard, 414; *Rogers v. Meranda*, 7 Ohio, N. S. 179.

It has been said with as much force in other instances, that the superior right of the joint creditors to the partnership assets, is no reason for excluding them from another fund on which they have an equal claim; *The Bank of Kentucky v. Reizer*, 2 Duvall, 169; *Whitehead v. Chadwell*, Ib. 432. Their priority grows out of the lien of the firm upon the partnership property; but there is no such ground for preferring the separate creditors in the distribution of the private property of the partners. It is conceded that during the lifetime of a partner, the obligations of the firm are also his, and a chancellor cannot regard this as ceasing to be true at his death, because in equity partnership debts are joint and several; *Wisham v. Lippincott*, 1 Stockton Ch. 353; *Williams v. Henderson*, 1 Mylne & Keen, 582. The rule

in bankruptcy is one of positive law, and peculiar to the statutory jurisdiction in which it originated. It should not, therefore, be applied when assets are brought into a Court of Chancery for distribution on equitable principles. Still less does it afford a precedent for postponing a levy on the separate estate of a partner for a joint debt, to a subsequent levy by a separate creditor. The firm creditors may be required under the doctrine of marshalling to look to the joint fund until that is exhausted; see *Murray v. Murray*, 5 Johnson Ch. 60, 72; *Meech v. Allen*, 17 New York, 300; but there is nothing in this to justify their exclusion from the separate property of the partners, or that should debar them from resorting to it as a means of supplying any deficiency that may exist in the joint fund; *Allen v. Wells*, 22 Pick. 450, 456; *Bardwell v. Perry*, 19 Vermont, 202; *Camp v. Grant*, 21 Conn. 25.

The former view is now adopted by the Supreme Court of the United States, and by a majority of the State tribunals; *Morrison v. Kurtz*, 15 Illinois, 193; *Adams v. Sturgis*, 55 Id. 468; *M'Culloch v. Dashiell*, 1 Harris & Gill, 96; *Glen v. Gill*, 2 Maryland, 1; *Ridgely v. Carey*, 4 Har. & M'Henry, 167; *Murrill v. Neill*, 8 Howard, 414; *Egberts v. Wood*, 3 Paige, 518; *Payne v. Matthews*, 6 Id. 20; *Robb v. Stevens*, 1 Clarke, 192; *Ladd v. Griswold*, 4 Gilman, 25; *Hall v. Hall*, 2 M'Cord, Ch. 269, 302; *Rodgers v. Meranda*, 7 Ohio, N. S. 179; *Smith v. Mallory*, 24 Alabama, 628; *Bridge v. M'Cul-*

lough, 27 Id. 661; *Damon v. Phillips*, 17 Indiana, 405, 409; *Oakey v. Casey*, 1 Freeman, 536; *Irby v. Graham*, 46 Mississippi, 425, 431; *White v. Thornburgh*, 15 Indiana, 124; *The Moline Man. Co. v. Webster*, 26 Illinois, 233. It is also established by the existing Bankrupt Law as that which must prevail, where a commission issues against a firm and the partners.

The only ground on which this course of decision can be vindicated is that the joint debts are contracted exclusively on the credit of the partnership assets, and the separate debts on that of the private estate of the members of the firm. If this be conceded, the entire failure of the joint assets is no reason for allowing the partnership creditors to come in on the separate assets. It has, nevertheless, been held that where there is no joint estate, and no living solvent partner, the joint creditors may prove against the separate estate of a deceased or bankrupt partner; *Ladd v. Griswold*, 4 Gilman, 25; *Sperry's Estate*, 1 Ashmead, 347; *Wilder v. Keeler*, 3 Paige, 167; *Emanuel v. Byrd*, 19 Alabama, 596; *Rogers v. Miranda*, 7 Ohio, N. S. 179, 190; *Claghorn v. The Bank*, 9 Georgia, 319. This exception has been rejected in some of the States as contrary to the principle of the rule; *M'Culloch v. Dashiell*, 1 Harris & Gill, 96; *Murrill v. Neil*, 8 Howard, 414; *White v. Thornburgh*, 15 Indiana, 124.

It is, nevertheless, essential to the due administration of a rule which might otherwise lead to

harsh and inequitable results. If it did not exist, a sale by an insolvent partner to his co-partners, followed by the insolvency of the firm, would be equivalent to an entire exclusion of the partnership creditors, *ante*, 402. The reason for it appears from the case of *Ladd v. Griswold*. There an outgoing partner sold his interest in the concern to his co-partner and died insolvent, and it was held that although the joint property had thereby become separate, the joint creditors might by force of exception come in *pari passu* with the separate creditors of the remaining partner.

The exception will not be made where there is a joint fund however small, and although arising from the act of the separate creditors in purchasing worthless assets for the sake of excluding the joint creditors; *Smith v. Mallory*, 24 Alabama, 628.

A creditor who holds a joint and several security for the debt of a bankrupt firm, may elect against which estate he will proceed, but is not entitled to a dividend from both; see *Ex parte Rowlandson*, 3 Per. Wms. 405; *Ex parte Bond*, 1 Atkyns, 98; but the rule against double proof does not apply, unless the separate estate is brought into bankruptcy for administration, nor where it is in the hands of an administrator, or has been assigned voluntarily for the benefit of creditors; see *Morris v. Morris*, 4 Grattan, 293; *Wilder v. Keeler*, 3 Paige, 167; *Bouser v. Cox*, 6 Beavan, 84; 1 Tudor's Leading Cases, 586. It was notwithstand-

ing held in *Ganson v. Lathrop*, 25 Barb. 445, that a partnership creditor is not entitled to a dividend from the estate of a deceased partner, although the contract is in form joint and several, or secured by the partner's guaranty or endorsement.

The grounds on which the rule was originally applied in the administration of the estate of a deceased partner, were clearly stated in *Arnold v. Hamer*, 1 Freeman, Ch. 509. "It is well settled that upon the death of one of several partners, a joint creditor has no claim for the payment of his debt out of the separate estate of the deceased partner, until the claims of the separate creditors have been first satisfied. It is true that joint creditors may come into equity to enforce their claim against the estate of a deceased partner, and equity will then consider the claim as it is considered at law, both joint and several; but this can only be done where the claims of the joint creditors do not come in conflict with those of the separate creditors. In such case, the priority of the separate creditors is always preserved. Upon the death of one partner, the claim of the joint creditors survives against the surviving partner, and is extinguished at law against the estate of the deceased partner, to which they can only resort through the aid of a court of equity, where the advantage thus thrown by accident upon the separate creditors, will be preserved. And in such case it makes no difference, that the surviving partner is insolvent, if the assets to be administered are purely legal; the

separate creditors having acquired a priority at law, and having equal equity, that priority will be preserved. For where the equities are equal, the legal right must prevail. A different rule obtains where the assets are purely equitable, and where, therefore, both joint and separate creditors would have to seek the aid of a court of equity. In such case, neither party having a legal preference, and the surviving partner being insolvent, the claimants would be decreed to take *pari passu*. It may, I think, be hence laid down, that in administering upon the legal assets of an insolvent partner, his property should be applied to the payment of his private debts, and partnership claims should not be reported for a *pro rata* dividend." It is noticeable that this reasoning does not warrant the exclusion of the joint creditors in the administration of the assets of a surviving partner, because the obligation is then legal and may be enforced without the aid of a chancellor. It is also inapplicable where the form of the contract is joint and several, or where partnership debts have been made several as well as joint by statute; see *Morris v. Morris*, 4 Grattan, 293; *Wilder v. Keeler*, 3 Paige, 167.

The separate creditors of a partner have agreeably to this view a prior claim on his private property which it is incumbent on the debtor to regard, and he can do no act tending to defeat their right inconsistently with good faith. A general assignment by a partner will therefore take effect in the first

instance for the benefit of his separate creditors; *Murrell v. Neil*, 8 Howard, 414; *Rodgers v. Meranda*, 8 Ohio, N. S. 179; *Pennington v. Bell*, 4 Sneed. 200; and if a clause preferring the joint debts cannot be stricken out, it will invalidate the deed; *Jackson v. Cornell*, 1 Sandford, Ch. 348; see *Wakeman v. Grover*, 4 Paige, 23; *Payne v. Matthews*, 6 Id. 19; 11 Wend. 187. The right of the separate creditors is nevertheless an imperfect one, which does not preclude the conversion of separate property into joint, or the appropriation of it to the payment of the partnership debts, if there is no reason to suppose that the assets of the party are inadequate to meet his engagements. So a partnership creditor may take the assets of a solvent partner in execution, and a court of equity will not enjoin the writ at the instance of the debtor or of his separate creditors; *Dunham v. Hanna*, 18 Indiana, 270; *Martin v. Tiffany*, 45 Illinois, 302. And it has never been pretended that a creditor may not receive payment from a partner without inquiring whether the money is drawn from his assets or from those of the firm. According, moreover, to the English authorities which are followed in New York and Maryland, the priority of the separate creditors is merely equitable, and will not avail against any legal advantage that has been obtained in good faith through the act of the partners or of the firm. It is not until the estate of an insolvent partner passes from his own keeping into that of an ad-

ministrator or assignee, that the equity of his separate creditors attaches or can be effectually administered; see *Thompson v. Frist*, 15 Maryland, 24; *McCullough v. Dashiell*, 1 Harris & Gill, 96. A mortgage by an insolvent partner for a firm debt, may wrong his separate creditors, but will not be set aside at their instance, unless the mortgagee was cognizant of the circumstances which invalidate an act that is *prima facie* good; and such is clearly the rule where an advance is made in good faith on such a security. So a lien acquired by a judgment or levy for a joint debt, will not be displaced by a chancellor in order to leave the way open for the demand of a separate creditor; *McCullough v. Dashiell*, 1 Harris & Gill, 96; *Wisham v. Lippincott*, 1 Stockton Ch. 353; *Kuhn v. Lair*, 14 Richardson, 20; *Toombs v. Hill*, 28 Georgia, 371; *Claghorn v. The Bank*, 9 Id. 319; *Baker v. Wimpel*, 19 Id. 87; see *Allen v. Wells*, 22 Pick. 450; *Cumming's Appeal*, 1 Casey, 269. In *Claghorn v. The Bank*, the court treated the priority of the separate creditors as indubitable where the question arises in the administration of an insolvent estate, but held that it does not afford a ground for setting aside an execution which has been levied on the separate property by a partnership creditor.

It was held in like manner in *Meech v. Allen*, 17 New York, 300, that although the separate creditors are entitled to priority in the distribution of equitable assets, "a court of equity never assumes to

exercise the power of setting aside or in any way interfering with an absolute right of priority obtained at law. In regard to all such cases, the rule is *æquitas sequitur legem* (1 Story Eq. Jur. § 553)." "In *Wilder v. Keeler*, 3 Paige, 171. Chancellor Walworth, says: "Equitable rules are adopted by this court in the administration of legal assets, *except so far as the law has given an absolute preference to one class of creditors over another.*" So, in the case of *Averill v. Loucks*, 6 Barb. S. C. R. 470. Paige, P. J., says: "Courts of equity, in the administration of assets, follow the rules of law in regard to legal assets, and recognize and enforce *all antecedent liens*, claims and charges existing upon the property, according to their priorities." This is also conceded in the case of *McCullough v. Dashiell*, 1 Har. & Gil. 96, where the whole doctrine of the distribution in equity of the joint and separate property of partners is very elaborately examined. Archer, J., by whom the opinion of the court was delivered, there says: "At law, the joint creditors may pursue both the joint and separate estate, to the extent of each, for the satisfaction of their joint demands, which are at law considered joint and several, *without the possibility of the interposition of any restraining power of a court of equity.*" But especially must it be beyond the power of such courts to interfere where an absolute right of legal priority is given by force of a positive statute, as in the case of a judg-

ment. Chancellor Walworth, in *Mower v. Kip*, 6 Paige, 88, says: "The rule of this court is to give effect to the lien of a judgment upon a legal title, so far as it can be enforced by execution at law." It is a necessary sequence from these principles that the lien of a joint judgment on the real estate of a partner, will not be set aside or postponed at the instance of a creditor who obtains judgment subsequently for a separate debt; *Meech v. Allen*, 17 New York, 300.

A different view prevails in New Hampshire, where a levy for a separate debt on the private estate of a partner, has precedence of a prior levy for the debt of the firm. Neither creditor is a purchaser, and the mere circumstance that one is first in point of time, does not preclude the court from moulding the execution of the writs in conformity with the requirements of justice; *Jarvis v. Brooks*, 3 Foster, 136; *Benson v. Ela*, 4 Fogg. 110.

It was held accordingly in *Jarvis v. Brooks*, 3 Foster, 136, that where the land of a partner is set off in execution for a debt due from the partnership, and afterwards the same land is set off in execution for a separate debt of the partner, the separate creditor of the individual partner will hold the land. The court said "if the preference is admitted in favor of the joint creditor, but denied to the separate creditor, the principle of equality and reciprocity upon which the interference of equity with the legal rule has been vindi-

cated in England wholly fails. At law the separate creditor might take his debtor's moiety in the partnership estate, and sell it for his debt. When he comes to assert this legal right equity interposes with the rule that partnership debts must first be paid out of the partnership property, and in answer to his complaint that equity has taken from him his legal right, he may be told in England that equity by way of compensation, has given him a corresponding preference in the application of his debtor's separate estate. We have admitted the equitable rule which takes away the separate creditor's legal right to satisfy his debt upon an undivided moiety of the partnership property. Principle, consistency and equal justice to the separate creditors would seem to require that we should also adopt the other branch of the same equitable doctrine, and as there is no greater difficulty in administering one branch of the doctrine, than the other, both may be directly asserted at law with equal convenience."

Agreeably to the rule as administered in England, property may be separate, although it belongs to two or more jointly. If there are three members of a firm, and two of them constitute another firm, the property of the latter firm is separate as it regards the creditors of the other firm. In like manner if one of three or more partners withdraws, and the others carry on the business, it is so far separate that the creditors of the original firm, are not entitled to

a dividend from the property acquired by the new firm, in the event of bankruptcy. So if one of several partners disposes of his interest in the common stock, to the others, it becomes their separate property, and will be applied under a commission to the liabilities which they have incurred in preference to the obligations for which they are jointly answerable with the retired partner, although he sold in consideration of an agreement on their part to assume the debts, *ante*, 399.

In *Frow, Jacobs & Co.'s Estate*, 23 P. F. Smith, 45, the Supreme Court of Pennsylvania declined to carry the rule to this length. Frow, Jacobs, Parker and Foresman, entered into partnership under the name of Frow, Foresman & Co. Foresman subsequently sold his interest to the other partners in consideration *inter alia*, of a joint and several covenant on their part to pay the existing debts. The remaining partners continued in business as Frow, Jacobs & Co. Jacobs subsequently withdrew from the concern, and Foresman returned to it, forming a new partnership, styled Foresman & Co. Finally, Frow and Parker assigned all their property for the benefit of the creditors of Frow, Jacobs & Co. The court held that under the law of Pennsylvania forbidding preferences, the creditors of Frow, Foresman & Co., were entitled to come in under the assignment. They were equally with the creditors of Frow, Jacobs & Co., the joint creditors of the assignors, and entitled to

be paid out of their funds. Frow, Jacobs and Parker had agreed to pay all the debts of Frow, Foresman & Co.; and it made no difference as it regarded the liability of Frow and Parker, that Jacobs was no longer a member of the firm. This decision is obviously sound on general principles, but it would seem to be contrary to the rule which regulates the distribution of assets in bankruptcy.

The claim of the separate creditors to priority is rejected in many of the States, although on grounds that are not everywhere the same; see *Grant v. Camp*, 21 Conn. 41; *The Bank of Kentucky v. Rizer*, 2 Duval, 169; *Whitehead v. Chadwell*, Ib. 432; *Bardwell v. Perry*, 19 Vermont, 292; *Allen v. Wells*, 22 Pick. 450; *Newman v. Bagley*, 16 Id. 570; *Hassell v. Griffin*, 2 Jones, 117; *Baker v. Wimpee*, 19 Georgia, 87; *White v. Dougherty*, 1 Martin & Yeager, 309. It has been declared in some instances, that as a partnership creditor trusts the partners as well as the firm, there is no justice or color of right in shutting him out from the separate property, because a separate creditor who has dealt exclusively on the individual credit of a partner, is excluded from the joint fund; see *Bell v. Newman*. In other instances the statutes which require the debts of a decedent to be paid ratably, have been held to preclude the priority of the separate creditors if it would otherwise exist; see *Sparhawk v. Russell*, 10 Metcalf, 305; *Sperry's Estate*, 1 Ashmead, 147; *Camp v. Grant*, 21 Conn.

551; *Freeman v. Stuart*, 41 Mississippi, 138; *Dahlgren v. Duncan*, 7 Smedes & Marshall, 280. In others again, a statutory provision rendering partnership debts several as well as joint, has been adjudged to do away with the only ground on which a chancellor can prefer the separate creditors, by giving the joint creditors a legal claim on the assets of a deceased partner; *Hassell v. Griffin*, 2 Jones' Eq. 117.

It is held in Connecticut and Massachusetts, that the rule in bankruptcy does not apply in the administration of the assets of a deceased partner, whatever the principle may be where the question arises during his life, because the assets of a decedent are under the statutes of those States distributable equally among all his creditors; *Sparhawk v. Russel*, 10 Metcalf, 305; *Camp v. Grant*, 21 Conn. 55.

In *Sparhawk v. Russel* the court adjudged that the partnership and private debts of a deceased debtor are to be paid ratably, out of the common fund derived from the partnership and private property, although the surviving partner is also insolvent, and the assets are not adequate to pay either class of debts; *Wilby v. Phinney*, 15 Mass. 116. Hubbard, J., said, that "the only preference known to the law of Massachusetts in the distribution of the estates of deceased insolvents, is for taxes and duties due to the commonwealth, and that all other debts of whatever kind are to be paid ratably. Where

one is a partner at the time of his decease, having both partnership estate and separate estate, and is indebted as a partner as well as on his private account, no difference is to be made in the course of distribution by the payment of the separate debts from the separate estate, and of the partnership debts from the joint estate, but each claim is alike provable without regard to its nature, or the source of the fund. The distinctions which prevail in this regard in settling the estates of living insolvents, were not recognized in the administration of assets after death."

The effect of this interpretation must be to defeat the equity of the surviving partners to have the joint assets applied in the first instance to the payment of the partnership debts. Such a result is seemingly foreign to the purpose which the Legislature had in view. A provision that the assets of a decedent shall be distributed ratably at his death, only extends to so much of the property belonging to him as a partner, as he might have diverted while he was alive, from what is needed for the payment of the firm debts. It cannot, therefore, affect the equity of the surviving partners, that these shall be paid before anything is taken for the separate debts.

In *Bell v. Newman*, 5 S. & R. 78, the Supreme Court of Pennsylvania put this construction on a statute prescribing equality as the rule in the distribution of the assets of a decedent, and it was

held that where a surviving partner dies indebted to partnership and separate creditors, the partnership property must be applied to the partnership debts; the separate creditors will receive the same proportion out of the separate property as has been paid to the joint creditors; and the residuum should then be divided ratably among all the creditors. Ch. J. Tilghman said, that by the act of April 19th, 1784, all creditors of the same degree were entitled to an equal share of the intestate's estate in case of a deficiency of assets. There was nothing in the nature of a partnership debt to preclude the right to satisfaction out of the individual property of the partners. If the intestate were still living, a partnership creditor who obtained judgment against him might clearly levy the whole debt on his separate estate. Did his death make any, and what difference? Under the rule in bankruptcy the joint creditors are to be paid first from the joint estate, and the surplus goes to the separate creditors, and *vice versa* as to separate creditors and separate estate. Although this was the undoubted rule, no one could tell how it came to be so; it had been rejected by Lord Thurlow; and Lord Eldon only submitted to it because it had been established by his immediate predecessor; *Ex parte Kensington*, 14 Vesey, 448; *Barker v. Goodair*, 11 Idem, 786. In *Bolton v. Butler*, 1 Bos. & Pul. 547, Ch. J. Eyre called it a rule of convenience, which had been

adopted in bankruptcy under the chancellor's power by statute to take order in the distribution of the effects of a bankrupt. The rule was convenient, though the equity of it was doubtful, but convenience alone would not justify the court in disregarding the statutory provision, that the effects of deceased persons should be distributed equally. There was, nevertheless, an equity between the members of a firm which the court was bound to regard, and which bore on the case under consideration. That equity forbade the surviving partner to withdraw anything from the joint assets until the partnership debts were paid. It was not defeated by his death, but bound his executors. When the joint property came to the hands of the executors, chancery would order it to be applied to the joint debts, not for the sake of the partnership creditors, but to exonerate the estate of the deceased partner. In the case before the court this equity required that the joint property should be applied to the joint debts, and the question was what distribution of the separate assets would best promote the equality which the statute had in view. Assuming that the joint estate belonged in moieties to Cookson and Waddington, if the partnership creditors received twenty per cent. from the joint estate, one-half must be regarded as coming from Waddington's estate and half from Cookson's. The separate creditors should consequently receive ten

per cent. from the separate estate, after which the joint and separate creditors would divide the balance among them equally *pro rata*." This conclusion appears to be altogether just, except that the whole amount received from the joint assets, should seemingly have been deducted before proof was made against the separate estate.

The argument of Ch. J. Tilghman, in *Bell v. Newman*, concedes that if the separate creditors have an equity, it will not be taken from them by a statute requiring that the assets of a decedent shall be distributed ratably among his creditors, and such, notwithstanding the language, held in *Sparhawk v. Russel*, ante, 424, would seem to be the sound interpretation, because the legislature will not be supposed to have intended to authorize the disregard of any right that is binding in conscience, and which a chancellor would enforce; *Mallory v. Smith*, 24 Alabama, 628.

It is accordingly held in Kentucky, that in distributing the joint and separate assets of an insolvent firm, the separate creditors are entitled to the same percentage of the separate assets as the joint creditors have received from the joint funds, and the residue is then to be distributed ratably among both classes of creditors; *The Bank of Kentucky v. Reizer*, 2 Duvall, 169.

The case of *Bell v. Newman* was cited and relied on in *Sperry's Estate*, 1 Ashmead, 347: but it has been overruled by the more recent decisions, which have established

the rule in bankruptcy as that which will prevail in Pennsylvania, wherever the estate of a partner is reduced to a fund by death or insolvency, and comes into the hands of an assignee or administrator; *Black's Appeal*, 8 Wright, 503; *Walker v. Eyth*, 1 Casey, 216; *M' Cormick's Appeal*, 5 P. F. Smith, 252.

The ground taken in Massachusetts and formerly in Pennsylvania, that there is no equitable reason for denying the joint creditors the benefit of a statute which prescribes equality as the rule of distribution, was also maintained by the Supreme Court of Mississippi, in *Dahlgren v. Damon*, 7 Smedes & Marshall, 393, and *Freeman v. Stuart*, 41 Mississippi, 138; but these decisions have shared the fate of *Bell v. Newman* in being overruled; *Irby v. Graham*, 46 Mississippi, 425, 431.

In *Woodrop v. Brice*, 3 Dessausure, 203, and *Snifer v. Sass*, 14 Richardson, 20, note, the principle of reciprocity was said to require that since the claim of the separate creditors on the partnership effects is subject to the joint debts, the partnership creditors must take the separate effects on the like terms. But these decisions have been overruled, and it is now held in South Carolina, that if a joint creditor may be compelled to proceed in the first instance against the partnership assets, he has yet, where the firm is insolvent, an incontestable right to take the separate property in execution; *Goodwin v. Carson*, 9 Richardson Eq.

259, 267; *Wilson v. M'Connell*, Ib. 500; *Kuhn v. Law*, 14 Richardson, 20.

In *Morris v. Morris*, 4 Grattan, 493, the court was of opinion that the separate creditors have no higher or better equity than the joint creditors. Their alleged priority depends on the inability of the joint creditors to proceed at law against the estate of a deceased partner. It, therefore, has no place as it regards equitable assets, which must be distributed ratably among all the claimants; see *Wilder v. Keeler*, 3 Paige, 167; *Arnold v. Hamer*, 1 Freeman Ch. 509; *ante*, 384.

For a like reason, where partnership debts have been made joint and several by statute, the ground for the preference of the separate creditors ceases, and the assets will be distributed ratably among the joint and separate creditors; *Hasel v. Griffin*, 2 Jones Eq. 117. *Morris v. Morris*, 4 Grattan, 493. Lee, J., said that a court of equity has no authority to impose terms on the prosecution of a legal remedy, or to exclude a creditor from one fund because he has a right of recourse to another. The joint creditors were by the force and effect of the statute to all intents and purposes the individual creditors of each member of the firm."

The broad ground is taken in some of the States, that there is no legal or equitable principle entitling the separate creditors to priority. A chancellor may marshal the assets by requiring the joint creditors to proceed in the

first instance against the fund which is not accessible to the separate creditors; *Filley v. Phelps*, 18 Conn. 294, 391; but the restraint cannot be carried further consistently with justice; *Tucker v. Oxley*, 5 Cranch, 35. The point was determined in *Bardwell v. Perry*, 19 Vermont, 290, 300, and the following propositions stated as giving the true theory of the relation between those who have given credit to the individual, and those who have trusted the firm. "The result of all the decisions in this State upon this subject now is: 1. That, at law, both separate and joint creditors may attach either separate or joint property, and sell it upon execution in satisfaction of their judgments, without regard to the equities of their debtors. 2. That in equity, by the very law of partnership, the partnership effects are pledged to each separate partner, until he is released from all his partnership obligations; but that this lien is solely under the control of the partners; and it would follow, doubtless, that if the partnership be dissolved, and the effects assigned to one partner, this pledge or lien is gone, as was held in *Ex parte Ruffin*, 6 Vesey, 119; but that, while the partnership continues, this equitable lien, existing for the benefit and security of the separate partners, may be reached in a court of equity by the creditors, as the only mode of fully carrying into effect the stipulations of the parties at the time of forming the association. 3. That a partnership contract imposes precisely the same obligation

upon each separate partner, that a sole and separate contract does, and that it is not true, that, in joint contracts the creditor looks to the credit of the joint estate, and the separate creditor to that of the separate estate; and that there is no express or implied contract resulting from the law of partnership, that the separate estate shall go to pay separate debts exclusively; but that, as the partnership creditors in equity, have a prior lien on the partnership fund, chancery will compel them to exhaust that remedy before resorting to the separate estate; but that beyond this, both sets of creditors stand precisely equal, both at law and in equity."

In *Tucker v. Oxley*, 5 Cranch, 54, the court held, that a firm debt might be set off against a suit brought by the assignee in bankruptcy of one of the partners, which was in effect paying a joint creditor out of the separate assets; and Chief Justice Marshall said, in delivering judgment, that if the other partners were solvent, or the property of the firm adequate to meet their liabilities, the partnership creditors ought not to prove their claims against the estate of the bankrupt partner; but that it was unjust to exclude them out from his estate, when it did not appear that they had an adequate recourse in any other quarter.

It was held, in like manner, in *Allen v. Wells*, 22 Pick. 450, that an attachment of the private property of a partner for a joint debt, will not be defeated by a subsequent attachment by a sepa-

rate creditor, or by a general assignment for the payment of his debts. Dewey, J., said, that by the rule of law as formerly held in England, the sheriff, under an execution against one of two copartners, took the partnership effects, and sold the moiety of the debtor in the property, as if owned by tenants in common; *Jacky v. Butler*, 2 Lord Raymond, 871. The courts of Massachusetts had adopted the equitable rule, that the only attachable interest of a copartner is the surplus of the joint estate which may remain after discharging all the joint demands. It followed, that a levy by a joint creditor would prevail over a levy by an individual creditor of a partner. It had been contended that a separate creditor had a similar priority as to the separate property of his debtor. There was, however, a manifest distinction between the cases. The restriction on the separate creditors arose not merely from the nature of the debt, but from the limited interest of the debtor, which only embraced what would remain on the final adjustment of the partnership accounts. But a debt due by a copartnership is the debt of every member of the firm, and each partner is liable for the whole amount. It followed, that the separate property of each might be attached and held to secure a debt due from the copartnership.

Agreeably to the law of Massachusetts, the joint and separate debts are paid *pari passu* under a voluntary assignment by a partner for the benefit of his creditors.

But the rule in bankruptcy prevails under the statutes of that State, where the estate of a partner is taken out of his hands in the course of proceedings in insolvency, and vested in an assignee, and the partnership creditors are not entitled to a dividend until the separate creditors have been paid in full. See *Allen v. Wells*, 22 Pick, 450, 456; *The Fall River Co. v. Borden*, 10 Cushing, 458.

*SCOTT v. TYLER.¹

[*144]

EASTER AND TRINITY TERM, 1787; DEC. 20, 1788.

REPORTED 2 BRO. C. C. 431; 2 DICK. 712.

CONDITIONS IN RESTRAINT OF MARRIAGE.—PUBLIC POLICY.—]

Legacy to a daughter, one moiety of which was to be paid to her at twenty-one, if then unmarried, and the other moiety at twenty-five, if then unmarried; but in case she married before twenty-one, with the consent of her mother, to be settled upon her as mentioned in the will. The daughter married under twenty-one, without the consent of her mother:—Held, that the legacy did not vest in the daughter upon the marriage, and that she never came under the description to which the gift of the legacy was attached.

RICHARD KEE,² the putative father of the plaintiff Margaret Christiana Scott, by his will devised as follows:—"I will that my executors, hereinafter named, do, with all convenient speed after my decease, purchase the sum of 5000*l*. South Sea Annuities 1751, in their names, upon trust that they, or the survivors or survivor of them, do stand possessed thereof, and receive the dividends from time to time as the same shall grow due, and thereout pay and apply the sum of 60*l*. yearly, and every year, in and towards the maintenance and education of my grandson, Richard Dryer, till he shall arrive at the age of fifteen years; and if my said grandson should then choose to go to the university, from thenceforth to pay and apply 120*l*. per annum in and towards his said maintenance and education at the university; but if my said grandson shall not go to the university, I will that, out of the sum of 5000*l*. and the dividends and savings arising thereon then made, a sum not exceeding 400*l*. be applied in placing *out my said grandson to any trade, profession, or employment he may, with the approbation of my execu- [*145] tors choose. And my will and meaning is, that the surplus divi-

¹ In this edition, so much of the statements, arguments, and judgments, as relate to the power of an executor to pledge property has been omitted.

² The statement of the case and arguments are taken from 2 Bro. C. C. 431; the judgment from 2 Dick. 712.

dends, if any, over and beside such allowances as aforesaid, from time to time be invested in the like South Sea Annuities, and that the said *capital sum, with such surplus dividends, be transferred to my said grandson at his age of twenty-one years*, if he shall be living, but *if he shall die before that age*, I give the said annuities between Mrs. Elizabeth Tyler, who now lives with me, and my god-daughter, *Margaret Christiana Tyler, equally to be divided between them, share and share alike*, but the share of my god-daughter not to be transferred to her till twenty-one. And if she shall die before her arrival at that age, I give her share to the said Elizabeth Tyler, for her own use and benefit; also, I will that my executors hereinafter named, do, with all convenient speed after my decease, purchase the sum of 10,000*l.* South Sea Annuities, 1751, in their names, upon the trusts after mentioned, that is to say, upon trust that they and the survivor and survivors of them do stand possessed thereof, and out of the dividends pay or permit the said Elizabeth Tyler to take or receive yearly, and every year, as the same shall become payable, the sum of 100*l.* for the maintenance and education of my said god-daughter, Margaret Christiana Tyler, until her age of twenty-one years, which will be on the 18th day of June, 1785, and add the surplus of such dividends from time to time to the said capital stock; and at her said age of twenty-one years, I will that *one moiety of the said capital stock of 10,000*l.* and the savings thereof, be paid and transferred to my said god-daughter, in case she shall be then unmarried; and that, at her age of twenty-five years, if she shall be then unmarried, I will that the other moiety of the said 10,000*l.* be then transferred to her for her own use and benefit; but in case my said god-daughter shall marry before her said age of twenty-one years, with the consent of her said mother, Elizabeth Tyler, I will that one moiety of the said 10,000*l.*, with the savings made,* [*146] *be settled on my said god-daughter, for her separate *use, and her issue, in such manner as her said mother Elizabeth Tyler, shall think proper, and the other moiety thereof, with the surplus dividends, disposed of, as she, my said god-daughter, shall think fit; but in case my said god-daughter shall depart this life before her arrival at the age of twenty-five years, unmarried, then, and in such case, I give the said 10,000*l.* to her said mother, Elizabeth Tyler, for her own use and benefit.* I give, devise, and bequeath to my executors, and to their heirs, all my freehold messuages or tenements, with the appurtenances, in Denmark-court in the Strand, being Nos. 2, 3, 4, and 5, in trust, that they and the survivors of them, and the heirs and assigns of such survivor, do from time to time receive the rents and profits thereof, and lay out the same in government securities, to the use of my aforesaid god-daughter, Margaret Christiana Tyler, till her age of twenty-one years; and from and after her attaining that age, I give the said messuages, and the rents, issues, and profits received by my said executors in the mean time, to my said god-daughter, her heirs, executors, administrators, and assigns, for ever; but if my

said god-daughter shall depart this life before she shall attain the age of twenty-one years, I give and devise the said messuages, or tenements and premises, to my said grandson, Richard Dryer, if living, his heirs and assigns; but if dead, I give and devise the same to the said Elizabeth Tyler, her heirs and assigns for ever." He then gave several other legacies, and appointed as follows:—"All my *freehold* estate in Whitechapel, in the county of Middlesex, and all bond debts, and other debts, owing to me by any person or persons whomsoever (particularly a sum of 2300*l.* and interest, due to me from Maurice Dryer and his wife, on mortgage of their estate), and effects as well real as personal, whatsoever and wheresoever, and of what nature or kind soever, I give and bequeath the same to the aforesaid Elizabeth Tyler, her heirs, executors, *administrators and assigns*, for ever, for her great care in looking after me in my several illnesses, and whom I look upon as my wife in every respect, which I would have made her, had it not been for a foolish promise I made to my late wife in her lifetime; and constitute and appoint the aforesaid Elizabeth Tyler, George Shakespear the Elder, Charles Mayhew, and Philip Nind, executors and trustees of this my last will and testament."

In 1774, James Cockburn left to the plaintiff Margaret Christiana Tyler a legacy of 100*l.* and made the defendant Tyler executrix, and Richard Kee died in September, 1776, without revoking his will. The plaintiff Samuel Scott about the latter end of 1782 paid his addresses to the other plaintiff, Margaret Christiana, and by her consent made proposals to the defendant Elizabeth Tyler relative to a marriage with her daughter, offering to settle her whole fortune, together with a reasonable part of his own, upon the marriage, which proposal was rejected by the defendant; but on the 17th of May, 1783, he married the other plaintiff, Margaret Christiana, *without her mother's consent*.

In 1786, Elizabeth Tyler became a bankrupt.

The original and supplemental bill prayed (amongst other things) that the right of Margaret Christiana to the 10,000*l.* South Sea Stock might be declared, and the same settled on the marriage.

The defendant Elizabeth Tyler by her answer denied that the marriage of the plaintiff was by her consent, and insisted, that, for want of performance of that condition, the plaintiff Margaret Christiana had forfeited her legacy of 10,000*l.* South Sea Annuities, which had fallen into the residuary estate of the testator.

The case was argued on three days in Easter and three in Trinity Term, 1787.

Mr. *Mansfield*, for the plaintiffs.—First, we say, that Margaret Christiana Tyler, having married under her age of twenty-one, is entitled to the legacy of 10,000*l.* If she married under that age, a moiety was to be settled on the marriage, the other to be paid

as she should direct. She, having married, is therefore become entitled to it. But it is objected, on the other side, that she is [*148] not entitled, *because her marriage with the other plaintiff was not with the consent of her mother, whose consent was made necessary by the testator's will. The doctrine of our law is, that wherever there is a personal legacy or a portion payable out of money only, and not out of land, and a condition is annexed of not marrying without consent, the clause restraining marriage is construed to be in *terrorem* only, and void; and it is immaterial whether the condition be precedent or subsequent. In this point our law follows the civil law, as far as personal property is concerned. If this were a new case, and to be argued on principle, it would perhaps be a matter of more difficulty; but the law seems to be so fully settled, that it scarcely seems to be necessary to do more than mention a few of the leading cases: *Hervey v. Aston*, Ca. t. Talb. 212, 1 Atk. 361, and *Comyn's Rep.* 726; *Rynish v. Martin*, 3 Atk. 330; *Elton v. Elton*, 1 Wils. 159. According to which cases, the plaintiff would be entitled to this legacy; and the condition requiring Mrs. Tyler's consent would be *pro tanto* void, even if it be taken as a condition precedent. But, in truth, this is a condition subsequent; the plaintiff was entitled absolutely to this legacy although she did not marry. Marriage is not necessary to give her the legacy: the condition would therefore operate to divest a gift which would otherwise have effect. The testator meant her to have the legacy in all events, at a certain period; and the clause respecting her marriage with Mrs. Tyler's consent was only meant to accelerate the payment.

Mr. Scott,¹ on the same side.—Independently of the clause containing the condition of marrying with consent, it may be argued, that the testator intended the legatee to have the 10,000*l.* in every event except one; namely, that of her dying unmarried under the age of twenty-five years, which, by her marriage, is now become impossible. That is the only event in which he has given the legacy over; for it is settled that the bequest of a residue is never considered as having the effect of a bequest over, of a particular legacy. But, on the authorities, it is clear, that [*149] *this being a personal legacy, the condition, as far as it requires the consent of Mrs. Tyler, is in *terrorem* only, and therefore void in law; and that, in fact, the condition, as far as it is legal, is complied with by the marriage. The case of *Long v. Dennis*, 4 Burr. 2052, shows how averse the Court always are from conditions in restraint of marriage, by requiring consent even in the case where*the legacy issues out of land. However, in the case of personalty, the rule is fully established, from *Hervey v. Aston*, that in this case our Courts follow the rules of the civil law, and that by that law two strict maxims are laid down. 1st, That marriage ought to be free. 2nd, That a testa-

¹ Afterwards Earl of Eldon.

ment shall not be inofficious. With reference to these two maxims, they held a condition requiring consent to marriage to be void; whereby, 1st, They encouraged matrimony upon sound principles of policy. 2nd, They prevented heirs from being defeated of their inheritance, by conditions requiring them to obtain consent from particular persons, which was a mode invented to evade the laws respecting inofficious testaments, by requiring a consent which the testator knew to be impossible to obtain. On this subject the civil law was very strict, and it was immaterial whether the condition was precedent or subsequent, or whether there was any gift over or not; nor did it signify what relation the legatee bore to the testator. The condition was absolutely void: *Godolph. Orphans' Leg. b. 1, c. 15*. This shows that the only effect of the condition was, that it made it necessary for the party to marry, and the other part of the condition, requiring consent, is unlawful and void. Marriage alone, therefore, is a compliance with the condition. *Godolph. b. 3, c. 17*. And the subject is more fully considered in *Swinburne, b. 4, c. 12, p. 266*. That these rules have been adopted by our law, is clear from many cases, particularly *Wheeler v. Bingham*, 1 Wils. 135; *Elton v. Elton*, 1 Wils. 159; *Piggot v. Morris*, Sel. Ch. Ca. 26; and in 2 Eq. Ca. Ab. 214. This last case may seem at first to be against us, but it was decided on the double times of payment. Then *Underwood v. Morris*, 2 Atk. 184, adopts the rule: *Semphill v. Bayley*, Prec. Ch. *562. *Garbut v. Hilton*, 1 Atk. 381, is a negative authority for us on this point, and [*150] shows that, if a marriage had been had, the condition would have been void, as far as it required assent: *Bellasis v. Ermine*, 1 Ch. Ca. 22. Another head of cases is, where there has been a provision made on the alternative of not marrying with consent, and there the Court has not relieved against the condition; but this is a distinct ground, and does not apply to this case. *Gillet v. Wray*, 1 P. Wms. 284, is a case of this nature. *Hemmings v. Munkley*, 1 Bro. C. C. 304, does certainly in some measure contradict *Underwood v. Morris*; but whether that case be wrong or right, is at present immaterial, as here is no devise over. [Lord Chancellor Thurlow.—The civil law seems to have determined it to be illegal to give one person a general control over another in respect to marriage: but I always apprehended this to be restrained¹ to a general control, and not to the preventing a rash or precipitate match. Here it is confined to marrying with consent under twenty-one years of age; and the question is, whether there is anything in sound reason to make a restraint to this extent illegal. Confining it to years of immaturity is a very different thing from a general restraint of marriage.] The second question in this case is, in respect to the deposit of the bonds by Mrs. Tyler in the hands of Messrs. Hankey the bankers, whether they can retain them against the specific legatee for the

¹ See *Stackpole v. Beaumont*, 3 Ves. 89.

private debt of the executrix. No assignment was ever made of them; it was merely a deposit of part of the testator's property, and made for a purpose that had no reference whatever to the purposes of the will. *Mead v. Lord Orrery*, 3 Atk. 235, lays down the rule, to be sure, pretty broadly, that executors may assign or pledge the testator's estate for any purpose whatsoever; but that case has been much shaken since, by *Bonney v. Ridgard*,¹ before the Master of the Rolls, December 3rd, 1784, where his Honor was of opinion, that the rule was carried too far in *Mead v. Lord Orrery*; for, though it is clear that an executor may dispose of assets, and anybody purchasing of him is not bound to see to the [*151] application of the money, yet this shall never protect anybody who purchases from an executor with a full knowledge that the money was to be misapplied; and that mortgaging a leasehold property of the testator did not seem to be the natural way of dealing with assets, and was in itself a very suspicious circumstance. *Nugent v. Gifford*, 1 Atk. 463, is also a strong case for the defendant, but is inconsistent with that of *Bonney v. Ridgard*. Now, this is a case where the defendants must know that the purpose for which these bonds were pledged could be no part of the purposes to which they were applicable by the will, for it was a deposit made in the course of a private transaction between them and Mrs. Tyler.

Mr. *Graham*, on the same side.—It seems a very fair inference, from the words of the will, that the plaintiff, Mrs. Scott, became entitled to her legacy at twenty-one, in all events; though in some cases not to be paid then, yet it vested. The clause is oddly worded, and there are several events which are not provided for expressly, such as her marrying with consent after twenty-one. It is given over only in one particular event, that of her dying unmarried under twenty-five; which seems to imply that her interest was absolute in all other events. But, on the point of the illegality of these conditions, the cases are positive. *Bellasis v. Ermine* is a case of great authority, for it had the assistance of the judges. So, *Fry v. Porter*, 1 Ch. Ca. 138. The distinction is between a legacy issuing out of land and a mere personalty: for, as to real property, it must follow the rules of the common law on the subject of conditions: *Reynish v. Martin*,² *Hervey v. Aston*. The Digest lays down those conditions as void, in the most unqualified terms possible: Dig. lib. 35, tit. 1; Laws, 62, 63, and 64.

Mr. *Alexander*, on the same side.—I contend that Mrs. Scott is become entitled in respect of her marriage. The rule of this Court is, that wherever a personal legacy is given to any one, upon condition of marrying with the consent of a third person, and no express provision is made in the case of the legatee's mar- [*152] rying without such consent, the part of the condition restraining the marriage to being with consent, is held to be in terrorem only, and the legacy vests on the marriage; and

¹ 4 Bro. C. C. 120; 1 Cox, 145.

² 3 Atk. 330.

this is so, whether the condition be precedent or subsequent; whether it be a portion or a legacy; whether the restraint be temporary or perpetual; and notwithstanding there is a general devise of the residue. But they will object, on the other side, first, that this rule does not apply where the condition is precedent. The doctrine is adopted from the civil law, and it would be almost unnecessary to argue that this distinction does not apply, had not Lord Chief Baron Comyns, in his argument in *Hervey v. Aston*,¹ taken great pains to prove that there was a distinction in the civil law between conditions precedent and subsequent. I admit the civil law had such a distinction, but it did not apply to this sort of condition. The rule was, that where the condition was impossible, against good morals or positive law, there was no distinction whether it was precedent or subsequent: the legatee took the legacy, discharged of the condition. The Lord Chief Baron himself states the rule so, in p. 788. Now this sort of condition was prohibited by the Lex Julia, and therefore falls within the rule. This the Lord Chief Baron admits in p. 736, but he cites Dig. 35, tit. 1, l. 64, which relates to restraint of another kind, and omits to cite Dig. 35, tit. 1, l. 72, si arbitratu Titii Seia nupserit, hæres meus ei fundum dato etiam sine arbitrio Titii, eam nubentem, legatum accipere respondendum est; eam legis sententiam videri, ne quid omnino nuptiis impedimentum inferatur. Then, if it was contrary to law, it is the same as if it had not been written, and no distinction whether it was precedent or subsequent. With respect to the modern practice of our Ecclesiastical Courts, we are informed it is consonant to the rule of the Digest. The cases in our law are principally *Bellasis v. Ermine*, 1 Ch. Ca. 22; *Semphill v. Bayly*, Prec. Ch. 562; *Pulling v. Reddy*, 1 Wils. 21; *Reynish v. Martin*, 3 Atk. 330; which last was a condition precedent. The cases where the condition is subsequent, prove the same thing. Those where the resolution* is in favour of the forfeiture, proceed on different circumstances. *Sutton v. Jewke*, 2 Ch. Rep. 95; [*153] *Jarvis v. Duke*, 1 Vern. 19, are on the devise over; *Stratton v. Grymes*, 2 Vern. 357; *Aston v. Aston*, 2 Vern. 452, on the same circumstance; *Gillet v. Wray*, 1 P. Wms. 284; *Creagh v. Wilson*, 2 Vern. 572; on the alternative provision; *Pigot v. Morris*, Sel. Ch. Ca. 26; *Hervey v. Aston*, Comyns, 726, was a case of land; *Chauncy v. Graydon*, 2 Atk. 616, there was a devise over; *Hemmings v. Munkley*, 1 Bro. Ch. Ca. 304, which seems to have been a hasty determination, but there is a devise over; from all which cases taken together, it seems that no distinction has been taken on this subject between conditions precedent and subsequent. The next objection that will be made, will be, that though this rule holds good of a portion, it does not extend to a legacy. This will be supported by an argument drawn from the civil law, and which is stated by Lord Chief Baron Comyns in his argu-

¹ Com. Rep 726.

ment, fol. 735, and a conclusion will be drawn, that it applies only to portions. But this proceeds only on a mistake of the Lex Julia, the policy of which was to compel persons to marry, by all the means that could be devised. It is not, therefore, probable that such a law should be confined to portions, and indeed the words of the law equally comprehend legacies. So, in *Reynish v. Martin*, which was the case of a legacy, not of a portion, for the party was entitled to a large provision besides. The third objection is, that though the rule may obtain where the restraint is perpetual, it is otherwise where it is temporary, and, as in this case, to cease at twenty-one or twenty-five years of age. If the question were to turn upon the policy of the thing, I admit this might be a very wise distinction, but it appears from all the cases, that there is no ground to argue it on policy. The objection proceeds on the supposition that the determination turns on the illegality of the restraint; in the civil law, it is true it is so, but this Court has adopted the rule of civil law in part only; and as a rule of construction of the testator's intent, [*154] that the condition should *be in terrorem only; and the question with us is only, whether the condition was meant in terrorem. Upon this ground it is, that in those cases where there are devise over, the condition has had its effect; but if the condition was considered as being in itself illegal, there being a devise over could make no difference; but the cases in our law say, that where there is a devise over, the testator having made an express provision in the event of the condition not being complied with, shows sufficiently that he did not mean it in terrorem only; and this reconciles these cases with the others, which would be unintelligible if they proceeded on the illegality of the restraint. The same observations arise upon another class of cases: those where there is a provision made for the legatee in the alternative; if the condition were illegal, it would be equally so in that case with any other. In the Roman law it was immaterial whether there was a devise over or not; for this reason it is that in our law the constant language is, that the condition is in terrorem; but there is no such language in the Roman law, in ours not a word of the condition being absolutely illegal and void, except in the case of *Long v. Dennis*, where the language attributed to Lord Mansfield by the reporter is so extraordinary as to leave room to doubt the accuracy of the report in other respects. From hence we may gather, that though our law has adopted the Roman law in part, it has not done so on the whole, and whatever the distinction in that law might be between temporary and perpetual restraints, our law has not followed them; no such distinction is to be found in any of the cases. If it be possible for a man to impose such a restraint till twenty-one, he has not done it here. Where he meant to give the property over, he has done it. In the bequest to his grandson, he has devised it over. Consider the policy of construing it so here. The residuary legatee had the custody of the infant; it was her consent, if

any, that was to be had to the marriage. How easy it would be to her to encourage a match without being proved to have consented to it; and she would herself be the person *to take advantage of its being without consent, and obtain the [*155] forfeiture. If the point, therefore, turned on any ground of policy, there is strong reason why, in this case, the restraint should not hold. The last point they will contend is, that the devise of the residue is equal to a devise over; and this will be founded on the case of *Amos v. Horner*, 1 Eq. Ca. Ab. 112; but there is no principle of good sense upon which it should be so. And the authority of *Amos v. Horner* has been expressly denied in *Hervey v. Aston*, *Garret v. Pretty*, and *Wheeler v. Bingham*, 1 Wils. 135.

Mr. *Hardinge*, for the defendant Elizabeth Tyler and her assignees.—(1.) One of the four alternative contingencies upon which the daughter's interest is to depend, and that which alone can found her claim to the limitation of this entire sum for her benefit, is not accomplished. She has not "married before the age of twenty-one with her mother's consent." The alternative, respecting this marriage with consent, is not merely formal, nor is it by way of substitution for other alternatives, and with an equal benefit annexed, but substantially different, and with additional benefit. She is to attain the age of twenty-one,—a mere contingency of time,—or she is to attain it unmarried; or she is to attain the age of twenty-five before marriage; or she is to marry with her mother's consent under the age of twenty-one. Upon every one of these alternatives after the first, her state is improved. In the first event, she is to have certain freehold houses. In the second, she is to have an immediate 5000*l.* In the third, she is to have an additional 5000*l.* In the fourth, she is to have 10,000*l.* before the age of twenty-one; but 5000*l.* is to be settled upon the marriage. The fourth contingency, interposing its earlier effects, saves the legatee from the restraint of the other stipulations, and by an act very much in her own power. The will does not compel her to be unmarried, or to wait for the age of twenty-five, or even that of twenty-one before her marriage; for she is only to marry with her mother's consent before twenty-one, and the 10,000*l.* is from that instant her own.

*(2.) There is no condition respecting marriage after the age of twenty-five; and there is no condition requiring [*156] consent after the age of twenty-one. The contingency of time is definite; but, coupled with a condition essential to its benefit, or indefinite, except as falling within a certain period, but so as to admit of being defined by the performance of a condition,—the marriage with consent. The will may be construed as if the words had been "when she has attained the age of twenty-five unmarried, or when she has married before twenty-one, with her mother's consent."

(3.) There is no direct legacy to the daughter. The gift is to

executors; and they are to pay at the several periods for her benefit.

(4.) She has a sure provision if she arrives at the age of twenty-one, married or unmarried, and married with or without consent.

(5.) Upon failure of the other events described, there is a marked and clear limitation over to the mother. But it is argued, that, upon the failure of this event (i. e. of the marriage before twenty-one, with consent), no limitation over to the mother appears in the will; and it is true, that, in terms no such limitation is to be found. But there is a limitation over of the whole 10,000% directly to the mother, in the very next clause to this, upon the event of the daughter's death before twenty-five unmarried; and she, the mother, is residuary legatee.

The assignees of the mother argue thus in their claim to the 10,000%:—

1st. The intention of the testator is clear to make the condition peremptory, and limit over the interest.

2ndly. The condition which he has imposed is unexceptionable if it stood alone, and is indispensable to any benefit under the will; or,

3rdly. At least it would be unexceptionable here, as put by way of alternative, and enabling a better provision.

4thly. It would avail here as a limitation of time; or,

5thly. As being followed by a limitation over.

[*157] 1st. As to the intention. The will has clearly meant *that her marriage without consent before twenty-one should put her in the same condition respecting her fortune as if she died before she attained the age of twenty-five unmarried.

It has been argued, that a right in the whole 10,000% vested in the daughter at the age of twenty-one, which this clause respecting the limitation over, if it operates at all, is to divest, and that a right cannot be divested by implication; but that argument overlooks the word "unmarried."

Another of the counsel has more plausibly reasoned, that inasmuch as the limitation over is expressly upon another event, it can only operate, in case of that event, as a limitation over; so that, in this respect, if the mother has any interest at all, it must be in her character of residuary legatee; but that she cannot, in that character, take this interest; because the testator has implied that she is only to have it in a certain event, which has failed; but why cannot she be excluded in one view from this interest, and admitted in another which is in alio jure, and which, by a devolution of law upon a partial intestacy falls into the residuum?

The counsel adds, that if the mother is excluded, the daughter alone can take this interest. But that is not a correct inference; for, if the residue given to the mother must be formed after a deduction of this interest, the part which is deducted will be a residue undisposed of.

2nd. The condition is good—even if it were the case of a direct legacy to the daughter, upon condition of a marriage, with consent of the mother before twenty-one.

It is a good condition by the civil law, and good in this court, which has not implicitly followed the rule of the civil law as to legacies, nor with an accurate reference either to the reason of that rule or to the distinction upon it.

By the civil law, the condition of remaining unmarried is void, and so is the condition which requires any consent, though it be that of the parent. This too, with or without a limitation over superadded. And if the general *rule which dispenses with a parent's consent be just, the extent of it thus far [*158] has very good sense in it.

The reason, however, of the rule, as given in Swinburne, is perfectly ridiculous. It stands thus: "A restraint upon marriage in general is void. This rule is peremptory and universal. A requisition of consent, which the testator knows will never be given, would baffle the rule; every testator may be guilty of this evasion; every nominal trustee may be an accomplice in it; a testator who is a parent may act in this point against his own child; therefore, says the civil law, we must cut the knot—'Rescindi debet quod fraudandæ legis gratia ascriptum est.'"

But even the civil law, with all its enmity against the condition, lets in the effect of it in another shape; for if a marriage with consent is to mark the time at which the legacy will be due, the Ecclesiastical Courts will not anticipate the event or act upon it by halves. In the case of *Hervey v. Aston*, Com. Rep. 735, the words of the Lord Chief Baron Comyns are these—"If a legacy be given upon a preceding fact, that may or may not be done, or be to be paid at such a time as may or may not come; if the fact be not performed, or if the time should never come, the legacy would be lost by the civil law:" and in p. 744, "When the legacy is given to be paid at a certain time, or upon a certain act which is to be performed, nothing is due till the time incurred, or the act performed, by the civil law." He cites for this Dig. l. 36, tit. 2, c. 21, 22. In p. 756, he puts the very case of money given to be paid upon marriage with consent, and holds, that, in that case, the legacy would be suspended by the civil law.

He seems to consider the marriage and the consent as two events that are indispensable marks of the time at which the gift shall begin to speak.

This rule, however, of the civil law, as it respects the mere condition, is not implicitly adopted here, and the reason of it never. For here, the condition of a parent's consent is good and meritorious. Lords Hale and Kelynge, in *Fry v. Porter*, approve it in very emphatical terms. *Lord Chief Baron Comyns does the same in *Hervey v. Aston*, Com. Rep. 748. [*159]

The idea of a condition in terrorem, as it is called, is perfectly ridiculous. What is a terror which is never to intimidate?

Would a man of sense impose it? Would any but an idiot act upon it?

The intention of the restraint is to guard against an improvident marriage, and punish it if it shall have taken place. In this view, which has the soundest policy, the restraint is here *stricti juris* to a certain extent; and though it is difficult, perhaps, to ascertain the limits with accurate precision, they are marked enough to bear directly upon the case before us.

According to Lord Chief Baron Comyns, in *Hervey v. Aston*, p. 729, "If money be directly given to A., in consideration that the legatee shall not marry without consent, and there is no devise over, the condition is ineffectual even here;" that is, in other words, if an absolute gift is qualified by that condition imposed upon it.

But it seems agreed, that if it be a devise of real estate, or of a sum charged upon real estate, the condition would be effectual, though without a devise over.

These distinctions are not very becoming; and they offend one the more, when the degree in which the rule taken from the civil law is adopted here, has been justified by a view to the uniformity of the two Courts, though uniformity in the same Court is thus overlooked. Suppose portions to A. and B., two daughters, of the same value, and qualified by the same condition, what can be more irrational or incongruous than to repel the condition as to one of the daughters, and adopt it as to the other, because the fund happens to be different?

The reason of rejecting the rule where there is a limitation over is explained by Chief Baron Comyns to be this: he says the intention is better marked by that circumstance; and he contends that if a similar intention can be collected aliunde, it should have the same effect. Lord Hardwicke, indeed, says, the intention is considered as favouring the devisee over, and as [160] vesting a right in him; that it is a condition, therefore, in that view, taken more as beneficial to him than as prejudicial to the legatee restrained.

But if money be given to be paid at twenty-one, or marriage with consent, both Courts are agreed that it is a good restraint, and that no money will be due till one or other of those events has taken place, and a fortiori, if the money be not given to the legatee, to be paid at those periods, but given to another in trust for that payment. The distinction is taken in *Hervey v. Aston*, Com. Rep. 752; and the point itself decided by an obvious implication resulting from the actual judgment in that case.

The 2000*l.* given by that will was personal estate; but it had the same condition imposed upon it, which had also fettered a real devise in the same will, and that condition was, "a marriage with consent;" yet, if the condition of requiring assent is void in a personal gift, the marriage without the consent would have entitled the legatee.

But the argument of Lord Chief Baron Comyns is more direct.

Page 751, he construes the will as if expressed thus: "When she marries with consent, I give her 2000*l.* more." He first argues from a general intention, covering both funds, and pointing at the time when the gift shall take place; but if the condition were necessarily bad in a personal gift, the time could not be so qualified.

He then reasons from its being a personal gift, in augmentation of the real devise preceding it, and he lays particular stress upon the want of a gift immediately to the child. He says, that if she were to die before the first portion could be paid, she would have neither of the gifts, and he comes, p. 753, to the very point, asserting the intent of the will to be, that the 2000*l.* shall be due to her upon her marriage with consent, and puts it as if so expressed. He affirms the condition to be lawful, as a condition precedent, and states, that, in every other personal gift, conditions precedent must be performed, that even the civil law holds that rule, and that we have *no instance the other way, [*161] either at common law or in this Court.

He distinguishes conditions precedent and subsequent with particular care, so as to refuse what had been too inaccurately called precedent conditions, and which he considers in the light of subsequent.

The distinction taken by him is between some event preceding the payment of the legacy (whether coupled with a condition, or importing a condition itself), and a condition put by way of restraint upon a gift actually made complete by the will, before the restraint is imposed.

3rd. But the condition here would be good, as enabling a better provision by way of alternative.

If a condition of marriage with consent, is by way of proviso to amplify a gift, there is no case where this condition, remaining unperformed, the additional benefit can be received. "You shall either have 20*l.*, or, if you marry with consent, you shall have 30*l.*" Shall the legatee marry without consent and have 30*l.*? *Creagh v. Wilson*, 2 Vern. 572, appears to be directly in point. Stress is laid upon this principle, too, in *Hervey v. Aston*, Com. Rep. 750. The testator, in the case before us, gives 10,000*l.*, at twenty-five, to his daughter unmarried; but if she marries with consent before twenty-one, he accelerates the payment, and relaxes the condition of unmarried.

No case can be found in which a new and ulterior benefit being the reason for a conditional gift, it can operate in defiance of the terms imposed.

4th. If the condition here were in itself absolutely void, either taken as precedent or subsequent, yet it would be good as a mark of the time when the legacy should be payable—this, too, even by the civil law.

In other words, if a personal legacy to a daughter is made payable upon an event marked in the time of it, by this condition upon her marriage, the legacy is not payable till the time so de-

scribed and qualified is come. Lord Chief Baron Comyns, in *Hervey v. Aston*, is express to this point: Com. Rep. 737, 744, and 756.

Swinburne, p. 269, states it as no condition, if put as an
[*162] *adverb of time "quamdiu" or "dum sola fuerit," &c. Lord Chief Baron Comyns treats it as a limitation of time, and in that view adduces the civil law as being agreed with him. This way of considering it parries the inconvenience of refusing the condition, as annexed to a personal gift, and adopting it as a gift of real estate. He distinguishes between a legacy "if," &c., and the same condition preceding the legacy, as the mark of its time.

5th. The condition here is good, as accompanied with a devise over.

The whole 10,000*l.* is given over to the mother, if the daughter should die unmarried.

If the testator had said, "unmarried before twenty one," it would have been more clear; but, even as it is, it is clear that the testator meant "unmarried before twenty-one with consent," not adverting to any marriage after twenty-one and before twenty-five.

In every other case of the event failing, upon which the particular legacy is given, the mother takes by limitation over, nor can a reason be assigned why it should be omitted here, where such peculiar anxiety is marked for the effectual performance of the condition.

The local position of the limitation over of the whole 10,000*l.* is not immaterial. It comes immediately after the gift of the 10,000*l.* upon a marriage with consent before twenty-one.

If this were not the key to it, the absurdity would be extreme; for the testator would then say, "If you should marry before twenty-one without consent, and die before twenty-five, having so married, it is not to be given over, though, in failure of all the other events, it is."

In *Hervey v. Aston*, a marriage with consent having preceded in the same will, subsequent words referring generally to marriage, are bound as referring to a marriage with consent. Thus, it appears, that in the case before us, the intention is clear from a conditional gift, the condition too is good in itself,—good as a limitation of time,—good as annexed to a better provision,—and good as accompanied with a limitation over.

[*163] *Mr. *Hargreave*,¹ for the assignees of Mr. Tyler.—Two questions occur in this cause: the one as to the bonds deposited with Messrs. Hankey, with respect to which I am not instructed to interpose; the other, concerning the 10,000*l.* claimed by Mr. and Mrs. Scott, which is a question of great importance, as it involves the general doctrine of the Court as to gifts on condition of marriage being merely in *terrorem*.

¹ See Harg. Jur. Arg. vol. 1, p. 22.

Four times has this Court called in the assistance of the judges of the Courts of law upon different branches of this doctrine. Lord Clarendon, in the case of *Bellasis v. Ermine* (15 Car. 2), was assisted by Lord Chief Justice Hyde and Lord Chief Baron Hale. Lord Keeper Bridgman, in the case of *Fry v. Porter* (21 Car. 2), had the three chiefs as assessors. A few years after the Revolution, in *Bertie v. Lord Falkland*, Lord Somers called in the aid of the Chief Justices Holt and Treby; and early in the last reign, *Hervey v. Aston* was heard before the Lord Chancellor, assisted by the Chief Justices Lee and Willes, with Mr. Justice Comyns. But notwithstanding this, and that new cases occurred in the latter part of Lord Hardwicke's time, yet, during the time that the Great Seal was in commission, the case of *Mansell v. Mansell*, on a power of jointuring given to a testator for life, on condition of his marrying with consent, came on, and underwent great discussion. In the interval between that case and the present time, two cases only seem to have occurred, *Randall v. Payne* (1 Bro. C. C. 55) and *Hemmings v. Munkley* (1 Bro. C. C. 304), neither of which appears to have been much debated.

The present case induces a necessity of re-examining the principles and authorities of the doctrine in question; I shall, therefore, examine the present case as far as relates to the condition of marriage with consent, annexed to the legacy given by Mr. Kee.

Under the will in question, Mr. and Mrs. Scott claim, in Mrs. Scott's right, the legacy of 10,000*l.* South Sea Annuities, and found their claim thus:—That Mrs. Scott having married under twenty-one years of age, the material *part of the contingency in Mr. Kee's will respecting the legacy has [*164] taken effect, and, therefore, that she is entitled to the Stock, with the accumulation of interest. Against this the assignees contend that she is not so entitled, because she has married without the consent of her mother. The bill states a kind of consent to have been obtained, but this is totally contradicted by the mother's answer, and there is not a syllable of proof of such consent, so that the fact must be taken to be that she has married under twenty-one, and without the consent of her mother.

The case has been argued on behalf of the plaintiffs in two ways:—First, that Mrs. Scott's title has accrued within the contingencies under the will. Secondly and principally, that the condition in the will, as far as it requires marriage with consent of the mother, is a condition in *terrorem* only, and, as such, null and inoperative.

With respect to the first point, it is not much relied upon; the true answer to it will be to state the contingencies. The first contingency is, that upon her attaining her age of twenty-one, a moiety of the Stock shall be transferred to her, in case she should be then unmarried; the event is, that at twenty-one she was, and still is, married to Mr. Scott: this contingency, therefore, has not happened. The next contingency is her attaining twenty-

five, and being then unmarried, when the remaining moiety is to be transferred; but to this there is a double answer,—she has not yet attained twenty-five, and she is married. The third contingency is, her marrying under twenty-one with the consent of her mother; but this contingency neither has happened nor ever can happen; for she married under twenty-one without consent, and has continued married till after her age of twenty-one. These are the only contingencies in the will, and are so framed that no one of them is complied with. It has, however, been attempted to raise an argument in favour of Mrs. Scott, from the devise over to Mrs. Tyler, which gives the 10,000*l.* to her only in the event of Mrs. Scott's dying before twenty-five unmarried.

[*165] *But this is inconclusive, because the real question is as to Mrs. Scott's right, not Mrs. Tyler's; because it vests Mrs. Tyler's right on the devise over, which really depends on the residuary clause, because the title on which each rests depends on the contingencies, and because the implication that Mrs. Scott is entitled to whatever Mrs. Tyler is not, is too violent.

I therefore proceed to the second and great point in the cause. The position maintained by the plaintiffs is, that it is the rule of the Court, in case of legacies of personal property, to consider conditions in restraint of marriage as merely in terrorem, unless where, upon the breach of the condition, the legacy is expressly devised over to a third person. That such a rule should ever have existed appears wonderful; and if the authorities were out of the case, the rule could not be supported.

There is no policy in our law which objects to reasonable restraints on marriage, although it will not admit of an absolute prohibition. On the contrary, it prohibits marriage under twenty-one, without consent of parents or guardians. A legacy, therefore, upon those terms, instead of being against law, coincides with and enforces it: the legality of such a legacy has been recognized in several instances, notwithstanding the condition has met with much opposition. It was once contended, that, in a devise of land, on condition of marrying with consent, the condition was null; but that point was settled in favour of the condition, in *Fry v. Porter*, 1 Ch. Ca. 138; 1 Mod. 300; and in *Bertie v. Lord Falkland*, 3 Ch. Ca. 129. So in the case of a portion to be raised out of land, in *Hervey v. Aston*, which also settled that the condition is effectual on a legacy having reference to a portion to be raised out of land; all agree that it is so of a legacy in money with a devise over. In *Mansell v. Mansell*, the condition was held effectual, on a power of jointuring with land, by the unanimous opinion of the Lords Commissioners. A question arose before Lord Hardwicke, whether the condition was effectual with respect to money to be laid out in land. This was in 1743, [*166] in the case of **Ready v. Colson*, a note of which is among Mr. Joddrell's MSS., but the point went off, the determination of it being unnecessary.

Is there any latent intent of the testator which the rule seeks

to establish? The rule seems to imply this: construing it to be in *terrorem* seems as if the intention was to deter the legatee; but what terror can arise from a condition known to be a nullity? It is impossible that the testator can mean to impose a void condition. Is there then, any rule of equity which interferes? There can be only one to have recourse to; and that is, that this Court will relieve against penalties. It will so; but then it is part of the rule to exact compensation; and where that cannot be given, the rule does not apply; but in these cases there can be no measure of compensation but the penalty, so that the rule is completely inapplicable. Where, then, is the foundation of the rule of considering restraints on marriage as only in *terrorem* to be traced? The answer given is, that the Roman law¹ rejected such conditions as invalid; that our Ecclesiastical Courts followed the rule of the Roman law, and that when the Courts of equity assumed a concurrent jurisdiction over legacies, they held themselves bound to adopt the same rules.

With respect to the Roman law, it certainly was unfavourable to conditions in restraint of marriage; many of its constitutions tend to promote matrimony, and discourage celibacy; the most celebrated provisions are those contained in the law commonly called the *Lex Julia*, but which is properly the *Lex Papia Poppæa*, the *Lex Julia* being a much earlier law. Among the provisions in the *Lex Papia Poppæa*, for encouraging matrimony, is one aimed against legacies on condition of celibacy. It is in the 29th chapter of the *Remnants of the Law*, as collected by Heineccius:² the words are, "*Si quis celibatus aut viduitatis conditionem hæredi legatariove injunxerit: hæres legatariusve ea conditione liberi sunt, neque eo minus delatam hæreditatem legatumve, ex hac lege, consequuntur;*" the terms of the law, therefore, only nullify conditions *wholly forbidding marriage, but do not make invalid all restraints upon it. The frauds upon the law, indeed, [*167] induced a large interpretation, extending to conditions, on account of their tendency to celibacy; as when a legacy was given on condition of marrying a particular person, who was so inferior as to make the marriage disreputable, it was deemed equivalent to a condition of celibacy, and brought within the construction of the law. So, if a legacy was given with a condition of marriage *ex arbitrio alterius*, it was null, under the idea that it was an evasion of the law, by naming a person who would not consent to any marriage. But it is impossible to argue from these provisions to our law, which will endure conditions not to marry without consent, where they do not amount to making marriage impracticable. In arguing upon the law of England, it cannot apply in argument that the law of Rome was otherwise. The Court can-

¹ "Common law" in the report is evidently a mistake.

² Heineccius in *legem Papiam Poppæam*, 4to, 1726, p. 94. And see an ample commentary on this chapter of the law in the same book, p. 298.

not adapt the *Lex Julia*, or the *Lex Papia Poppæa*, where our law is contrariant. Besides, it is far from clear that the Roman law did reject conditions in restraint of marriage to the extent supposed. In the case taken from that law the restraint is perpetual, and is given to a stranger,—not, as in the present case, restrained to a limited time, and the consent required that of the parent, a restraint imposed by the law itself. There is no authority to show that such a restraint would have been rejected by the Roman law. With respect to the Ecclesiastical Courts, it is probably a mistake that they carried the rule to the extent in which the Court of Chancery is understood to have received it. What authority is there to show that there was any such rule? Since the Courts of equity have assumed a concurrent jurisdiction over legacies, the Ecclesiastical Courts have little cognisance of them; and when they are called upon, instead of giving the rule to the Court of Chancery, they regulate their proceedings by our equity reports. Swinburne and Godolphin are almost the only books which have been produced by the ecclesiastic lawyers; but Swinburne is wholly occupied by the Roman law upon his [*168] subject; and Godolphin, where *he does not follow him, takes his materials from the reports of decisions in the temporal Courts. The only reference by name to a legacy cause, decided in the spiritual Court, is in Moore's Rep. 857, where Judge Winch cites *Pigot's case*, in which the legacy was held good, notwithstanding the breach of a condition not to marry without consent. From this case alone the Courts of equity are said to have borrowed this rule from the Ecclesiastical Court, and are said to have adopted it, not from conviction of its rectitude, but merely for the sake of conformity between the concurrent jurisdictions, which in general is certainly highly laudable, but has its proper bounds. But in the present case there is a seeming inconsistency, as we are immediately told that the Courts of equity reject a very material part of the rule adopted by the Ecclesiastical Court. With them a devise over will be no guard to the condition; but it is confessed, that, in the Courts of equity, it will render the condition inviolable,—a deviation which greatly detracts from the conformity of the jurisdictions.

The doctrine appears, from this view of it, to rest on erroneous opinions with respect to the Roman law, and the practice of the Ecclesiastical Court; but it has become so entrenched by authorities, and supported by great names, especially those of Hale, Nottingham, and Hardwicke, that it cannot be wholly denied to be the law of the Court; it can only now be pressed, that the Court will not carry it an iota beyond its limits, and resists its application to such a case as the present. For this purpose I shall contend,—

1st, That the doctrine is inapplicable where the condition of marriage is precedent;

2dly, That the residuary devise in the present case is a sufficient devise over;

3rdly, That the doctrine ought to be confined to immediate and direct legacies, and not to include a trust engrafted upon them; under which latter denomination the legacy in question must be admitted to be.

*If I succeed in either of these points, it will negative the claim of the plaintiffs to this legacy of the 10,000*l*. [*169]

1st, As to the first of the three points. I acknowledge that the authorities in support of the in terrorem doctrine are, to a certain extent, so strong and so uniform, that they extort submission; but, in so saying, I look to the distinction between precedent and subsequent conditions. Where the condition is subsequent the authorities are peremptory. I entertained a doubt whether it was not the same as to conditions precedent, being aware that Lord Hardwicke had refused to draw the distinction between them where restraint of marriage was concerned; but upon serious investigation, I found ample room for exempting conditions precedent, both upon the principle on which equity affords relief, and upon the authorities; and with respect to the principle on which the Court relieves, it does not extend to conditions precedent. The only principle to which it can be referred, is that by which the Court relieves against penalties and forfeitures. The rule with respect to marriage conditions, when adopted by the Courts of equity, therefore became arranged under that head, and not being permitted to have any further effect than to alarm the parties, they obtained the names of conditions in terrorem. Unfortunately that principle required compensation to be made, which will not hold as to these conditions; but this only shows that the principle has been misapplied, not that the relief has not been administered under colour of that principle. If this be allowed to be the principle, let us examine whether, on that account, conditions precedent are not entitled to be exempted from the interference. The old distinction between conditions precedent and conditions subsequent, to which Lord Coke calls the attention as of the first importance, is this: that where an estate is given on a condition subsequent, the estate vests till the condition or contingency takes place, and then it operates by divesting or destroying the estate. It is resorted to in order to enforce the object of the donor by the terror of a penalty, and as it operates by the destruction of estates *it is considered as odious, and stricti juris. In a MS. common-place book of Judge Dodderidge's it is said, "Conditions that go in defeazance shall be taken strictly, for they are odious." To the same effect is Co. Litt. 218 a; *Fraunces's case*, 8 Co. 90: title "Condition," in Fulbeck's Par. and Shep. Touch. One effect of this disfavour is, that if the condition is, or by the act of God becomes, impossible, the estate as is absolute, if there had been no condition: Co. Litt. 206 a. So, where the condition subsequent is unlawful: Fulbeck's Par. part 2, 66 b, citing Perkins, Sect. 139, and 4 Hen. 7, 4, and 2 Hen. 4, 9. Another effect of the odium under which they lie, is, that they are construed strictly: *Fraunces's case*, 8

Co. 90 b, and 1 Leon. 305. Thus, it appears, that, in respect to the penal nature of these conditions, the phrase of *in terrorem* is peculiarly applicable to them.

The condition precedent is of quite an opposite nature; there the estate cannot commence until the condition is performed, or the contingency has happened. It has, therefore, been observed upon it that "*Adimpleri debet, prius quam sequatur effectus.*" A passage in Plowden conveys an idea of the dependent nature of the estate on such a condition. Judge Brown says, Plowd. 272, "If I grant to you, that if you will do such a thing, you shall have a lease in such particular land of mine; there the condition precedes the lease, as the needle precedes the thread, and as the needle draws the thread after it, does the condition the lease." The condition, therefore, is beneficial, not penal, and is favoured and benignantly interpreted, according to the intention of the words, Co. Litt. 218 a, 219 b. The phrase of *in terrorem* is therefore from its nature inapplicable to them; actual performance is essential to them, notwithstanding their favourable interpretation: therefore, though the condition be impossible or illegal, no estate can arise, and it is the same as if none had been given; Co. Litt. 206, a. and b., 217 b., 218 a.; Ful. Par. part 2, 67 a. The result is, that though penal conditions to destroy estates may [*171] be dispensed with, beneficial conditions to raise estates must always be complied with.

If this doctrine is important at law, it essentially affects the jurisdiction of equity. From the penal nature of conditions subsequent, they in general fall within that lenient principle by which Courts of equity relieve against penalties; but there is no connexion between this and a condition precedent, which operates by giving an estate and conferring a benefit. Upon such a condition equity cannot interpose; equity cannot raise an estate which the donor has not given. If such power was to be assumed over one subject, it might soon extend over others, and overleap all boundaries. If the principle on which this argument proceeds be just, is there a reason to be alleged why marriage conditions precedent, when conformable to law, should not be strictly complied with? Nor is the distinction of penalty or no penalty new in this Court: there are cases where the form alone will make the difference, as in the case where four or four and a half per cent. interest is reserved in a mortgage, with a condition of increasing the interest, in default of punctual payment, to five per cent: the Court will relieve, because it is in substance and in form a penalty; but if the reservation be five per cent., with condition of reducing the interest to four, on punctual payment, equity cannot interpose, because, though they are substantially the same, there is not in this case the form of a penalty. This is a stronger case than that between estate and conditions; because, with respect to the payment of interests, the difference is only formal; but the difference between conditions precedent and subsequent is substantial.

If I have established the doctrine with respect to the difference

between conditions precedent and subsequent, I may proceed to argue, that the circumstances of the present case furnish less reason for considering it as a penalty than cases upon marriage conditions in general. This is not the case of a child left with a portion, wholly dependent on a marriage conditioned to be with consent; *it is the case of an additional portion; besides [*172] the present portion, she has four freehold houses, with the intermediate rents, together with the money due on the New River bonds, with the accruing interest upon them, the principal sum of which is 1000*l.*; she has also a contingent interest on the death of the grandson. The present is therefore a conditional addition to a provision unlogged by conditions: and there is not so much to affect the feelings of the Court, and impress the idea of penalty, as a person, looking only to this provision might suppose.

I come now to the authorities on the distinction between conditions precedent and subsequent. However nice the discrimination for which I have argued may be, I cannot expect it will be recognised, if the current of authorities should be against me. I shall endeavour to evince, that, however authorities on conditions subsequent are against me, there is an ample stock, with respect to conditions precedent, of respectable authorities, that these provisions need not be disappointed.

The gentlemen on the other side have rested their argument on the authorities; they have declined arguing it on principle, and have referred the Court to cases of great weight, principally those in the time of Lord Hardwicke. The chief authorities they have relied upon are these:—*Daley v. Desbouverie*, 2 Atk. 261. The declarations of Lord Hardwicke certainly blends conditions precedent and subsequent: but he only says, that the Court puts the most favourable construction on both, to prevent forfeiture: and the judgment was given on evidence of a kind of consent to the marriage; on which account his Lordship cites *Farmer v. Compton*, 1 Ch. Rep. 1; *Wiseman v. Forster*, 2 Ch. Rep. 23, both of which are cases turning on consent: *Underwood v. Morris*, 2 Atk. 185: the report of this case has not a word on the distinction of the two conditions. I agree, however, that the condition should be taken as precedent: *Pulling v. Reddy*, 1 Wils. 21. It is not clear that the condition in this case was not subsequent: *Reynish v. Martin*, 3 Atk. 330; 1 *Wils. 130. This [*173] is an unambiguous decision, that a condition precedent is equally in terrorem with a subsequent one; and that the real estates being charged with the legacy will not exempt it from the rule: *Wheeler v. Bingham*, 3 Atk. 364; 1 Wils. 135; and in Mr. Joddrell's MS. Reports. In this Lord Hardwicke repeats his opinion against distinguishing conditions precedent; but the case was on a condition subsequent, and Lord Hardwicke treats it as such. The earliest of these cases is not further back than Lord Hardwicke's accession to the Great Seal. The cases are only five in number, and only two of them can be considered as

decisions against the effect of conditions precedent, viz., *Underwood v. Morris* and *Reynish v. Martin*. Only one of them is pointed in distinct terms against precedent conditions; and Lord Hardwicke in the other does not name the authorities on which he relied; so that at last they seem to compress themselves into one fully pointed decision, and the opinion of one single judge of equity.

I do not mean to question that Lord Hardwicke's opinion on the subject was gradually and deliberately formed. Whether he had made up his mind against exempting conditions precedent from the rule, at the time when he determined *Hervey v. Aston*, does not clearly appear; but he certainly was afterwards satisfied upon the point, which gives great weight to his opinion.

Sir Joseph Jekyll was also clearly of the same opinion, as appears by his judgment in *Hervey v. Aston*, as reported by Mr Forrester, Ca. t. Talb. 212. And some appearance of authority may be gathered for the same position from the cases before the Revolution: but, according to my idea, those cases were decided upon as conditions subsequent.

The first case in favour of conditions precedent is that of *Popham v. Bamfield*, 1 Vern. 83, where Lord Nottingham says, "Precedent conditions must be literally performed, and this Court will never vest an estate where, by reason of a condition precedent, it will not vest in law."

In *Bertie Lord Falkland*, 3 Ch. Ca. 129; Freem. Ch. Rep. 220, [*17±] and 2 Vern. 333, all the Court (Lord Somers, *assisted by the Chief Justices Holt and Treby) held, 1st, that the condition being precedent, the estate never vested; 2ndly, that the case was beyond the relief of equity. The words of the two Lord Chief Justices, that the condition of marriage was precedent, are very strong. Lord Chief Justice Treby's words, according to Vernon, were these:—"The condition, which is precedent, not having been performed, it is plain that the estate, by the letter of the will, is gone over to Lord Falkland." He afterwards said, "They run upon a plain mistake in saying that they come to be relieved against a forfeiture." In another part he says, "It is not a case in compensation; it is not capable of an equivalent to answer the will of the testator." Lord Holt's words, according to Ch. Ca. 130, were these:—"The estate was given on a condition precedent; and such is the nature of a condition precedent in point of law, that no action interposing can be a ground to relieve upon, if it be not performed; so that, being a condition precedent, though the Lord Guilford had died within the three years, and the condition had become impossible by the act of God, it could not have helped the lady. It will not be easy in a Court of equity to shew any precedent of relief in case of conditions precedent, as often happens in cases of conditions subsequent." Lord Somers also laid great stress on the condition being precedent. The case is of great strength—1st, It is a decision against a devisee, who was also heir-at-law; 2nd, The con-

dition was a hard one; 3rd, The lady had shown a willingness to do all the delicacy of her sex would permit towards the performing of it; 4th, It was a legacy of personal estate as well as a devise of land, and no attempt at a distinction was taken between them; 5th, The great ground of determination was, its being a condition precedent, not the devise over; for it appears by Freeman's Reports, that the Lord Chancellor did not hold a devise over essential on a condition precedent. Another authority with me is *Creagh v. Wilson*, 2 Vern. 572, where Lord Cowper founded himself on the greater legacies being substantially on a condition precedent. The case is, therefore, a direct authority, *that [*175] if the condition of marriage be precedent, it wants not a devise over to make it effectual. The next is *King v. Withers*, Prec. Ch. 348; Gilb. Ch. Rep. 26. The case shows Lord Harcourt's opinion, that where the condition was precedent, and had not happened, he did not think the want of a devise over material; and although the devise was of a portion out of land, no distinction was made in that respect. In *Gillet v. Wray*, 1 P. Wms. 284, Lord Chancellor Cowper held the condition not to be in terrorem—1st, Because the provision was alternative. 2ndly, Because the condition was precedent. In *Clark v. Lucy*, 3 Geo. 1, Lord Cowper is said (5 Vin. 87, in the side-note) to have expressed himself thus:—"When the party cannot be compensated in damages, it is against conscience to relieve; and in *Fry and Porter's* case, the condition could not be compensated in damages, being a marriage without consent. Precedent conditions must be literally performed, and a Court of equity will never vest an estate when, by means of a condition precedent, it will not vest at law. But as conditions subsequent are to divest an estate, there it is otherwise, where there can be a compensation made in damages as above; but in any other case, even in a case of condition subsequent, it is not so." *Holmes v. Lysaght*, 2 Bro. P. C. 103, Toml. ed., arose on the additional legacy given on a condition of marriage with consent; it is a direct authority for supporting a condition of marriage precedent, without a devise over, and in the case of personalty, for the legacy was primarily chargeable on the personal estate. The next authority is the great case of *Hervey v. Aston*, decided in 1737 or 1738, and first heard by Sir Joseph Jekyll, whose judgment is reported by Mr. Forrester, Ca. t. Talb. 212. He decided that the condition, which was precedent, was only in terrorem, both as to the portion out of land and the money legacy. The case was brought by appeal before Lord Hardwicke, who called in the assistance of the Lord Chief Justices Lee and Willes and Mr. Justice Comyns. There is a full report of the argument in 1 Atk. 361. Lord Chief Baron Comyns' argument is reported by himself; *Mr. Joddrell's MS. contains the completest account of Lord Hardwicke's [*176] argument; and far the best account of the Chief Justice's, is a MS. report which I have been favoured with by Mr. Sergeant Hill. Sir Joseph Jekyll's argument is against the effect of con-

ditions precedent; nor will Lord Hardwicke's reversal make for me, as he decided on the distinction between land and money, and held the money legacy to be governed by a reference to the portion. But all his Lordship's assessors were of opinion with me. Lord Chief Baron Comyns thought the condition effectual as to the money legacy, and relied on the case of *Creagh v. Wilson*; and his short note of the case in the margin makes the point determined a general one as to money legacies as well as portions out of land. The Chief Justices concurred in thinking the precedent condition effectual with respect to the money legacy, independently of its being mixed with the portion out of land. In *Mansell v. Mansell*, the Lords Commissioners held a precedent condition annexed to a power of jointuring to be effectual, and laid great stress on the general doctrine as to conditions precedent. An expression of Lord Mansfield, in *Ambrose v. Ashby*, 4 Burr. 1929; 1 W. Bl. Rep. 607, upon *Hervey v. Aston* being cited, his Lordship said, "That was a condition precedent, and, therefore, the estate never vested; and, in Chancery, it is held, that subsequent conditions of forfeiture, in restraint of marriage, are only in terrorem, unless there is a devise over." This amounts to an opinion, that where the condition is precedent, it is effectual without a devise over. Another authority remains, from what fell from Lord Loughborough, in *Hemmings v. Munkley*, 1 Bro. C. C. 304. The words are few but import an opinion, that the condition, being precedent, was sufficient to make it effectual. I do not rest much upon it, because in fact there was a devise over before the Court, and it is not quite certain that the Court meant to decide independently of that circumstance. These are the authorities which oppose the doctrine of Lord Hardwicke, Sir Joseph Jekyll, and Lord Chief Baron Parker. and though they [177] were few, might justify your Lordship in overruling this determination. The balance is vastly in favour of the proposition, that where the condition of marriage is precedent, it is effectual in case of a money legacy without a devise over. Upon the whole, I cannot but suspect that Lord Hardwicke fell into a mistake on the subject, by supposing many of the cases to have been on conditions precedent, which really turned on conditions subsequent. Those cases are many in number. I will only refer to them in the order of time: *Yelverton v. Newport*, Tothill, 226, is the oldest case in Chancery on a marriage condition; *Pigot's case*, cited by *Winch*, Moore, 857, as a sentence of the Ecclesiastical Court: *Norwood v. Norwood*, 1 Ch. Rep. 121; *Vintner v. Pix*, 1 Ch. Rep. 121; Toth. 227; *Bellasis v. Ermine*, 1 Ch. Ca. 22; *Freem. Ch. Rep.* 171; *teming v. Walgrave*, 1 Ch. Ca. 58; *Anon.*, 1 *Freem.* 302; *Rightson v. Overton*, *Freem. Ch. Rep.* 20; *Hicks v. Pendarvis*, *Freem. Ch. Rep.* 41; a case put by Lord Nottingham, in *Jervois v. Duke*, 1 Ven. 19; *Lord Salisbury's case*, 2 Vent. 365; 2 Vern. 223; *Skin.* 285; *Garrett v. Pretty*, 2 Vern. 293; *Semphill v. Baily*, *Prec. Ch.* 562. In all these cases, although at first sight the conditions appear to have been precedent, yet on

a closer view they were all considered as conditions subsequent. This will particularly appear by considering the case of *Bellasis v. Ermine*, which is considered as the leading case, for requiring a devise over, on a condition precedent; yet, according to the authorities as they stood in the time of Lord Hardwicke, and to the strict language of the bequest, the condition is subsequent, there being an immediate legacy by the first words, and the condition following afterwards. This construction was given to a legacy of the same kind by Sir Joseph Jekyll, *Peyton v. Bury*, 2 P. Wms. 626. It is true, in *Elton v. Elton*, 1 Ves. 4 (reported also in Mr. Joddrell's MS.), Lord Hardwicke would not allow legacies so expressed to be vested, though the legatee was a grandchild; but it is sufficient if the current of old cases considered them as vested, for if so, I believe it will be found, that the cases on which Lord Hardwicke formed his opinion, that the doctrine of in terrorem *governs conditions precedent as well as subsequent, will be found to be cases of condition subse- [*178] quent, and if so, it will leave Sir Joseph Jekyll's opinion alone in favour of the plaintiff.

2nd. The second ground upon which I argue, that the present condition is effectual, is that the general residuary devise over is a sufficient devise for that purpose.

I admit that the authorities of Sir Joseph Jekyll and Lord Hardwicke are against me upon this point. The former, in *Paget v. Haywood*, cited 1 Atk. 378, denied to a general devise of the residue the effect of a devise over. In *Hervey v. Aston*, Lord Hardwicke seems to have avoided deciding this point; but, in *Wheeler v. Bingham*, he appears to have been of opinion that it must be a special bequest, on failure of the event. There are also some earlier authorities the same way, as *Garrett v. Pretty*, 2 Vern. 293; and *Semphill v. Baily*, Prec. Ch. 562. Yet there are very strong authorities on the other side; the first of these is *Lady Kilmore's case*, cited by Lord Nottingham, in *Parker v. Parker*, Freem. Ch. Rep. 59, a legacy of 1000*l.* each to daughters, if they married with consent of a person named; and if they married without, they were to have only 500*l.* each, and the residue was given to the son. The daughters being thirty years of age, sued in Chancery for their legacies, but the Court would not decree them without security given to refund on marrying without consent. But this, I confess, is not a clear case, as to its being residue, and not a devise over, though it should seem the former. The next, *Amos v. Horner*, 1 Eq. Ca. Ab. 112, is a complete decision upon a general residuary bequest. A legacy to a daughter of 100*l.*, payable on marriage with consent, or at twenty-five; and if she married without consent, 50*l.*, and no more, the residue to the defendant; the daughter marrying without consent, under twenty-one, Sir John Trevor held the devise of the surplus of the estate to be a devise over of the 50*l.* This case was refused as an authority, by Sir Joseph Jekyll, because no decree was to be found in the Register's book; but Lord Chief Justice Willes, in

[*179] **Hervey v. Aston*, said it appeared by the calendar that a decree was made; and it appears that he was of opinion that the residuary bequest was a sufficient devise over. Upon this contrariety of authorities, your Lordship will be justified in deciding this point according to the reason of the thing and the real intention of the testator.

The nature of a residuary bequest is to vest in the legatee all the property of the testator not otherwise disposed of; therefore it is that lapsed legacies of personalty fall into the residuum, which seem once not to have been allowed: *Sprigg v. Sprigg*, 2 Vern. 394; at least, if the legatee was dead at the time of making the will. But the doctrine is now settled in favour of residuary legatees: *Wright v. Hall*, Fortescue, 182. Therefore, in *Durour v. Motteux*, 1 Ves. 320, Lord Hardwicke decided in favour of the residuary legatee on a legacy void by the Statute of Mortmain. The residuary bequest, in the present case, is in the fullest and completest terms possible; it extends both to the real and personal estate, and gives a particular reason for making her the hæres factus and universal legatory of his estate, subject to the former devises in his will. If the condition annexed to Mrs. Scott's legacy had been any other than marriage with consent, there could not have been a doubt on its failure, of Mrs. Tyler's title, the intent being sufficiently clear; and if so, why should any stronger evidence of intent be required on a condition of marrying with consent, than of living to a particular age, or any other contingency? But it may be said, that a special devise over effectuates a marriage condition, not by being an expression of intention, but by creating an interest in a third person; and this is Lord Hardwicke's method of accounting for it in *Wheeler v. Bingham*, 3 Atk. 367; but the residuary legatee is equally interested with any special devisee over. In both cases, the interest of the third person is equally at stake; the only difference is, that the interest of the one is created by general words, the other by a special limitation.

[*180] 3rd. The third point I made was, that this is not the *case of a direct legacy, but of a trust. The Court will consider whether, being such, it is at all within the sphere of the ecclesiastical jurisdiction. If it is not, the foundation on which the doctrine of in terrorem stands is wanting, and it becomes the subject of quite a different rule, under which land, portions out of land, powers over land, and money legacies, having a reference to a devise of land, are exempted from the doctrine. There was a case before Lord Hardwicke, of *Reddy v. Colson*, which I have referred to before, which went off; but Lord Hardwicke, expressed a doubt in respect to its being a trust, whether it was not exempted from the rule.

Upon the whole, Mr. and Mrs. Scott fail in making out their title to any part of the legacy of 10,000*l.*, Mrs. Scott having married under twenty-one, without the consent of her mother, which was made essential by Mr. Kee's will. The only ground for avoid-

ing the contingency is, that it is a condition in restraint of marriage, and therefore only in terrorem. In answer to this, I have endeavoured to show that the doctrine is mistaken, or at most, does not apply to conditions precedent; that if a devise over is necessary to defend a condition precedent, as well as a condition subsequent, the residuary bequest amounts to such a devise over.

Lastly, I have submitted, whether a trust is not exempted from this supposed rule of the ecclesiastical jurisdiction; I have only to add, that the present case is favourable to the validity of the condition, as it comes from a father to a child; is exacted only whilst the legatee is under twenty-one; as the power is vested in the parent; that the power has not been abused, and it is not a case where the child loses her whole provision, there being a considerable portion for her, which is not affected by the condition.

Mr. *Stainsby* (as *amicus curiæ*) referred the Court to the case in *Dyer*, 189 b (*Butler v. Lady Bray*), which he said was cited in *Mansell v. Mansell*, by Sir John Skynner, then the junior counsel in the cause, and was thought so *important by the Court, [*181] that the cause was ordered to stand over till the next day, in order that Mr. Henley, the Attorney-General, might answer it.

Mr. *Plumer*, on the same side.—The question in this cause brings two points under discussion. 1st, The intention of the testator, independent of the authorities on the subject. 2nd, The construction of the will upon the ground of the authorities.

The only question now is, as to Mrs. Scott's claim under the will. She stands in the light of a particular legatee taking this legacy out of the general fund; to do this, she must show the intention of the testator in her favour, either by express words or by implication. In the present case, it is not claimed as given in express terms; and it does not appear by implication that she was to have it in the event, which has happened, of her being married under twenty-one without her mother's consent. The legacy is given to an infant twelve years of age. The testator had a son-in-law and a grandson; and he gives to the present plaintiff other provisions, without any conditions, except attaining twenty-one years of age, by which she is amply provided for—a real estate of 150*l.* a year, and a contingent interest in 5000*l.* given by the testator to Dryer, the grandson, on his dying under age, which is a very ample provision for a child under the circumstances of the plaintiff. The testator had not affixed any condition or restriction as to marriage, to the gift of the 5000*l.* to his grandson Dryer; but, when he was giving this 10,000*l.* to an infant, in augmentation of the fortune already provided for her, he might think it very reasonable to give it her with a restriction respecting marriage; it might be very detrimental to the daughter herself not to be restrained in a matter of so much importance. The testator knew how to qualify his gift in the one case, and to leave it unqualified in another, where he thought it unnecessary. In re-

spect of this child, he makes no disposition till she attains twenty-one years of age; then, in order to entitle herself to the legacy, [*182] she must do one of two things; she must either *postpone her marriage till twenty-five, or, if she marries under twenty-one, she must do so with her mother's consent. This is a reasonable restraint, such as the law itself imposed upon her, and such as many celebrated writers think imposed upon her by nature. The whole devise is in one sentence; one moiety is to be paid to her at twenty-one, if unmarried, the other at twenty-five, if then unmarried. If the testator had made no further disposition, it would be clear that the legacy was not given absolutely, for she is not to take it unless she is unmarried. But he then says (going upon the ground of the former prohibition), that, in case she should marry under twenty-one, it must be with the consent of her mother. The condition he looked forward to was marriage; the first part of his will contains a prohibition of marriage till twenty-five; the latter lessens that restraint to twenty-one, with consent. By marrying under twenty-one, without consent, she has departed from the lesser restraint, and disqualified herself from the additional bounty to which she had no title but upon the performance of the condition. The only way the case can be argued in her favour is, that this restriction was not a condition, but a recommendation, because the legacy is not given over; and although it is given over in case of her dying unmarried under twenty-five years of age, that it is not so in any other event; the construction that it was recommendatory is not maintained by the will; it might as well be contended that marriage itself was not necessary, as that it was not to be with consent. The principal intent as to marriage was to postpone it till twenty-five; your Lordship, will not, therefore, admit that conjecture into the construction of the will. The assertion, that it is not given over on marriage without consent, is a mere fallacy, founded on a supposition that whatever is not given away is given to the plaintiff, who is only a particular legatee; for, in truth, whatever is not given away goes to the residuary legatee. But they argue, that being given to her in one event it is not so in any other; which is a mistake, as Mrs. Tyler does [*183] not claim as a *particular legatee, but as general legatee; therefore, if anything is not disposed of from her, it is given to her. It is by no means incompatible that it should be given to Mrs. Tyler in case of the plaintiff dying unmarried, and also in case she should marry without consent; but to give it to Mrs. Scott, if she marries without consent, is inconsistent with giving it to her on condition of marrying with consent, and would destroy a principal object of the testator's intention. Mrs. Scott is therefore not entitled to take on the ground of the testator's intention.

When I call this condition a restraint, I am probably wrong, for I may as well call it a condition in encouragement of marriage; if the condition had stopped in its first part, it would have

been a restraint, for the plaintiff in that case could not have married until twenty-five; then permitting her to marry under that age is an encouragement to marriage; but to say because it is a condition in encouragement of marriage, it shall be construed as an absolute gift immediately upon marriage, is not arguing justly. The condition annexed has nothing in it to engage a wish to set it aside. The intention of the testator is legal; imposes nothing but what the law itself imposes; it ought therefore to prevail; and if it does, the plaintiff does not make out the proposition, that there is, in the event that has happened, an intent, either expressed or implied, that she shall take the additional legacy of 10,000*l.* given in the will.

Secondly. Suppose the intent to be clear, that, in the events which have happened, the plaintiff is not entitled to take the legacy, the authorities ought to be very strong to induce the Court to contradict that intent.

All the authorities upon the subject are bottomed on the civil law.

In cases not within the ecclesiastical jurisdiction, the civil law has not been adopted as the rule, as in the cases of settlements of land, or of money to be raised out of land; in these the condition has been held good; from whence it follows that the condition in its own nature is just and legal, otherwise it must fail universally. Neither is the rule adopted in the case of pecuniary legacies, where there is a limitation over, or in the case where there is an alternative provision where it only notifies the testator's intention. It follows, therefore, that where the intention is clear to the contrary, the rule does not apply. Another proposition also arises from the cases; the only ones which apply are those of money legacies upon conditions precedent. If the doctrine laid down by Lord Chief Baron Comyns and the Chief Justices in their argument in *Hervey v. Aston* is right, those even do not apply if the intention appear to the contrary, although there is neither a remainder over, nor an alternative provision; this is expressly laid down by Chief Baron Comyns. [*184]

In adopting the rule of the civil law, your Lordship will inquire what that rule is; and if it appears that it is not a deduction from principles, but merely a part of the *Lex Scripta*, the *Lex Papia-poppea*. This rule makes the condition unlawful, and counteracts two principles adopted by our law: it makes the condition unlawful which by our law is legal, and it gives the legacy; whereas our law annuls the legacy given on an unlawful condition. Will this Court adopt a part of the *Lex Scripta* of Rome, made under the particular circumstances of the times, against the clear principles of our own law? It was a part of this law, that a man who had but one child should take but half of a legacy. Will the Court adopt a part of the law and reject the other? Where is the propriety of making a positive law of Rome, a rule of construction of a will here? How can it constitute a rule for discovering a testator's intention? Perhaps, how-

ever, after the determinations which have passed, it would be presumptuous to say the Court should not at all refer to it. But if the Court feels itself obliged to consider it as a subsisting rule as to those cases which fall within it, I trust your Lordship will not extend it farther than it has hitherto prevailed; if the case [*185] before you could not, from its nature, *be of ecclesiastical cognisance, or enter under that jurisdiction, the rule does not apply.

The present case is not a bill for the payment of a legacy; it is a bill filed for carrying into execution a trust; the legal fund is vested in the trustees; the Ecclesiastical Court cannot compel the execution of the trust, it can only give the legacy to the nominal trustee. The trust, then, is the subject of the appropriate jurisdiction of this Court; the bill is to compel the mother to dictate the words of the settlement, as to a moiety of the legacy, which the Ecclesiastical Court could not do: if they had attempted it, this Court would have restrained them by injunction. This appears from *Anon.*, 1 Atk. 491, where it is laid down by Lord Hardwicke, that notwithstanding the original jurisdiction of the Ecclesiastical Court in legacies, yet, if there be a trust, this Court will grant an injunction, *trusts being only proper for the cognisance of this Court.*

The Court, therefore, in a matter of trust, is not bound by the rule of the civil law. This is the first case on the subject of a trust fund. In the case of land, or portions charged upon land, the rule has been held not to apply; so also it has been held in personal legacies under certain circumstances. Will your Lordship then conform to the general rule of this Court, agreeable to the law of England; or adopt the rule of the civil law made under partial circumstances, when the question is which of these rules shall be applied to a new set of cases upon which there is hitherto no determination? But even admitting that the rule of the civil law is to prevail, the rule of that law would in this case not be to avoid, but to give effect to the restraint. The case here is that of a parent. The case in the Roman law is the consent of a stranger; so it was also in the case of *Underwood v. Morris*, and in *Reynish v. Martin*. The civil law required the consent of the parents in all marriages: Dig. l. 23, tit. 2, l. 2,—*nuptiæ consistere non possunt nisi consentiant omnes; id est, qui coeunt quorumque in potestate sunt.* And it appears by Dig. l. 22, tit. 2, l. 62, that the father might *delegate this authority to [*186] the mother; and if she unjustly withdrew her consent, the prætor might compel her to give it: Dig. l. 23, tit. 2, l. 19. The restraint imposed here is therefore only of the same kind with that which the civil law recognised. It is limited to twenty-one, which is acknowledged by Swinburne, 153, to be good; "Albeit all these conditions are generally disliked; where they are part restrained, as that the daughter shall not marry under twenty, the condition is not void." The case there put is stronger than the present: there the restraint is absolute,—here only to

restrain without consent. The civil law would therefore give effect to, not control the present restraint. The cases do not militate with this doctrine; many of them turn upon the special manner in which they are penned; several of them are upon conditions subsequent. In *Underwood v. Morris*, and *Reynish v. Martin*, the restraint is unlimited, and given to strangers; the former of them is directly contradicted by *Hemmings v. Munkley*; and there is no one of the cases which, if all the facts are taken into consideration, contradicts the doctrine now laid down.

Mr. *Stratford*, on the same side.—This case has been argued on the part of the plaintiff, on the ground of two principles, both drawn from the civil, and, as it is alleged, adopted by our law:—

1st, That all conditions in restraint of marriage are void.

2nd, That conditions annexed to legacies of marrying with consent are, where the legacies are not specifically given over, to be held in terrorem only, and not necessary to be performed.

With respect to the first of these principles, it is not to be maintained, taking it in a general, universal, and unqualified sense, but only when it is taken sub modo; and therefore in the same book in which it is said, “that all conditions against the liberty of marriage are unlawful,” it is also added, “but if the conditions are only such as whereby a marriage is not absolutely prohibited, but only *in part restrained, as in respect of [187] time, place, or person, then such conditions are not utterly to be rejected.” *Godol. Orph. Leg. 45, c. 15, s. 1.* The reason of which seems to be, because none of these conditions impose celibacy upon the party altogether and at all events; for, though the marriage may not be had at this particular time or place, or with this particular person, yet it may at some other, &c.

The question, therefore, in all these cases must be, whether the restraint imposed be reasonable or not.

In the present case, if the restraint be unreasonable, it must be so either as applied to the person to whom the power of restraining is given, or to the length of time for which such power is given. As to the person, the power is given to the mother of the legatee; and as to the time it can in no event continue longer than till the legatee attains the age of twenty-five years.

It were needless to state particularly the power which the Roman law gave to the parent over the child in cases of marriage. Many passages have been cited from the civil lawyers, and many more might be, to show that no marriage could stand without the previous consent of the parent (where there was one), and the child was not emancipated. Among others, it is said in the *Digest*—In tantum (speaking of marriage), *jussus parentis præcedere debet*. But it is said that this authority resided in the father only, and not in the mother, and that it was part of the *patria potestas*. In answer to this it is to be observed, that the civil law, as it appears to be adopted in our ecclesiastical law respecting marriages, gives an equal power of consenting to the mother as to the father. Thus it is expressly decided by the *Canons* of

1603, that no children under the age of twenty-one complete, should contract themselves or marry without the consent of their parents (in the plural number), or guardians and governors, if their parents be deceased. These are the words of the Hundredth Canon, and by the Act of the 26th of Geo. 2, c. 33, it is expressly [*188] enacted, that the consent of the mother shall be as *necessary as that of the father was, if the father be dead and there be no guardian.

The length of time during which the restraint may in this *individual* case last, does not much exceed the time given to parents by the Act of the 26th of Geo. 2, c. 33, universally. And though the testator has in this case by his will mentioned a time, viz., the age of twenty-five, to the extent of which the marriage of the legatee might by possibility have been restrained, yet he has by the same will held out inducements to an earlier marriage, provided it be a marriage with consent; and he has not impeded any marriage whatever after the age of twenty-five years.

There is no case to be found in which it has been said what should be a reasonable restraint in regard to the time it is to continue; but from what is said in *Aston v. Aston*, 2 Vern. 452, it should seem, that, though no time be limited, the restraint is not reasonable—that is, so as to avoid the condition.

If the legacy in this case had been given to the legatee at the age of twenty-five years, *if she was then sole and unmarried*, it would at least have been questionable whether by such a bequest a certain character and description of person was not imposed upon the legatee, which it would be necessary for her to sustain at that age, and without which she could not be entitled; and yet in such a case marriage would be as much impeded as in the present. In this view of the case another ground of argument arises on the part of the defendant. In the common case of a legacy of personal estate, given to a person of twenty-one, it was expressly said by the Court, in pronouncing judgment in *Dawson v. Killett*, 1 Bro. C. C. 123, it makes such a description of the person, that, if the person does not sustain the character at the time, the legacy will fail. I do not cite this case as being in point to the present (though that was a case upon a personal legacy, whether vested or not), but merely for the passage alluded to in the judgment which was pronounced on consideration.

[*189] *If it be true, then, that the words of the bequest do in this case describe the qualification and character of a person under which the legatee is to take, a condition arises which, according to what is said by Lord Cowper in the case of *Creagh v. Wilson*, 2 Vern. 572, is in the nature of a condition precedent, and must be performed before the legatee can be entitled. To what is said by Lord Cowper in the case of *Creagh v. Wilson*, may be added what is said by the Lords Commissioners Willes and Wilmot, in the case of *Mansell v. Mansell*,¹ (24th

¹ Wilm. 36.

February, 1757), which case seems much in point with the present one, as to the principle at least upon which the question now to be stated was determined. The case was this:—

Sir Edward Vaughan Mansell being seised in fee of lands, &c., by his will devised as follows:—

“I give and devise all my estates, lands, tenements, and hereditaments to my wife Mary Mansell for ever, and will that she shall be directed and governed by John Vaughan, Esq., and Morgan Davis, gent., and their heirs, in the management of her concerns, whom I appoint and institute trustees of this my will, to act for her and my children’s interest as hereinafter mentioned; and after my wife’s decease, I give and devise all my lands, &c., to my son Edward Mansell for the term of his natural life; and I will that he shall be capable, *with the consent of the said trustees, to settle a jointure on the woman they agree to in writing he should marry*; and from and after his decease to his first and other sons,” &c.

There was also in the will the like limitation to Rawleigh Mansell, the testator’s second son, with remainder to his first and other sons, &c., and the same power of jointuring.

The testator died in 1720, leaving his eldest son Edward thirty years of age and married: and the trustees were sixty years old and upwards.

In the year 1740, the lady of Sir Edward Vaughan Mansell, the devisee for life, being dead, and the trustees *also being both dead, Davis being the survivor, and leaving a son [*190] and heir-at-law, Edward Mansell, then Sir Edward Mansell, and who was at that time a widower, married Lady Mansell (the plaintiff in the cause), and by deed settled the whole estate devised to him by his father’s will upon her, by way of jointure, without any consent obtained of the heir of the surviving trustee.

Sir Edward Mausell, the plaintiff’s husband, died afterwards without issue; and upon his death the defendant in the cause, who was the eldest son of Rawleigh Mansell was the remainderman in tail of the estates in question, but the plaintiff entered upon the estates under her jointure; and the bill was brought by her for confirmation of her jointure, and for delivery of some deeds. And one of the questions made, and much agitated in the cause, was, whether the want of consent of the heir of the surviving trustee to the marriage and jointure was matter of circumstance only, and the Court should aid the execution of the powers as being defective or not.

Lord Commissioner Willes said, “I observed the counsel on both sides have considered this consent as a condition. By the defendant’s counsel it has been argued as a condition precedent: by the plaintiff’s as a condition subsequent. I think, if it is to be taken as a condition, it must be a precedent one; and, not being performed, no estate could arise. The trustees were not only to consent to the marriage, but to the quantum of the estate; and, therefore, there are two conditions, and both precedent.”

Lord Commissioner Wilmot.—“Such an act as attends this power, must be in the nature of a condition precedent. I have no idea of a condition annexed to a power being subsequent: the condition must be performed before the power can take effect. All powers arise out of the original freehold; and the person who takes under a power takes from the original grantor in the power; but such taker must bring himself within the description to enable him to take. And it is plain, without cases, that [*191] *when a person claims by designatio personæ, he must verify the description.”

Mr. Mansfield puts this as the case of a vested legacy. If it had been given to the legatee; without the intervention of trustees, he might, perhaps, have argued, that it did come within the cases of legacies vested, though to be paid in future. But here, nothing is given immediately to the legatee, but to the trustees; and they are directed “to pay and transfer,” as it seems to me, to one of two persons, at a certain time, and on certain events, viz., when the legatee shall attain the age of twenty-five years, to her, if unmarried, or if married with consent; but if not married with consent, to her mother.

With respect to the second of the principles mentioned, viz., that conditions annexed to legacies of marrying with consent, where the legacies are not specifically devised over, are to be held in *terrorem*, and not necessary to be performed, I consider the circumstance of there being, or not being, a devise over, as a ground of presumption only of the intent of the testator, and not a necessary and invariable rule of itself. And this will appear to be so, by considering the rule, as far as it may be called one, and the principles on which it has been adopted. The rule is laid down in the case of *Stratton v. Grymes*, 2 Vern. 357, where it is said, that a devisee over being named, he must be looked upon as a person whom the testator considered and had in his thoughts, as to what provision he was to have by his will; but where there is no devise over, the condition shall be held in *terrorem* only; because, as it is said by Sir Joseph Jekyll in the case of *Hervey v. Aston*, though a daughter marries without her father's consent, yet it is not to be supposed that his severity, if living, would carry him so far as to leave her quite destitute.

As to the rule itself, as laid down in *Stratton v. Grymes*, Lord Harcourt, in observing upon it in the case of *King v. Withers*, Prec. Ch. 350, says it is too wide. And as to the reason given by [*192] Sir Joseph Jekyll, if it be the true *one, it does not apply to the present case; for, in this case, the daughter is not only not left destitute, but is provided for otherwise; and where that is the case, the rule has been held not to apply: *Gillet v. Wray*, 1 P. Wms. 284. Upon authority, therefore, as well as principle, if the legatee be otherwise provided for, though there be no devise over, the legatee must fulfil the condition or forfeit the legacy.

But it is said, that there must not only be a devise, but a

specific devise over, in order to disappoint the legatee, and that a devise of a residue will not do. It is possible that the precise meaning of the word *specific*, as applied to a devise over, is not sufficiently attended to; but it should seem, that where the devise over, though of a residue only, be to a particular person, that, in such a case, the word *specific* applies at least as much to the person to take as to the thing given; indeed, otherwise the rule, as laid down and reasoned upon in *Stratton v. Grymes*, is hard to be understood.

In this case the residue is expressly given to Mrs. Tyler nominatim, accompanied with strong words of regard. It might have been different had Mrs. Tyler been appointed executrix, and the residue had fallen to her as such. But here Mrs. Tyler seems to be the person whom the testator considered, and had it in his thoughts to provide for *specifically* next after his daughter, and in case his daughter should not comply with the terms of marrying with the consent of her mother, if she thought proper to marry at all before she was twenty-five years of age, or continuing unmarried till that time.

Mr. Mansfield, in reply.—I shall endeavour to take notice of the several heads of argument under which the gentlemen of the other side have arranged the questions in the cause. The question is that made on the will, whether this gift to the plaintiff Mrs. Scott is, or is not, a simple gift of the money in one of two events, or whether she was, at all events, to have the money in case she married. The first gift in the will is that to Dryer, of 5000*l.*, payable when he should attain the age of twenty-one; *if he should die under that age, it was to be divided between the defendant Elizabeth and [*193] the plaintiff Margaret Christiana, and if the latter died under twenty-one, it was to go wholly to the defendant Elizabeth. Then comes the bequest upon which the question arises: he directs his executors to purchase 10,000*l.* South Sea Annuities, and gives a direct order that the interest (except the 100*l.* a year maintenance) should accumulate until the plaintiff should attain her age of twenty-one years, then the accumulation was to stop, and half of the stock, and all the savings, were to be paid to her, and at twenty-five the other moiety was to be paid. Then comes the provision for her marrying under twenty-one, and the gift of the stock over to the mother, in case she should die under twenty-five, unmarried. He then proceeds to give her the houses at twenty-one, and if she dies under that age he gives them to Dryer, and then to the River Lee Bonds, which he gives to the plaintiff at twenty-one, and if she dies under that age he gives them to the mother, the defendant Elizabeth. He afterwards gives several legacies, and gives the residue to the defendant Elizabeth Tyler. It is a mere blunder by which the legacy is made to vest at twenty-five; he understands and means that she shall have it at twenty-one, if married; but if married before twenty-one, with consent, he meant to accelerate it, and that she

should not, in that case, wait till she attained twenty-one. The provisions as to twenty-one and twenty-five, are a restraint of the precedent gift of the moiety and savings at twenty-one, at which age he gives her everything else—the houses, the River Lee Bonds, and the contingency in Dryer's legacy of 5000*l*.

If this be the fair construction, there is no pretence to say the legacy is forfeited by the marriage. The gentlemen on the other side have fancied them different provisions at different times; but this is wrong, for by their construction, if the plaintiff married at seventeen, and died under twenty-one, even leaving children, she would transmit nothing to them. There is no arguing against the words of the will. The 10,000*l*. is the only thing given [*194] *as a portion: out of that alone her maintenance is to arise, out of the other funds she is to derive nothing till twenty-one; this is the reason, that, in disposing of them, no reference is made to her marriage. They have studiously avoided taking any notice of the remainder over, which is simply in the event of her dying unmarried. This is a ground for deciding against them: the only shift they have been able to find, is to construe it “*so unmarried*,” which will be to contend, that dying married without consent, is dying “*unmarried*.” The clause of dying unmarried is at twenty-five. It will be a new construction, that this signifies the same thing as unmarried under twenty-one: it shows that they are sensible of the efficacy of that clause. All the argument from the bequest over, is therefore in full force. He could not mean what he has expressed; for, as half was to vest at twenty-one, the whole could not go over if she died between that age and twenty-five. He could not mean her situation to be worse if she married between twenty-one and twenty-five, than she was at her arrival at that age; but it is contended, she is only to take in the events pointed out. But the restraint being confined to twenty one, he could not mean her provisions should be less upon marrying without consent, between twenty-one and twenty-five, than if she married without consent under twenty-one. The mistake is obvious: it arises from the insertion of twenty-five, instead of twenty-one. If twenty-one had been inserted, it would have been clear she was to have her whole fortune upon marriage after twenty-one, or upon marriage before twenty-one with consent.

In the present case there are no negative words: it is, in that respect, not like *Reynish v. Martin*; there the gift was upon marriage with consent, *and not otherwise*; but here there are no words, nor a title to show an intent to deprive her of the legacy. On the fair construction, therefore, of the will, according to the true intent of the testator, if she was married she was to have the whole at twenty-one, and the provision in restraint of marriage is as such in *terrorem* only.

[*195] *It, however, the testator has expressed himself so imperfectly, that she is obliged to get rid of the objections

which have been raised to the legacy, we must consider what has been said on the several points.

1st, I have always understood the point to be established, that there is no distinction between conditions precedent and conditions subsequent, except with respects to lands, or where there was a devise over; and that in all other cases a condition in restraint of marriage was void. It is not very pleasant to find that this is a mere distinction of authority, not of reasoning; and that children are not, in all reasonable cases, bound by the authority of parents and guardians. In reasoning, subsequent conditions ought just to prevail as much as precedent ones; but the doctrine is established, and it is too late to correct it, at least with respect to subsequent conditions. But it is said, on the other side, that though this be the case with subsequent, it is not so with precedent conditions. And with a reference to some of the cases, the intention of the testator has been talked of; and Mr. Plumer has argued, that wherever the intent of the testator appears, that shall be the rule; but in the same breath he says, a subsequent condition shall not prevail, although there can be no doubt but a subsequent condition speaks the intention of the testator as strongly as a precedent one can do. It is contended, however, that the authorities are different as to precedent conditions; but the authorities put precedent conditions out of the way as much as subsequent ones. The doctrine is adopted from the civil law. They contend the civil law has been misunderstood, and that we are now to give it a new construction. But if there is any error in the manner in which the civil law has been construed, the time for correcting that error is past; the doctrine is now established too strongly to be moved; it has become the law of the Court, and the question only can arise, how it has been understood and adopted. It is of no avail to understand it better than those who adopted and established the rule have done. But, in fact, the civil law does not admit the *distinction between precedent and subsequent conditions. What is the difference [*196] taken on the other side between these conditions? That precedent conditions are favoured and must prevail? that subsequent ones must be rigorously construed as to their validity, and may be dispensed with where compensation can be made. At law there is no distinction between conditions precedent or subsequent, if the subsequent condition is broken. If a legacy be give to A. if he marry with consent of B., there is no distinction whether in point of form it be a condition precedent or subsequent; and equity has nothing to do with the condition. There can be no compensation, and therefore there is no distinction between them, as applied to this subject. If it is so applied, it is arbitrarily to create a law for the purpose. But it is admitted on the other side, that a subsequent condition is void. There is no argument for a subsequent condition being void, that will not equally apply to a precedent condition being void also. A great many cases have been cited, as to the distinction, which I shall not go

through: *Creagh v. Wilson* and *Amos v. Horner* were clear cases of alternative provisions, and in each of them there was a remainder over. There is not one of the cases where a precedent condition prevailed. *Hervey v. Aston* is that which has been the most relied upon, as favouring what has been contended for on the other side. It is not easy, from Lord Chief Baron Comyn's argument, to determine what his opinion was; but I think it may be gathered, that he thought both the precedent and the subsequent condition void. But what was the decision and the ground of it, in that case? That it was the case of land, and therefore the gift could not take place till the condition was completed. I never yet knew any other conclusion drawn from that case, but that it was so distinguished from the case of personal property. But how came Sir. Joseph Jekyll to decide in that very case that the condition was void? How came Lord Hardwicke or Lord Somers, to doubt whether such a legacy was to take place, when the condition was not complied with? They must have understood *that a condition in restraint of marriage was, in [*197] general, void; but doubted, when it was to arise out of land, whether the distinction was to prevail, or was to yield to the ecclesiastical rules. These are the principal authorities referred to by the other side; for I shall not dwell on the opinions of commentators on the civil law, which is a lamentable way of collecting what the law is.

On the other side we have very express authorities; from Godolph. Orph. Leg. c. 15, p. 45, it appears that such a condition, though precedent, is void; and thus is confirmed by the passage from the Digest, cited there. In the case of *Reynish v. Martin*, *Underwood v. Morris*, and *Elton v. Elton*, the point is treated as perfectly settled, that there is no such distinction. In *Amos v. Horner*, the decision proceeded on the remainder over; not on the condition being precedent. I may add *Gillett v. Wray*, where the condition was held good; but that was on account of the alternate provision. *Bellasis v. Ermine* was clearly a condition precedent; and the Court was of opinion that it was only in terrorem. In *Holmes v. Lysaght*, 2 Bro. P. C. 261, Toml. edit., the counsel in their reason expressly state, that in a legacy of personalty there is no distinction between conditions precedent and subsequent. *Underwood v. Morris* is said to be impeached by *Hemmings v. Munkley*, but the point determined in the latter did not apply to that case. Lord Hardwicke's authority on this subject has every circumstance possible to give it weight; *Reynish v. Martin* was late in his time, and was determined upon great consideration. He had the strongest aversion to inconsiderate marriages; and after again and again considering the subject, he decided that point in that case as an established rule in this Court. If the cases are such as I have stated them, it is now too late to discuss any thing but what the cases are.

2nd. It has been endeavoured, on the other side, to bring in the devise over; and they have argued, that, being given to the

plaintiff in three events, that in all others the legacy goes to Mrs. Tyler. A devise over *exists only where there is a gift [198] to one, if he marry or do any other act; with a gift, if he does not, to another person. A residuary bequest does not amount to a devise over. There is no devise over here, but what there is in every case where there is not an intestacy. The case of *Stratton v. Grymes*, 2 Vern. 357, shows that a devise over is only a gift to A., in one event, in another to B., where B. has as good a claim in the latter event as A. has in the former. As to a residuary legacy being a devise over, it cannot be in such a case as this, where it is given over only in one certain event, that of the daughter dying unmarried under twenty-five. And the legacy being expressly given over to Mrs. Tyler in that event, it is absurd to say it is given over to her in another event, and in a different character. A general residuary legatee has never been considered as a devise over of a particular legacy.

They then contended, that here is an alternative provision. But the testator has said no such thing. The other gifts are without any reference to this legacy of 10,000*l.*; if the plaintiff had died under twenty-one, she would, according to their argument, have had nothing, for none of the other gifts vested before that time. There is not the least ground to say that here is an alternative within the meaning of *Gillet v. Wray*, where one thing is given in one event and another in another event.

Another ground of argument has been that the restraint is only till twenty-one, though there is a passage in Swinburne, where a restraint to twenty is said to be good; it is only given as his opinion; and although the point might have occurred in two or three of the cases—as *Amos v. Horner*, and *Creagh v. Wilson*, where the restraints were only temporary,—yet it was not insisted upon in those cases: and although the restraint in *Underwood v. Morris* was only till twenty-one, yet the condition was held void, and not a hint given that the circumstance of its being confined in point of time would make any difference.

*Another circumstance introduced to vary this case [199] was that here the restraint was given to a parent. In the civil law, the mother could not be considered as a parent. Is there any possible distinction to be taken between a parent and a guardian? The law makes no such distinction, and reason and common sense agree in this with the law. In *Hervey v. Aston* the consent first required was that of the mother; but no distinction was made on that ground.

The objection that this is a trust is also perfectly new. If there is any ground for this distinction, another case must be added to the exceptions upon this subject, that a condition in restraint of marriage annexed to a legacy given in trust for the legatee, will be good, though if the legacy be given immediately to the legatee, it will be void. And this is a distinction expected to be adopted in a Court which says, that trust estates follow the nature of legal estates. Although the Ecclesiastical Court has

not in general a jurisdiction over trusts, it is by no means clear that that court may not compel the executor to pay the legacy to the party actually entitled; and where the executor is himself the trustee, that Court may undoubtedly compel him to pay it, as he in that case only is what he is in all cases—a trustee for the legatee. Upon the true construction of this will, I therefore contend Mrs. Tyler was not to have this legacy if Mrs. Scott married.

The cause stood over till this day,¹ when it came on for judgment.

LORD CHANCELLOR THURLOW.—This is a bill filed by Samuel Scott and Margaret Christiana his wife, against Elizabeth Tyler, the residuary legatee and executrix of Richard Kee, George Shakespeare, Charles Mahew, and Philip Nind, executors and trustees named in the will of the same Richard Kee, and Richard Dryer, his heir-at-law.

The bill prays that the plaintiff Margaret Christiana's right may be established in a trust fund of 10,000*l.* South Sea Annuities, and that proper accounts may be directed accordingly.

[*200] *For this purpose the bill states the will of Richard Kee, made on the 16th day of December, 1776, whereby he directs his executors to purchase 5000*l.* South Sea Annuities, of the year 1751, in their own names, but in trust to pay 60*l.* per annum for the maintenance of Richard Dryer till his age of fifteen, and from thenceforward 120*l.* per annum, with liberty to raise 400*l.* to put him out in some trade or profession, the surplus profits to be invested in the like Annuities, and the whole to be transferred to him at twenty-one; but if he dies in the meantime, the whole is to be thereupon divided between the defendant Elizabeth Tyler and the plaintiff Margaret Christiana, the share of Margaret Christiana not to be transferred to her till her age of twenty-one, and if she dies sooner her share is to go over to Elizabeth.

He also directs his executors to purchase the sum of 10,000*l.* in the like Annuities, in their own names, in trust to pay Elizabeth Tyler 100*l.* per annum for the maintenance of Margaret Christiana till her age of twenty-one, the surplus to be laid out in the meantime in the like Annuities: at her age of twenty-one, if then unmarried, one moiety is to be transferred to Margaret Christiana, for her own use and benefit; and at her age of twenty-five, if then unmarried, the remainder to be transferred in like manner.

If she marries with the consent of Elizabeth, before twenty-one, a moiety of the whole sum is to be settled to her separate use, and for her issue, according to the discretion of Elizabeth; the other moiety to be disposed of as Margaret Christiana shall think fit; if she dies unmarried, before her age of twenty-five, the whole is to go over to Elizabeth.

¹ 20th December, 1788.

He also gives to the same trustees certain freeholds in Denmark court, in trust to lay up the rents till Margaret Christiana shall attain twenty-one, whereupon he gives both the estates and their produce to her absolutely; or if she dies sooner, to Richard Dryer, or if he be then dead, to Elizabeth Tyler.

He gives divers other legacies. All the rest of his *estate, real and personal, he gives to Elizabeth Tyler, absolutely, whom he looks upon as a wife. [*201]

He died on the 3rd of November, 1776, leaving Elizabeth surviving, and Margaret Christiana his natural daughter by her.

On the 17th of May, 1783, the plaintiff Samuel Scott clandestinely and against the will of Elizabeth, married Margaret Christiana, then an infant of eighteen years. Elizabeth objected to it as an improvident match, by reason of his inferior circumstances, his advanced age, and the family which he had by one of his former wives, and warned her daughter of the consequence.

And, as the plaintiff Samuel Scott states, by a deed of 13th of May, 1783, he has covenanted to settle Margaret Christiana's fortune on her and her children, after his own death, if she or they should survive him.

The bill further states the will of James Cockburn, who died in October, 1774, leaving Elizabeth Tyler his executrix, and Margaret Christiana a legatee of 100%.

All the executors proved Richard Kee's will; Elizabeth Tyler alone acted.

Elizabeth Tyler forthwith transferred 5000%. South Sea Annuities into the names of the trustees, which have been since transferred to Dryer, together with the accumulations, and that legacy has been duly discharged.

In August, 1777, she transferred 10,000%. South Sea Annuities into the names of herself and co-trustees, together with the further sum of 1000%. of like Annuities, whereof she has constantly received the produce; she received, in like manner, the rents of the freehold houses and the interest of the securities on the River Lee.

She admits the legacy of 100%. to remain due, and that she had assets, but claims a debt of 900%. against the plaintiff Samuel Scott.

In March, 1786, Elizabeth Tyler became a bankrupt; a commission issued, and Sir Edward Vernon, Thomas Hankey, John Marr, and Malcolm Cockburn, were chosen assignees.

Upon this matter questions arise, whether, as the case *stands, the plaintiffs have any and what interest in the 10,000%. South Sea Annuities. [*202]

The testator makes four several bequests to his daughter: a contingent interest in the 5000%. South Sea Annuities originally given to Dryer, the 10,000%. South Sea Annuities in question, the freehold tenements, and the Lee Bonds, all upon the event of her living till the age of twenty-one, married or unmarried. If she

dies before twenty-one, the first, third, and fourth bequests take no place, and yet the interest of the fourth is to be paid to her separate use, notwithstanding her coverture during her infancy; but there is an event upon which the second bequest may take place before twenty-one, namely, *if she marries before that age with the consent of her mother.*

It is impossible not to suspect that the testator has failed of expressing his full intention concerning this bequest of the 10,000*l.* He gave it to the daughter on a double contingency,—her age, and being then unmarried; he seems to have meant it for the mother on the contrary event; but he has given it over also to her on a double contingency,—the death of the daughter before her age, and unmarried. This leaves a middle case,—the premature marriage of the daughter,—in which neither can claim under the form of this bequest. Again, he has provided for the anticipation of the daughter's title, by another double contingency; namely, *marriage before twenty-one, and without consent of the mother*; but, in case of a marriage between twenty-one and twenty-five, with or without consent, half the legacy would remain undisposed of; which it can hardly be imagined he meant.

Some endeavours were used to infer, from the terms in which it was given to the mother, that, in all other events, it was meant for the daughter; it is more probable, that in the case of the daughter's not becoming entitled, it was meant for the mother; but neither conjecture is sufficiently collected from the actual expression, by any admissible rules of interpretation.

The main argument for the plaintiff turned on this proposition, [*203] that one branch of the contingency upon which *the legacy was given (or rather anticipated), implied a condition in restraint of marriage, which is merely void, and consequently the legacy became absolute.

In support of this position, innumerable decisions of this Court were quoted; but the cases are so short, and the dicta so general, as to afford me no distinct view of the principle upon which the rule is laid down, or consequently, of the extent of the rule, or of the nature of the exceptions to which its own principle makes it liable.

The earlier cases refer in general terms to the canon law, as the rule by which all legacies are to be governed. By that law undoubtedly all conditions which fell within the scope of this objection,—the restraint of marriage,—are reputed void, and, as they speak, *pro non adjectis*. But those cases go no way towards ascertaining the nature and extent of the objection.

Towards the latter end of the last and beginning of the present century, the matter is more loosely handled. The canon law is not referred to (professedly at least) as affording a distinct and positive rule for annulling the obnoxious conditions; on the contrary, they are treated as partaking of the force allowed them by the law of England. But in respect of their importing a restraint of marriage, they are *treated at the same time as unfavorable, and con-*

trary to the common weal and good order of society. It is reasoned that parental duty and affection are violated when a child is stripped of its just expectations; that such an intention is improbably imputed to a parent, particularly in those instances where there was no misalliance, as in marriage with the houses of Bellasis,¹ Bertie,² Cecil, and Semphill,³ which the parent, had he been alive, would probably have approved. These ideas apply indifferently to bequests of lands and of money, and were, in fact, so applied in one very remarkable case; nay, to avoid the supposed force of these obnoxious conditions, strained constructions were made upon doubtful signs of consent, and every mode of artificial reasoning was adopted to relax their rigour. This was thought more practicable by calling them conditions *subsequent, although, if that had made such difference, they [204] were, and indeed, must have been generally, conditions precedent, as being the terms on which the legacy was made to vest. At length it became a common phrase, that such conditions were only in terrorem. I do not find it was ever seriously supposed to have been the testator's intention to hold out the terror of that which he never meant should happen; but the Court disposed of such conditions so as to make them amount to no more.

On the other hand, some provisions against improvident matches, especially during infancy, or to a certain age, could not be thought an unreasonable precaution for parents to entertain. The custom of London has been found reasonable, which forfeits the portion on the marriage of an infant orphan without consent.⁴ The Court of Chancery is in the constant habit of restraining and punishing such marriages; and the legislature⁵ has at length adopted the same idea, as far as it was thought general regulation could in sound policy go.

In this situation the matter was found about the middle of the present century, when doubts occurred which divided the sentiments of the first men of the age. The difficulty seems to have consisted principally in reconciling the cases, or rather the arguments, on which they proceeded. The better opinion, or, at least, that which prevailed, was, that devises of land, with which the canon law never had any concern, should follow the rule of the common law; and that legacies of money, being of that sort, should follow the rule of the canon law.

Lands devised, charges upon it, powers to be exercised over it, money legacies referring to such charges, money to be laid out in lands (though I do not find this yet resolved), follow the rule of the common law, and such trusts are to be executed by analogy to it.

Mere money legacies follow the rule of the canon law; and

¹ Bellasis v. Ermine, 1 Ch. Ca. 22.

² Bertie v. Lord Falkland, 3 Ch. Ca. 129.

³ Semphill v. Bayly, Prec. Ch. 562.

⁴ Foden v. Howlett, 1 Vern. 354.

⁵ 26 Geo. 2, c. 33.

all trusts of that nature are to be executed with analogy to that.

But still, if I am not mistaken, the question remains [*205] *unresolved, What is the nature and extent of that rule, as applied to conditions in restraint of marriage?

The canon law prevails in this country only so far as it hath been actually received, with such amplifications and limitations as time and occasion have introduced, and subject at all times to the municipal law. It is founded on the civil law; consequently, the tenets of that law also may serve to illustrate the received rules of the canon law.

By the civil law, the provision of a child was considered as a debt of nature, of which the laws of civil society also exacted the payment, insomuch that a will was regarded as inofficious, which did not in some sort satisfy it.

By the positive institutions of that law, it was also provided, si quis cælibatus, vel viduitatis conditionem hæredi, legatariove injunxerit; hæres, legatariusve é conditione liberi sunt; neque eo minus delatam hæreditatem, legatumve, ex hac lege, consequantur.¹

In amplification of this law, it seems to have been well settled in all times, that if, instead of creating a condition absolutely enjoining celibacy, or widowhood, the same be referred to the advice or discretion of another; particularly an interested person, it is deemed a fraud on the law, and treated accordingly; that is, the condition so imposed is holden for void.

Upon the same principle, in further amplification of the law, all distinction is abolished between precedent and subsequent conditions; for it would be an easy evasion of such a law, if a slight turn of the phrase were allowed to put it aside. It has rather, therefore, been construed, that the condition is performed by the marriage, which is the only lawful part of the condition, or by asking the consent; for that also is a lawful condition; and, for the rest, the condition not being lawful, is holden pro non adjectâ.

On the other hand, the ancient rule of the civil law has suffered much limitation in descending to us.

The case of widowhood is altogether excepted by the [*206] *Novels;² and injunctions to keep that state are made lawful conditions.

So is every condition which does not, directly or indirectly, import an absolute injunction to celibacy.

Therefore an injunction to ask the consent,³ as I have said

¹ Heinnecius ad legem Papiam Poppæam, 1776, p. 294.* And see the Commentary, p. 298.

² Novell 22, c. 44.

³ Sutton v. Jewke, 2 Ch. Rep. 9; Creagh v. Wilson, 2 Vern. 572; Ashton v. Ashton, Prec. Ch. 226; Chauncey v. Graydon, 2 Atk. 6.6; Hemmings v. Munkley, 1 Bro. C. C. 304; Dashwood v. Bulkeley, 10 Ves. 230.

before, is a lawful condition, as not restraining marriage generally.

A condition not to marry a widow is no unlawful injunction, for the reason given before.

So, is an annuity to a widow during her widowhood.¹

A condition to marry, or not to marry, Titius or Mævia, is good, for this reason, that it implies no general restraint; besides, in the first case it seems to have a bounty to Titius or Mævia in view.²

In like manner, the injunction which prescribes the due ceremonies, and the place of marriage, is a lawful condition, and is not understood as operating the general prohibition of marriage.

Still more is a condition good, which only limits the time to twenty-one,³ or any other reasonable age, provided this be not evasively used as a covered purpose to restrain marriage generally. And this must obtain still more forcibly where the *lex loci* implies the same restraint.

Nay, according to Godolphin, the use of a thing may be given during celibacy; for the purpose of intermediate maintenance will not be interpreted maliciously, to a charge of restraining marriage.⁴

It seems also agreed on all hands, that when, on any condition, however restrictive of marriage, the legacy is given over to pious uses, the intention of the party shall be deemed to regard those uses, and not to have the objectionable purpose of restraining marriage.⁵

As we receive the canon law, a bequest over, to any purpose, or person, shall be interpreted in the same manner, and make a conditional limitation.

It was made a question, formerly, what a legatee should take on her marriage, under a bequest of 200*l.* if she married, or 100*l.* if she did not. Some thought *300*l.*, some 200*l.*, some 100*l.* In [*207] our books we find it determined formerly, in the case of a greater legacy given upon marriage with consent, or after a certain age, and a less in the other events, that the greater legacy was not forfeited by marrying against the condition;⁶ but those decisions happened in the period alluded to before, when the worth of the alliance was thought a sufficient reason for a favourable interpretation, as it was called, of the condition; but Lord Cowper determined otherwise, on alternative bequests.⁷

It is true that the foregoing limitations, which are detailed in

¹ *Jordan v. Holkam*, Amb. 209; *Barton v. Barton*, 2 Vern. 308.

² *Jervoise v. Duke*, 1 Vern. 19; *Randal v. Payne*, 1 Bro. C. C. 55.

³ *Stackpole v. Beaumont*, 3 Ves. 89.

⁴ See *Webb v. Grace*, 2 Ph. 701, reversing *S. C.* 15 Sim. 384; *Morley v. Renoldson*, 2 Hare, 570, 580.

⁵ *Swinb.* Part 4, sects. 12, 14.

⁶ *Hicks v. Pendarvis*, Freem. Ch. Rep. 41; 2 Eq. Ca. Ab. 212; *Bellasis v. Ermine*, 1 Ch. Ca. 22.

⁷ *Creagh v. Wilson*, 2 Vern. 572; *Gille v. Wray*, 1 P. Wms. 284.

Swinburne and Godolphin, are not found in our reports so expressly stated; but the cases did not call for such particularity, except those few alluded to before, which turned upon the looser doctrine of favourable interpretation, and that, which is not to be supported, of *Underwood v. Morris*,¹ and which was determined by Mr. Justice Parker, sitting for the Lord Chancellor. It does not appear by any report that I have seen to be closely considered; it is contrary to the canon and civil law, and apparently unreasonable, the restraint having been imposed only till twenty-one, and the marriage contracted improvidently at sixteen. I therefore agree with the late Lords Commissioners² in denying the authority.

Sir Dudley Rider, in arguing the case of *Hervey v. Aston*, expressly founds his argument on the perpetuation of the restraint; and Dr. Strahan, who argued on the same side, admits the qualification of time, place, and person, as given before.

The will before us contains a residuary bequest; but that has been repeatedly, and well enough determined, to leave the conditional legacy in statu quo;³ it only prevents that which has not been disposed of already, whatever be its amount, from falling by order of law to the executor or next of kin.

But the great vice of the argument in favour of the daughter lies here. It was not contended against the rules above mentioned, [*208] if the bequest had been to her at *twenty-one or twenty-five, in case she were then unmarried, without more, that she could have claimed the legacy at any other time, or in any other case. But, because the mother was empowered to accelerate the gift by her consent to a proper marriage, and a proper settlement, it was thence argued, that it was indirectly putting an illegal constraint upon marriage. Now, if the first branch of the gift did not impose a direct restraint, in contradiction of law, the relaxation of that condition certainly would not operate as an indirect restraint of the same nature.

I am therefore of opinion, that the daughter, having married at eighteen improvidently, so far as appears, and against the anxious prohibition of the mother, never came under the description to which the gift of the 10,000*l.* was attached.

It was therefore void, and a part of the residue; consequently, it belongs to the assignees of the mother, the defendants; and the bill must be dismissed, so far as it seeks to have that trust executed.

¹ 2 Atk. 184.

² See *Hemmings v. Munkley*, 1 Bro. C. C. 304; and see *Stackpole v. Beaumont*, 3 Ves. 89; *Knight v. Cameron*, 14 Ves. 389; *Clifford v. Beaumont*, 4 Russ. 325.

³ *Semphill v. Bayly*, Fre. Ch. 563; *Paget v. Haywood*, cited 1 Atk. 378, overruling *Amos v. Horner*, 1 Eq. Ca. Ab. 112, pl. 2, but where there is an exception that the forfeited legacy shall fall into the residue. See *Wheeler v. Bingham*, 3 Atk. 364; *Lloyd v. Branton*, 3 Mer. 103, overruling dictum in *Reeves v. Herne*, 5 Vin. Ab. 343, pl. 41; and see *Ellis v. Ellis*, 1 S. & L. 1.

Upon principles of public policy, conditions annexed to legacies, devises, or contracts, operating unduly in restraint of marriage, as well as contracts entered into for the purpose of promoting marriage for reward, or in fraud of one of the parties to the marriage or their friends, are, by the laws of England, which have in many respects been influenced by the Roman law, utterly null and void. It is proposed in this note to consider how such conditions and contracts are dealt with in Courts of equity.

As to Testamentary Gifts prohibiting or tending to a prohibition of marriage.—Both by the common law of England, as well as by the civil law, all conditions annexed to gifts *generally* prohibiting marriage, are void, as being against public policy, or as, Lord Thurlow expresses it in the principal case, “contrary to the common weal and good order of society:” *Keily v. Monck*, 3 Ridgw. P. C. 205, 244, 247, 261; *Hervey v. Aston*, Com. Rep. 726, 729; *S. C.*, 1 Atk. 361; 1 Eq. Ca. Ab. 110, pl. 2, n. a; *Rishton v. Cobb*, 9 Sim. 615, 619; *Morley v. Rennoldson*, 2 Hare, 570; *Connelly v. Connelly*, 7 Moore, P. C. C. 438.

*And not only condition actually prohibiting, but also such as lead to a *probable* prohibition of marriage are void. Thus, [*209] where a legacy was given by a testator to his daughter, payable on her marriage or age of twenty-one, upon condition “that she shall not marry without consent, or shall not marry a man who shall not be seised of an estate in fee simple, or of freehold property of the clear yearly value of 500*l.*,” the condition was held void: *Keily v. Monck*, 3 Ridgw. P. C. 205. And see *Long v. Dennis*, 4 Burr. 2052. For the Roman law, see Dig. xxxv., tit. 1, l. 22, 64, 72; s. 4, 78; s. 4. 100.

But a condition to marry or not to marry particular persons, or at a particular place, was by the Roman law good, as not operating in general restraint of marriage, unless, in the case of a condition to marry a particular person, it appeared that the match was derogatory; or, in the case of the condition to marry at a particular place, it appeared that marriage would not be likely to take place elsewhere; for, in these cases, the condition would be void, as a fraud upon the law: Dig. xxxv., tit. 1, l. 63, 64.

Upon the same principle, according to our law, and to a greater extent than by the Roman law, all conditions which do not, directly or indirectly, import an absolute injunction to celibacy are valid. Thus, a condition to marry or not to marry any particular persons (*Jervois v. Duke*, 1 Vern. 19; *Randal v. Payne*, 1 Bro. C. C. 55); or a native of any particular country (*Perrin v. Lyon*, 9 East. 170); or a person belonging to a particular religious sect, as a papist (*Duggan v. Kelly*, 10 Ir. Eq. Rep. 295; 1 Eq. Ca. Ab. 110, pl. 2, n. a); or a condition which prescribes the ceremonies of marriage, although differing from those of the established church, as those of the Quakers (*Haughton v. Haughton*, 1 Moll. 611); or which prohibits marriage before twenty-

one, or other reasonable age (*Stackpole v. Beaumont*, 3 Ves. 89), even before twenty-eight (*Younge v. Furse*, 8 De G. Mac. & G. 756), is not illegal.

It is said, however, that a condition not to marry a man of a particular profession or calling, whether there be a limitation over or not, is not legal (1 Eq. Ca. Ab. 110, pl. 2, n. a), upon the ground, it is presumed, that it leads to a probable prohibition of marriage: *Keily v. Monck*, 3 Ridg. P. C. 205, 265.

It has been recently laid down that there is neither principle nor authority for saying that a parent may not make a provision for his daughter cease on her taking the veil, or becoming permanently connected with a convent. The condition is *conditio rei licitæ*, and so the rules derived from conditions in restraint of marriage* or other-
[*210] wise against the liberty of the law, are inapplicable: *Dickson's Trusts*, 1 Sim. N. S. 37, 46; and see *Clavering v. Ellison*, 8 De G. Mac. & G. 662; 7 Ho. Lo. Ca. 707.

According to the Roman law, when a legacy was given to a widow, if she did not marry away from her children, the condition would be void; but if the legacy were "*si a liberis impuberibus ne nupserit*," the condition would be good; and the reason given was, "*quia magis cura liberorum, quam viduitas injungeretur*:" Dig. Lib. xxxv., tit. 1, 62, s. 2, and tit. 1, 72. Widows, as observed by Lord Thurlow, in the principal case, were excepted from the Novels; and it is clear, that, according to our law, a gift during widowhood is good: *Barton v. Barton*, 2 Vern. 308; *Jordan v. Holkam*, Amb. 209; *Lloyd v. Lloyd*, 2 Sim. N. S. 255, 263.

By the Roman law, however, all conditions requiring *consent* to marriage seems to have been void, and the gifts dependent upon them to have been good upon a marriage taking place without consent (Dig. xxxv., tit. 1, l. 72, s. 4); as would also be the case if the person whose consent was required died in the lifetime of the testator: Dig. xxxv., tit. 1, l. 28.

By the law of England, conditions restraining marriage under the age of twenty-one or other reasonable age, unless with the *consent* of parents, guardians, or executors (*Sutton v. Jewke*, 2 Ch. Rep. 9; *Creagh v. Wilson*, 2 Vern. 573; *Aston v. Aston*, Prec. Ch. 226; *Chauncy v. Graydon*, 2 Atk. 616; *Hemmings v. Munkley*, 1 Bro. C. C. 304; *Dashwood v. Bulkeley*, 10 Ves. 230), are valid.

But although such restraint may be valid, the effectiveness of the condition imposed will depend, in a great measure, upon the nature of the property, and of the condition itself.

The principal case, so thoroughly argued before Lord Thurlow, by the ablest counsel of the day, is generally cited as the leading authority whenever the question arises, whether a condition in restraint of marriage annexed to a gift is or is not valid. And in determining

this question, the nature of the property is material; for, as is laid down in the principal case, in construing conditions in restraint of marriage, annexed to a devise of lands, charges upon it, powers to be exercised over it, money legacies referring to such charges, and money to be laid out in land, a Court of equity will follow the rule of the common law. If they are annexed to a mere personal legacy, it will follow the rules of the Ecclesiastical Court, derived from the civil law, except so far as they have been modified or departed from by its own decisions. Unless for the purpose of maintaining uniformity with the decisions of common law as to land, and of the Ecclesiastical Court *as to legacies, there exists no reason for the distinction: the construction ought to be precisely the same as to both; but it [*211] is now too strongly established to be overthrown by anything short of the interference of the legislature. It was strongly disapproved of by Lord Rosslyn, who thus accounts for its origin:—"In deciding questions," said his Lordship, "that arise upon legacies out of land, the Court very properly followed the rule that the common law prescribes and common sense supports, to hold the condition binding where it is not illegal. Where it is illegal, the condition would be rejected, and the gift pure. When the rule came to be applied to personal estate, the Court felt the difficulty, upon the supposition that the Ecclesiastical Court had adopted a positive rule from the civil law upon legatory questions, and the inconvenience of proceeding by a different rule in the concurrent jurisdiction, (it is not right to call it so,) in the resort to this Court instead of the Ecclesiastical Court, upon legatory questions, which after the Restoration was very frequent, and in the beginning embarrassed the Court. Distinction upon distinction was taken to get out of the supposed difficulty. How it should ever have come to be a rule of decision in the Ecclesiastical Court is impossible to be accounted for but upon this circumstance—that, in the unenlightened ages, soon after the revival of letters, there was a blind superstitious adherence to the text of the civil law. They never reasoned, but only looked into the books, and transferred the rules, without weighing the circumstances, as positive rules to guide them. It is beyond imagination, except from that circumstance, how, in a Christian country, they should have adopted the rule of the Roman law with regard to conditions as to marriage. First, where there is an absolute unlimited liberty of divorce, all rules as to marriage are inapplicable to a system of religion and law where divorce is not permitted. Next, the favor to marriage, and the objection to the restraint of it, was a mere political regulation applicable to the circumstances of the Roman empire at that time, and inapplicable to other countries. After the civil war, the depopulation occasioned by it led to habits of celibacy. In the time of Augustus, the Julian law, which went too far, and was corrected by the Lex Papia Poppæa, not only offered encouragement to marriage, but

laid heavy impositions upon celibacy. That being established as a rule in restraint of celibacy, (it is an odd expression,) and for the encouragement of all persons who would contract marriage, it necessarily followed, that no person could act contrary to it, by imposing *re- [*212] straits directly contrary to the law. Therefore it became a rule of construction that these conditions were null. It is difficult to apply that to a country where there is no law to restrain individuals from exercising their own discretion as to the time and circumstances of the marriage their children or objects of bounty may contract. It is perfectly impossible now, whatever it might have been formerly, to apply that doctrine not to lay conditions to restrain marriage under the age of twenty-one to the law of England; for it is directly contrary to the political law of the country. There can be no marriage under the age of twenty-one without the consent of the parent." Per Lord Rosslyn, in *Stackpole v. Beaumont*, 3 Ves. 96. And see *Pearce v. Loman*, 3 Ves. 139.

In our law, however, there is a marked distinction between conditions precedent and conditions subsequent; for where a condition is precedent, as the estate cannot commence until the condition is performed, the condition is beneficial, as creating an estate, and ought to be construed favorably. Where, however, a condition is subsequent, as it operates by way of destruction of an estate already in existence, and being of a penal nature it ought to be construed strictly. In consequence of this distinction it will be better to consider conditions precedent and subsequent, as applicable to the subject now under consideration separately.

Conditions Precedent with respect to marriage.—With regard to a devise of land (*Fry v. Porter*, 1 Ch. Ca. 138: 1 Mod. 300; *Bertie v. Lord Falkland*, 3 Ch. Ca. 129); or of a portion to be raised out of land, or a legacy having reference, and given as an augmentation, to a portion to be raised from land (*Reves v. Herne*, 5 Vin. Abr. 343, pl. 41; *Hervey v. Aston*, 1 Atk. 361; *Reynish v. Martin*, 3 Atk. 330), on condition of marrying with consent, it is clear that it will not take effect unless the condition be complied with, even although there be no gift over; for such condition is valid at common law, and must be complied with.

And although, from the leaning towards the civil law, it seems at one time to have been supposed, that where a personal legacy was bequeathed to a person upon marriage under twenty-one, or other reasonable period, *with the consent* of persons designated by the testator, the condition was only in *terrorem*, and that the legacy would vest upon marriage, it is now, it is submitted, settled by the principal case, that such legacy will not vest unless the consent be first obtained; for the condition is precedent; and, as it imposes no other restraint upon the liberty of marriage than is before imposed or is allowed by

*the law of the land, it is good, whether there be a limitation over or not (*Hemmings v. Munkley*, 1 Bro. C. C. 304: 1 Cox. [*213] 38; overruling *Underwood v. Morris*, 2 Atk. 184); for although there is a limitation over in the principal case, it is not dependent upon a marriage without consent, but upon dying under a particular period, without marriage ever having taken place,—a limitation which was disappointed by the marriage of the legatee, though without consent.

This subject was much discussed in the important case of *Stackpole v. Beaumont*, 3 Ves. 89. There the testator devised his real estates in remainder to the use of L. W., or such person, if any, with whom she should first intermarry, “if before twenty-one, then with the consent of his trustees, or the survivor of them,” for their joint lives and the life of the survivor, &c. Towards the end of his will, he gave to L. W. 10,000*l.*, “payable and to be paid to her as follows:—5000*l.* upon her marriage with such consent as aforesaid, and 5000*l.* within two years next afterwards.” L. W., while an infant, and a ward of the Court, eloped, and was married in Scotland, without the consent of the trustees. Lord Rosslyn held, that she was not entitled to the legacy. “Confined to cases,” said his Lordship, “where the restraint operates only up to the age, till which, by the law and policy of the country, consent is necessary, I have no difficulty to say there is no authority to lead the Court to pronounce a proposition so repugnant to that law, as that such a condition is invalid. In *Scott v. Tyler* there is a very accurate, though not a very extended, opinion of Lord Thurlow (reported by Brown), which carries conviction along with it. The question is, not whether any forfeiture has been incurred, but whether the parties to whom the legacy is given have put themselves in a situation to answer that description of the person to take. There is no gift here but in the direction to pay; for I cannot stop in the middle of a sentence. He gives her 10,000*l.*, that is, in effect, two sums of 5000*l.*, one payable upon her marriage with consent. She has not married with consent. She has married without it. Can she claim the 5000*l.* under the will? I do not see the great importance of the distinction upon a bequest over of the legacy. It is one of the points that occurred to Judges sitting here, to deliver them from the difficulty arising from the rule of the civil law adopted without seeing the ground and the reason of applying it to this country under different circumstances.” And see *Clifford v. Beaumont*, 4 Russ. 325; *Knight v. Cameron*, 14 Ves. 389; but see *Reynish v. Martin*, 3 Atk. 330; 1 Wils. 130.

*Where a legacy or annuity is given by a parent to his daughter provided she does not marry before a certain age, as [*214] for instance the age of twenty-eight, she will not it seems be entitled to the legacy or annuity, if she marry before that age, even with the consent of her parent; *Younge v. Furse*, 8 De G. Mac. & G. 756; 3 Jur.

N. S. 603, where the Lords Justices reversed the decision of Sir John Romilly, M. R., reported 2 Jur. N. S. 864 ; 26 L. J. Ch. N. S. 117.

There is some doubt, with regard to a personal legacy, whether a condition precedent requiring consent *generally*, without reference to the age of the legatee, is valid, unless it be accompanied by a bequest over on marriage without consent, in which case it is clearly valid ; *Malcolm v. O'Callaghan*, 2 Madd. 349, 353 ; *Gardiner v. Slater*, 25 Beav. 509. So, likewise, is it where there is another legacy or provision for the legatee in the event of marriage without consent ; *Creagh v. Wilson*, 2 Vern. 572 ; *Gillet v. Wray*, 1 P. Wms. 284 ; but see *Hicks v. Pendarvis*, Freem. Ch. Rep. 41 ; 2 Eq. Ca. Ab. 212. In both these instances the testator may be considered to have shown it as his intention by a gift over to another, in the first, and by a different gift to the legatee in the second case, that the condition should not be taken merely as in *terrorem*.

Conditions Subsequent with respect to marriage.—It seems to be clearly settled, according to the law as administered in Courts of justice in this country, that, if a condition in restraint of marriage is *general*, and also subsequent, then the condition is altogether void, and the party retains the interest given to him, discharged of the condition ; that is, supposing a gift of a certain duration, and an attempt to abridge it by a condition in restraint of marriage *generally*, the condition is *primâ facie* void, and the original gift remains ; *Morley v. Rennoldson*, 2 Hare, 579.

And this would be the case either with regard to a devise of land or the bequest of a legacy. In *Morley v. Rennoldson*, 2 Hare, 570, the testator bequeathed the residue of his personal estate to his daughter upon trust for her maintenance and support until she attained twenty-one or married with the consent of his trustees under that age ; and upon her attaining such age or her marriage, for her separate use, with remainder to her children ; and in case of her death without issue, he bequeathed the same to certain legatees in remainder. The testator afterwards, by a codicil, declared that, in consequence of a nervous debility his daughter was unfit for the control of herself, and his will was, that she should not marry ; and in case of her marriage or *death [215] he gave the property he had bequeathed to her over to the same legatees in remainder. It was held by Sir James Wigram, V. C., that the restraint upon marriage being general, the condition was void, notwithstanding the limitation over. "The question to be considered," said his Honor, "is that upon which, in fact, I reserved my judgment,—whether, according to the true intent of the second codicil, it must be considered as confirming the gifts made by the will, and then seeking to determine them on the event of marriage, or whether it was not a complete substitution of new bequests, amounting in substance to a limitation during celibacy. Without saying the case is clear, the conclusion

to which I have come is, that this codicil does, in point of fact, recognise and confirm the prior bequests by the will. . . . In the case of *Malcolm v. O'Callaghan* (2 Madd. 349), which was cited, marriage with consent was a condition precedent by the will, and the codicil giving the legacy to the survivor of the daughters who should die before the age of twenty-five or marriage with consent, was held to keep alive the condition. The testator, in this case, has so expressed himself as to import an intention to create a general restraint upon the marriage of the legatee, and the limitation over with that object is therefore *primâ facie* void. . . . I cannot do otherwise than hold, that this is a conditional gift in general restraint of marriage, by which the testator seeks to cut down an interest which he had given by will; and, therefore, that I must hold this to be a void condition." See also *Lloyd v. Lloyd*, 2 Sim. N. S. 255.

And even where the condition in restraint of marriage is not general, but against marriage with a particular person (*W. v. B.*, 11 Beav. 621; and see *Poole v. Bott*, 11 Hare, 33), or restraining a widow of a testator from marrying again (*Marples v. Bainbridge*, 1 Madd. 590), in the absence of a gift over upon breach of the condition, it has been construed as in *terrorem* merely.

Where, however, there is a gift over on marriage, and even, it seems, where the gift to the widow is made to cease upon marriage, a condition subsequent against marriage generally, attached to a devise or bequest, is valid, not only when the legatee or devisee is the widow of the testator (*Tricker v. Kingsbury*, 7 W. R. V. C. W. 652; *Craven v. Brady*, 4 L. R. Eq. 209), but also when she is the widow of another person (*Charlton v. Coombes*, 11 W. R. V. C. S. 1038). In *Newton v. Marsden*, 2 J. & H. 356, by a will certain trusts were declared for the benefit of the widow of the testator's nephew and her children, under which the widow was entitled to certain rents of real estate, and to annuities *charged primarily on real estate, and to be made up if [*216] necessary, out of personal estate, and there was a proviso that, if the widow married again, the trusts for her benefit should absolutely cease and be void. It was held by Sir W. Page Wood, V. C., that the condition was valid. "It seems to me," said his Honor, "that the real principle in the case of a gift by a husband is, that the condition is not regarded as an arbitrary prohibition of marriage altogether, but the conditional gift is considered as made to the widow because she is a widow, and because the circumstances would be entirely changed if she entered into a new relation. The very same consideration applies to this gift, and I think it would be reasonable, on a will of this kind, to hold that the case falls within the principle which governs a gift to a man's own widow. But I prefer to rest my decision on what is perhaps the safer as well as the broader ground, namely that there is no authority in the common law, independently of the civil law, for saying

that a condition restraining the marriage of a widow is void; and having regard to the observations of Lord Loughborough, I do not hesitate to say, that I shall not introduce any new doctrine to carry the rule of avoiding restraints on marriage beyond the limits of the old authorities:" and see *Tricker v. Kingsbury*, 7 W. R. V. C. W. 652.

Whether a condition defeating a gift to a *man* on his second marriage is good or bad, does not appear to have been decided; *Evans v. Rosser*, 2 Hem. & Mill. 190.

Where a legacy is given to a woman absolutely, at a certain time, and there is a subsequent condition requiring *consent* to marriage, the condition will be construed as in *terrorem*, if there be no bequest over, although there be a diminished gift to the legatee in the alternative of her marrying without consent; *Garret v. Pritty*, 2 Vern. 293; 3 Mer. 120, n.

If the power of diminishing the legacy is delegated to another person, the condition will be considered as in *terrorem* merely, in the same manner as if the diminution of the legacy had been provided by the testator in his will; *Wheeler v. Bingham*, 3 Atk. 364.

Should, however, the legacy be limited over to another person on the marriage without consent, the condition will not be considered merely as in *terrorem*, but on breach of it, the gift over will take effect; *Stratton v. Grymes*, 2 Vern. 357; *Barton v. Barton*, 2 Vern. 308. And see 3 Atk. 367.

Different reasons have been assigned by different judges for the operation of a devise over. Some have said that it afforded a clear manifestation of the intention of the testator not to make the declaration of forfeiture merely in *terrorem*, which might otherwise have been [*217] presumed. Others have *said, that it was the interest of the devisee over which made the difference; and that the clause ceased to be merely a condition of forfeiture, and became a conditional limitation, to which the Court was bound to give effect. Whatever might be the ground of decision, it was held, that where the testator only declared that, in case of marriage without consent, the legatee should forfeit what had been before given, but did not say what should become of the legacy, such declaration would remain wholly inoperative." Per Sir W. Grant, M. R., in *Lloyd v. Branton*, 3 Mer. 117.

It seems that a mere gift of a residue, as is laid down by Lord Thurlow, in the principal case, will not be considered as a bequest over, for it has been repeatedly determined that that will leave the legacy in *statu quo*, as it only prevents that which has not been disposed of already, whatever be its amount, from falling, by order of law, to the executor or next of kin: *Paget v. Haywood*, cited 1 Atk. 378; *Keily v. Monck*, 3 Ridg. P. C. 205, 252; overruling *Amos v. Horner*, 1 Eq. Ca. Ab. 112, pl. 9.

However, there is a clear distinction between a mere residuary be-

quest, and a direction that a legacy should sink into and form part of the residue ; for that is tantamount to a gift over to the persons participating in the residue: *Wheeler v. Bingham*, 3 Atk. 368. And see *Lloyd v. Branton*, 3 Mer. 108, 118.

Limitations until marriage as distinguished from conditions.—Where property is limited to a person until marriage, and upon marriage then over, the limitation is good. "It is difficult," says Sir J. Wigram, V. C., "to understand how this could be otherwise: for in such a case there is nothing to give an interest beyond the marriage. If you suppose the case of a gift of a certain interest, and that interest sought to be abridged by a condition, you may strike out the condition and leave the original gift in operation ; but if the gift is until marriage, and no longer, there is nothing to carry the gift beyond the marriage. . . . I am satisfied, from an examination of the authorities, that there is no reason to alter my opinion, that a gift until marriage, and when the party marries then over, is a valid limitation. In the case of a widow, there is no question of the validity of such a limitation. It was decided in *Jordan v. Holkham*, Amb. 209, that, where an estate was given during the widowhood, the estate was determinable by the second marriage ; and an annuity given during widowhood is also good: *Barton v. Barton* (2 Vern. 308). In *Scott v. Tyler* (ante, 205, 206), Lord Thurlow, speaking of the change which the civil law had undergone in its descent, observes, that, in the Novels, *widowhood [*218] was excepted, and an injunction to keep that state was a lawful condition: *Scott v. Tyler*, was certainly a peculiar case: but, referring to the canon law, Lord Thurlow, citing Godolphin, says, that the use of a thing may be given 'during celibacy for the purpose of intermediate maintenance, and will not be interpreted maliciously to a charge of restraining marriage' (ante, 206), affirming, therefore, the general doctrine, that a gift until marriage would be good. In the case of *Low v. Peers*, C. J. Wilmot's Cases, 369, Chief Justice Wilmot goes through the cases upon the subject, and shows that, according to his apprehension of the law, a gift until marriage is perfectly good. He notices the case of college fellowships, of customs of manors, of limitations of estates during celibacy, and the express distinction between limitations and conditions ; and he remarks, that that distinction is recognised and established, and that the common law allows it. I may refer to the cases, and amongst them to the later ones of *Bird v. Hunsdon* (2 Swanst. 342), and *Marples v. Bainbridge* (1 Madd. 590), as affirming the same proposition. In those cases, all the reasons the Court referred to were superfluous, if a limitation during celibacy is not good. The Court might have taken the short course, and have said that it was in the nature of a restraint, and therefore could not be supported: " *Morley v. Rennoldson*, 2 Hare, 580; *Evans v. Rosser*, 2 Hem. & Mill. 190.

In *Webb v. Grace*, 2 Ph. 701, A. covenanted to pay E. C. during her life, subject to the proviso thereafter contained, an annuity of 40*l.*, the proviso being, that in case E. C. should at any time thereafter happen to marry, the annuity should thenceforth be reduced to 20*l.* only, which sum should, in such case, be paid and payable to E. C. from the time of her marriage for the remainder of her life. E. C. having married, Lord Cottenham, reversing the decision of Sir L. Shadwell, V. C. (reported 15 Sim. 384), held her only to be entitled to the annuity of 20*l.* "The question," observed his Lordship, "turns upon the construction of the covenant; for there really cannot be any doubt as to the rule of law. The questions which have arisen as to conditions subsequent in restraint of marrying do not appear to me to apply. There can be no doubt that marriage may be made the ground of a limitation ceasing or commencing. It is necessary to refer to authorities for this purpose: *Richards v. Baker* (2 Atk. 321), *Sheffield v. Lord Orrery* (3 Atk. 282), *Gordon v. Adolphus* (3 Bro. P. 306, Toml. edit.), were cited in the argument. If, then, this grant is a grant of 40*l.* per annum until marriage, and, from that event happening, of 20*l.* per annum for life, there can be

[*219] *no doubt but that such a gift is lawful, and that, after marriage, there can be no demand for the 40*l.* per annum. The claim is grounded upon contract and obligation on the part of the grantor; the parties claiming must therefore prove that their claim is within the terms of the contract and obligation. . . . Is there, in the covenant, any contract or obligation to pay 40*l.* per annum after the marriage of E. C.? The argument in favor of the claim assumes that there is an unqualified grant of an annuity of 40*l.* per annum for life, and an attempt to defeat the gift by an illegal condition subsequent. This proposition, I think, fails in all its parts: for there is not any unqualified gift of an annuity of 40*l.* for life; the contract and obligation is, to pay to E. C. during her life, subject to the proviso hereinafter contained, an annuity of 40*l.* at certain times specified. The contract and obligation is not absolute and unqualified, but explained, qualified, and bound by the proviso, and must be construed precisely in the same manner as if the terms of the proviso had been introduced into and made part of the contract and obligation. It is, therefore, to pay 40*l.* per annum to her during so much of her life as she shall remain unmarried, which brings the case within the unquestioned rule of law, as acted upon in the cases referred to. One of them, indeed—*Sheffield v. Lord Orrery*—is, upon this point, stronger than the present; for there was a gift for life, without any qualification in the terms of the grant, but a subsequent condition, giving the property over in the event of marriage; and Lord Hardwicke said, that the gift over was to take effect on the marriage. There is another way in which this may be viewed equally fatal to the claim. The contract and obligation is, to pay a certain sum at certain stipulated periods during the life of E. C.; but she is, by

the proviso, at each of those periods to be qualified to receive it by the fact of not being married. Can she claim any of such payments, though disqualified by the fact of marriage? The condition, therefore, if there be one, is precedent and not subsequent."

In *Heath v. Lewis* (3 De G. Mac. & G. 954) a testator bequeathed an annuity to a single lady (if living and unmarried at the death of a prior annuitant) "during the term of her natural life, if she shall so long remain unmarried:" it was held by the Lords Justices to be a limitation as distinguished from a condition, and that the annuity ceased when the lady married. "It must be agreed on all hands," said Lord Justice Knight Bruce, "that it is by the English law competent for a man to give to a single woman an annuity until she shall die or be married, whichever of these two events shall first *happen. All men [220] agree that if such a legatee shall marry, the annuity will thereupon cease. But this proposition has been advanced—a proposition which, if true (and I do not deny its truth), is, perhaps, not creditable to this English law—that if a man give an annuity to a woman, who has never married, for life, and afterwards declares that, if she shall marry, the annuity shall be forfeited, the condition is void, and she may yet marry as often as she will, and retain her annuity. Such is the state of our English law on this subject said, and perhaps truly, to be; and the question argued before us has been, to which of these two classes the gift in this will belongs, being a gift of an annuity to a single lady 'during the term of her natural life, if she shall so long remain unmarried.' This language being the technical and proper language of limitation as distinguished from condition, long known to the English law, and familiar to us all. Both upon precedent and reason, upon principle and authority, I am of opinion that this is a limitation as distinguished from a condition, and that the annuity ceased when the lady married."

In the recent case of *Cooper v. Cooper*, 6 Ir. Ch. Rep. 217, a testator by his will, dated in 1841, devised lands to trustees upon trust for B. for life, "provided she does not marry, and from and after her decease or second marriage," for other persons. In 1847 the testator married B., and afterwards made a codicil to his will which had the effect of republishing it. It was held by Lord Chancellor Brady, that the devise to B. took effect notwithstanding her marriage to the testator. "Looking," said his Lordship, "at what took place, and the fact that she had married the testator himself, it would be a very strong thing to decide that where, by his own act, he induced her to break the condition, she was to be deprived of all this estate. I must, however, treat the codicil as a republication, and therefore as declaring that, at all events, at the time of its execution, it was his will that she should take this property unless she should afterwards marry." See also *In re Corkers v. Minors*, 1 Ir. Jur. 316; *West v. Kerr*, 6 Ir. Jur. 141; *M'Culloch v. M'Culloch*, 3 Giff. 606.

As to Consent to Marriage.—A marriage in the lifetime of the father, with his consent, or even his subsequent approbation, is equivalent to a marriage after his death with the consent of trustees. Thus, in *Clarke v. Berkeley*, 2 Vern. 720, under a devise upon trust to convey to the testator's daughter, in case she married *with the consent of two of the trustees and her mother*, but, if she died before marriage, or married without such consent, to other uses; the daughter having [*221] *married in her father's lifetime with his consent, Lord Cowper decreed a conveyance according to the will, declaring that the condition was dispensed with, by having the testator's own consent, which was more to be regarded than any consent of trustees to whom he had delegated a power to consent, in case of marriage after his decease. So, in *Coffin v. Cooper*, cited 1 V. & B. 481, where a testator gave the residue of his property to his children at twenty-one, adding a proviso, that if any of his daughters married with the consent of his trustees, such daughter was to take immediately two-thirds of her portion, the other third to be settled to her separate use; if, without such consent, then making a different disposition. One of the daughters married in the testator's lifetime without his consent, but he *afterwards* approved of the marriage. The Court considered the clause substantially complied with. See *Parnell v. Lyon*, 1 V. & B. 479; *Wheeler v. Warner*, 1 S. & S. 304; *Coventry v. Higgins*, 14 Sim. 30.

Upon the same principle, Lord Rosslyn held a condition in a will requiring the consent of trustees to a marriage not to be applicable to the second marriage of a daughter who had married between the date of the will and the death of the testator, and was a widow at his death. "It would," he observed, "be the absurdest of all constructions, that a will, intended to provide for a marriage, and enable the wife to provide for the children, must, by these conditions, so inapplicable to the case of a daughter married and having children, compel her to marry again for the sake of the children by the first marriage." *Crommelin v. Crommelin*, 3 Ves. 227.

Where no particular mode is prescribed for trustees to give their consent, it will be presumed that they have given it where they have allowed courtship and marriage to take place without expressing their dissent, especially if from any fraudulent or corrupt motive they have withheld actual consent. Thus, in *Mesgrett v. Mesgrett*, 2 Vern. 580, H. T. gave to Maria, her only child, 300*l.*; but if she married before twenty-one, without the consent of her executors, Mesgrett, Tanden and Chawell, it was to go to the children of her sister, the second wife of Mesgrett. Maria being eleven years old at the death of her mother lived for some time with Chawell, and was there courted by the son of Mesgrett by a former marriage; and afterwards Maria removed to the house of Mesgrett, where the marriage was had with his privity. The other executors having notice the match was being carried on, did not

contradict or disapprove of it, or remove the young woman as they might have done. Upon pretence that the legacy was forfeited, Mesgrett claimed it for his children *by his second wife; but Lord [222] Keeper Cowper held that Maria and her husband were entitled to the legacy, "it plainly appearing there was at least a *tacit consent*, and the will not prescribing the manner of the consent to be in writing, or otherwise; and looked upon it as a fraud in Mesgrett in promoting the marriage, and afterwards to pretend a forfeiture for want of a consent to gain the legacy to his children by his last wife." Lord Eldon, approving of this case, in *Clarke v. Parker*, 19 Ves. 12, says, nevertheless, that it would be difficult to support it, if consent *in writing* had been required, and that the Lord Keeper laid stress on the circumstance, that, as writing was not required, consent might be signified by acts, without a formal consent. However, in *Lord Strange v. Smith*, Amb. 263, although the *written* consent of the mother was made requisite, it was held by Lord Hardwicke, that the mother having made the first offer to Lord Strange, received him at her house, encouraged his addresses to her daughter, and treated with him and his father about the settlement, had thereby given her consent (although it does not appear by the report that it was in writing); and that she could not withdraw it, on account of the offence she took at Lord Strange, for some reflections which she heard that he had made upon her. Lord Eldon, although he cites this case in *Clarke v. Parker*, does not notice that the consent was required to be in writing. In *Worthington v. Evans*, 1 S. & S. 165, where, however, a letter written by the trustee the day before the wedding, was held to be a sufficient consent in writing, Sir John Leach, V. C., said, "that if there had not been such a letter, inasmuch as the formal consent in writing would have been executed by him, but for the accidental delay occasioned by the other trustee, and not from any change of purpose, the court would have considered his consent to have been substantially given, according to the will; because he had expressed his full approbation of the marriage, and only did not sign it for a reason personal to himself."

Courts of equity are disposed to put a favorable construction upon the expressions of trustees where consent is requisite, so as to prevent a breach of condition, especially after a mutual attachment has been suffered to grow up under their sanction. Thus, in *Daley v. Desbouverie*, 2 Atk. 273, where the consent (not in writing) of three trustees, or the major part of them, was necessary, a proposal was made by the intended husband for a settlement to one of the trustees who communicated it to his co-trustees; and one of the trustees, writing on behalf of the other, said, "If the father will make the settlement *proposed, [223] we believe the young folks are too far engaged for us to attempt break off the match, and therefore we shall be obliged to consent to it." The trustees afterwards refused their consent, unless the lady's portion

was settled in a particular manner, and the parties were married "by John Graynman, the famous Fleet parson." Lord Hardwicke, nevertheless, held, that the marriage was substantially with the consent of the trustees. So, in *D'Aguilar v. Drinkwater*, 2 V. & B. 225, where the marriage was to be with the consent of three trustees, first obtained in writing, it was held that the consent of all was duly obtained, although two of them only had expressly given their consent; the other, only in general terms, stated in a letter, that "he would never stand in the way of any arrangement by the co-trustees," and advised a settlement, he having previously encouraged the proposal, and, though fraud was not imputed, having a prospect of benefit from the forfeiture. See also *Le Jeune v. Budd*, 6 Sim. 441. See, however, Lord Eldon's observations on *Daley v. Desbouverie*, in *Clarke v. Parker*, 19 Ves. 12, 18.

In *Pollock v. Croft*, 1 Mer. 181, where there was a bequest of personal estate to A., provided she married with the consent of B., but if she married without such consent, then to C., Sir William Grant, M. R., held, that a general permission given by B. after A. attained twenty-one, to contract marriage as she might think fit, and subsequent approbation of a marriage contracted under such general permission without his knowledge, was a sufficient compliance with the requisition; but as the consent only appeared by the answer of B., which could not be read against C., who was an infant, a reference was directed to the Master to inquire what consent was given by B.

The Court has assumed the power, although it be a dangerous one, of examining whether the refusal of consent by a trustee proceeds from any vicious, corrupt or unreasonable cause: *Dashwood v. Lord Bulkeley*, 10 Ves. 245; *Clarke v. Parker*, 19 Ves. 18. But even if the person who refuses his consent be the devisee over, he is not obliged to show his reason for dissent—it lies upon the party requiring assent to show that it has been unreasonably refused; "for," as observed by Lord Eldon, "the testator must know that he has made necessary the consent of a person who has an interest:" *Clarke v. Parker*, 19 Ves. 22. See, however, the remarks of Lord Hardwicke, in *Hervey v. Ashton*, Atk. 381; and of Lord Mansfield, in *Long v. Dennis*, 4 Burr. 2052.

If a trustee, whose consent to a marriage is required, refuse to interfere, either by consenting or objecting to a proposed match, the Court will direct a reference *to inquire and state to the Court whether [*224] the marriage is a proper one: *Goldsmid v. Goldsmid*, G. Coop. 225.

If consent be once obtained, unless by fraud or misrepresentation (*Dillon v. Harris*, 4 Bligh, 321), it cannot without a sufficient reason be withdrawn, especially if the person so withdrawing his consent would derive a benefit from a marriage without consent: *Lord Strange v. Smith*, Amb. 263; *Merry v. Ryves*, 1 Eden, 1; *Le Jeune v. Budd*, 6 Sim. 441. In *Dashwood v. Lord Bulkeley*, 10 Ves. 230, the refusal

of the intended husband to make a settlement was held by Lord Eldon a sufficient reason for the trustees withdrawing their assent to the marriage, which they had given upon condition of his making it.

When the consent of all the trustees is required, the consent of two, without the third being consulted, is insufficient, as there is a discretion in him as well as the others (*Clarke v. Parker*, 19 Ves. 1); but the consent of one of the executors or trustees, who renounced or never acted, would, according to the more recent authorities, be unnecessary, the authority of consent being annexed to the office. See *Clarke v. Parker*, 19 Ves. 15, 16; *Worthington v. Evans*, 1 S. & S. 165. However, in *Graydon v. Hicks*, 2 Atk. 16, where the marriage was to be with the consent of the executor Graydon, the executor renounced, and administration was granted to one Timewell, a marriage took place without any consent; but it was objected, that it was not a breach of the condition, because Graydon had renounced, and administration with the will annexed, had been granted to Timewell; but Lord Hardwicke was of opinion, that the objection was not well grounded, and that the legacy was forfeited; as the word "executor" was a description of every person who should be administrator; and that it was a power not annexed to the office of executor, but independent from the rest of his duty as executor.

"Where the condition has become impossible by the person dying whose consent was necessary before marriage, it is an excuse:" Per Lord Hardwicke, in *Graydon v. Hicks*, 2 Atk. 16. And see *Aislabe v. Rice*, 3 Madd. 256; *Grant v. Dyer*, 2 Dow. 93; *Collett v. Collett*, 35 Beav. 312; 14 W. R. M. R. 446. So, where a legacy was bequeathed to a lady upon condition of her marrying with the consent of two persons, who were also executors; on the death of one of them, the condition being subsequent and become impossible, she might marry without the consent of the survivor: *Peyton v. Bury*, 2 P. Wms. 626; but see *Jones v. Earl of Suffolk*, 1 Bro. C. C. 529.

The subsequent approbation of persons whose consent is necessary to a marriage, is immaterial, *because it cannot amount to a performance of a condition, or dispense with a breach of it: [*225] *Reynish v. Martin*, 2 Atk. 330; *Fry v. Porter*, 1 Ch. Ca. 138; 1 Mod. 300. Lord Hardwicke, in *Burleton v. Humphrey*, Amb. 256, where the marriage was to be with "the consent or approbation" of a trustee, who did not give his approbation until a month after the marriage, struggles to distinguish between consent and approbation; and the condition being in the latter part of the clause expressed in the alternative, inclined to the opinion that the subsequent approbation would do. "Lord Thurlow, however," says Lord Eldon, "denied that, as he did not see why subsequent approbation, if sufficient after eleven months, would not do at any time during the whole life of the trustee; during which it must be quite uncertain whether the marriage was had in conformity with the condition or not:" *Clarke v. Parker*, 19 Ves. 21.

And where the condition was that the party should not marry *against* the consent of the trustees, a marriage contracted *without* their knowledge, but with their subsequent approbation, was held a breach of the condition; *Long v. Ricketts*, 2 S. & S. 179.

Where a legacy is to vest or be paid at a particular age, and then there is a clause of forfeiture on marriage without consent, such clause will be construed as having relation to a marriage under the specified age; *Lloyd v. Branton*, 3 Mer. 116; *Osborn v. Brown*, 5 Ves. 527. And see *Desbody v. Beyville*, 2 P. Wms. 457.

The court may relieve against forfeiture accasioned by the negligence of a trustee. Thus in *O'Callaghan v. Cooper*, 5 Ves. 117, a trust term was limited to trustees, to raise out of real estate portions for daughters, to be paid on marriage, upon condition that they should be married with consent of their mother, or, after her death, of the trustees, and that the husband should previously make a settlement. A marriage having taken place with the consent of the mother and the privity of the trustee, but by the neglect of the trustee, without any settlement, the husband having before and after the marriage offered all that was required of him, and being ready to execute a settlement within the condition, relief was given upon those circumstances by raising the portion upon the execution of the settlement. See also *Mallon v. Fitzgerald*, 3 Mod. 28.

Where the testator has not made the consent of *other* persons requisite, the question may arise, when he has imposed any condition with respect either to the time of marriage, or against marriage with a particular person, how far by *his own consent* to the marriage he will be held to have dispensed with the condition, and it seems that where the condition is subsequent, the consent of the person *who imposed [226] the condition will remove the consequence of its non-performance. Thus, in *Smith v. Cowdery*, 2 S. & S. 358, a testator bequeathed his residuary personal estate unto his executors upon trust to pay and divide the same equally amongst his children, Susannah, Mary, Ann, Fanny, and William, when they should respectively attain twenty-one, or on the day of marriage, the interest in the meantime to be applied for their maintenance, "except his daughter Mary, whose share the testator directed should be paid to her upon the day of her intermarriage with any other person *excepting H. T.*, and the interest in the meantime to be applied for her maintenance." And the testator directed that "in case his daughter Mary should at any time thereafter intermarry with H. T., then upon trust to pay and divide her share of the residue of his personal estate" unto and amongst his other children. The testator died on the 1st of June, 1795, but his daughter had during the testator's lifetime, *and with his consent, married H. T.* It was held by Sir John Leach, V. C., that Mary was entitled to her legacy. "The testator," said his Honor, "introduces a condition in

his will to prevent the marriage of his daughter Mary with H. T. After the making of his will, his daughter married H. T. with his express consent and approbation; and the condition is thus dispensed with. In coming to this conclusion I follow the cases of *Clarke v. Berkeley*, 2 Vern. 720; *Crommelin v. Crommelin*, 3 Ves. 227; and *Parnell v. Lyon*, 1 Ves. & B. 479."

But the consent of the testator will not dispense with a condition precedent, that is to say where the performance of the condition is necessary before any interest is taken by the intended legatee or devisee. In *Bullock v. Bennett*, 7 De G. Mac. & G. 283; a testator bequeathed a sum of money upon trust for his daughter then a widow, "*for life, or until her marriage, or after her decease or marriage, which should first happen,*" upon trust for the children of his daughter by her first and second husband, both then deceased. Between the date of the will, and the testator's death, his daughter married a third husband, with her father's knowledge and approval, but he died without having republished his will. It was held by the Lords Justices, reversing the decision of Sir W. Page Wood. V. C. (reported 1 K. & J. 315), that the interest of the daughter had ceased, and that the gift over took effect. Their Lordships thought that the case was not affected by the 24th section of the Wills Act (1 Vict. c. 26), which they considered made the will speak as if executed immediately before the death of the testator with reference to the *real and personal property* comprised in it, and *not with reference to the *objects* [*227] of his bounty who are to take the real and personal estate. "The Vice-Chancellor," said Lord Justice Turner, "seems to have placed some reliance on the circumstance of the testator having approved the marriage. But this circumstance does not appear to me to be material. He might approve the marriage, and still intend the dispositions of the will to take effect. It seems probable indeed that this was his intention, for the dispositions over are in favour of children of the former marriages, for whom the daughter might be disabled from providing by the third marriage. . . . Some authorities were referred to on the part of this lady in the course of the argument: but they were cases in which the provisions of the will applied to marriages *with the consent of trustees* appointed by the testator's will, and the marriages afterwards having taken place in the lifetime of the testator, the legatees were held to be entitled. These cases do not seem to me to touch the present. The plain intention in such cases is to provide for the event, not of any marriage, but of an improvident marriage, and the consent of the testator proves that he did not consider the marriage to be improvident. But here the provision in the will applies to any marriage, whether provident or improvident."

In *Younge v. Furse*, 3 Jur. N. S. 603, 8 De G. Mac. & G. 756, the testator gave his daughter an annuity of 50*l.* for life, "providing that

she did not marry before she arrived at the age of twenty-eight." Subsequently, on being applied to for his consent to his daughter's marriage, she being then under twenty-one years of age, the testator wrote, "You have my qualified consent; but I must hear, of course, from my daughter before I can make that absolute." The daughter wrote to the testator stating her consent, and he wrote back to say he was very ill and could not appoint a time to attend to business, and on the following day he died. The daughter married after the death of the testator, and under the age of twenty-eight years. It was held by the Lords Justices of the Court of Appeal, reversing the decision of Sir John Romilly, M. R. (reported 2 Jur. N. S. 864), that the daughter was not entitled to the annuity. Lord Justice Knight Bruce is reported to have said, that "if the condition on which the present contention arises was precedent, I think that it was valid, and that its performance has become impossible, and that therefore the gift cannot take effect. If it was subsequent, it was, in my opinion, reasonable and valid; and it has not been testamentarily waived; and supposing it capable of being otherwise waived, it has not in my judgment been so waived. In saying this I assume the testator's consent *to the marriage to [*228] have been absolute; for, in my view, its being absolute is immaterial in such a case and under such testamentary dispositions as those before us." Lord Justice Turner, said, "This condition has not been complied with, and as to the consent of the testator to the marriage, I do not think that he ever gave an unconditional assent." And Lord Justice Knight Bruce further added, that he had assumed for the purposes of the argument, that the testator's consent to the marriage had been absolute; for in his view the absoluteness of such consent was immaterial in such a case. See *West v. Kerr*, 6 Ir. Jur. 441; *Davis v. Angel*, 31 Beav. 223.

From these authorities we may come to the conclusion that the consent of the testator in such cases, not testamentarily given, will not dispense with a condition imposed by his will, unless it be a condition subsequent.

As to whether conditions requiring marriage with consent are broken by a first marriage without consent, so as to disable a legatee from taking upon a second marriage with consent: see *Randall v. Payne*, 1 Bro. C. C. 55; *Page v. Hayward*, 2 Salk. 570; *Lowe v. Manners*, 5 B. & Ald. 917; *Stackpole v. Beaumont*, 3 Ves. 89; *Clifford v. Beaumont*, 4 Russ. 325; *Beaumont v. Squire*, 17 Q. B. 905; *Davis v. Angel*, 31 Beav. 223.

Where a condition against marriage was broken by a widow, who concealed her second marriage, her husband, who was aware of the condition, was held bound to refund the income which trustees had paid to her in ignorance of the marriage: *Charlton v. Coomes*, 4 Giff. 382; 11 W. R. (V. C. S.) 1038.

In a case where an estate was limited over in a settlement to the plaintiff on the second marriage of the defendant a widower, the plaintiff filed a bill, alleging that the marriage had taken place, and seeking discovery, a declaration of the rights of the parties, and the appointment of new trustees. It appeared by the evidence that no marriage had taken place, but that the defendant was cohabiting with a woman whom he held out to the world to be his wife. It was held, however, by Sir W. Page Wood, V. C., that as the plaintiffs failed in what was really their whole case, they ought to pay the costs of all parties up to the hearing, although incidental relief was granted by the appointment of new trustees: *Preece v. Seale*, 3 Jur. N. S. 711.

Persons will not be permitted to allow a long time to elapse without making any claim, and then to insist on a forfeiture, and throw on the persons entitled the burden of proving that there has been none. Thus, where a legacy was given, conditional on the consent and approbation of the trustees, and the party entitled in default of consent made no claim until twenty-eight years had elapsed after the *marriage, [*229] and the trustee and the legatee were all dead, it was held by Sir J. Romilly, M. R., although there was no distinct proof of consent, yet that it was to be presumed, under the circumstances of the case. "The ground," said his Honor, "I proceed on is, that after the lapse of twenty-eight years from the marriage, and after the death of the trustees, everything is to be presumed in favor of the legatee. That is the ground on which I proceed in this case. If this contest had taken place immediately after the marriage had occurred, and the fact before me had been, that the trustees knew nothing about it, and gave their approbation subsequently, I should be of opinion, that the legacy was forfeited:" *Re Birch*, 17 Beav. 358.

Of the laws as administered in England, in contrast from those of Rome, in regard to restraint upon marriage, Mr. Fonblanque has well observed, that "the claims of parental authority, controlled as they are by the law of England, merit considerable respect: nor has the right which individuals have of qualifying their bounty, been disregarded. The only restrictions which the law of England imposes are such as are dictated by the soundest policy, and approved by the purest morality: that a parent, professing to be affectionate, shall not be unjust; that, professing to assert his own claim, he shall not disappoint or control the claims of nature, nor obstruct the interests of the community; that, what purports to be an act of generosity, shall not be allowed to operate as a temptation to do that which militates against nature, morality, or sound policy, or to refrain from doing that which would serve and promote the essential interests of society; are rules which cannot reasonably be reprobated as harsh infringements of private liberty, or even reproached as unnecessary restraints on its free exercise." 1 Fonbl. 257.

Contracts in restraint of marriage, or in fraud of the marriage contract.—Upon the principle of public policy, contracts in restraint of marriage are held void. Thus, in *Baker v. White*, 2 Vern. 215, a widow gave a bond to pay B. 100*l.* if she married again, and B. gave a bond to her, to pay her executors the like sum if she should not marry again. On the marriage of the widow, a bill being filed by her and her husband, the Court ordered her bond to be delivered up to her, and also the bond of B. to be delivered up to him.

So, a contract to marry a particular person, when that person is not bound by corresponding obligation, will be cancelled: "it being contrary to the nature and design of marriage, which ought to proceed from a free choice, and not from any compulsion:" *Key v. Bradshaw*, 2 Vern. 102; and see *Woodhouse v. Shepley*, 2 Atk. 535; **Lowe* [*230] *v. Peers*, 4 Burr. 2225; *Cock v. Richards*, 10 Ves. 429; *Hartley v. Rice*, 10 East. 22. See Dig. Lib. xxxv., tit. 1, l. 62, 63, 64.

A contract, however, by which persons are mutually bound to marry each other will be valid at law. See *Cock v. Richards*, 10 Ves. 438, 439; and *Atkins v. Farr*, 1 Atk. 28; *S. C.*, 2 Eq. Ca. Ab. 247; but a bond under a penalty to marry a particular person, if given in fraud of parents or persons in loco parentis will be set aside in equity: *Woodhouse v. Shepley*, 2 Atk. 535.

A covenant to pay a woman a sum of money as long as she continues sole and unmarried is not illegal: *Gibson v. Dickie*, 3 M. & S. 463.

But although the contract may be mutual and valid at law, a Court of equity will relieve against it, if it be a fraud upon parents, or persons in loco parentis, from whom expectations are entertained. This was much discussed by Lord Hardwicke, in the important case of *Woodhouse v. Shepley*, 2 Atk. 535, where it seems that the defendant, a tailor by trade, and entitled to a small real estate of about 14*l.* per annum, in the year 1730 made his addresses to the daughter of a man who was esteemed in the neighbourhood to be a person of substance; the courtship had been carried on for some time before it came to the father's knowledge, who, as soon as he was acquainted with it, declared a great dislike to the match, and forbid his daughter giving the suitor any encouragement; notwithstanding which, the courtship was carried on in a clandestine manner till January, 1732, when they gave each other mutual bonds in a penalty of 600*l.*, to marry each other thirteen months after the decease of the father. Upon the death of the father, in 1736, a bill being filed by the daughter, Lord Hardwicke, upon the whole circumstances taken together, but principally by the encouragement which a different decision might give to disobedience, and fraud on parents, decreed the bond given by the daughter to be cancelled. "The points," said his Lordship, "on which I found my judgment, are these: that bonds of this sort, where parents are living, are liable to great fraud and abuse; that, to decree in favour of such a bond, would

be a great encouragement to persons to lie upon the catch to procure unequal marriages against the consent of parents ; and though they dare not solemnise the marriage in the lifetime of the parent, but only engage the affection, and draw the unfortunate person into a bond to forfeit their whole fortune, as is the case here, yet it is of very dangerous consequence, and tends to bring great misfortunes upon families.

“ Another principal ground of my opinion is, that this tends to encourage disobedience to parents, and indeed is a fraud and imposition *on the parent, though there is no actual fraud as between the parties. In this case she lived with her father, and was depend- [*231] ent on him for her portion, and he considered her as a child to be advanced ; and though a parent has no power by law to prevent the marriage of his child, yet it is expected that she should take his consent and approbation ; and by the laws of some countries that is made necessary. It is, therefore, a fraud on the father, who thinks his child has submitted to his opinion of the match, and in that opinion makes a provision for her, to advance her in marriage, which, had he known of the bond, he would not have done, or might have done in such a manner as would have prevented the marriage ; it is, therefore, in fraud of the father's right of disposing of his fortune among his children, according to their deserts, and may be compared to the cases of bonds given before marriage to return a part of the portion ; for there is no fraud in those cases between the contracting parties, but on the parents or friends of one of them, who are deceived, by settling lands equal to the portion that appears to be given ; and for such reason such bonds have been set aside. Another ground of relief is the penalty ; for this differs greatly in the reasonableness of it from executory promises, where the jury can consider the whole case, and whether the party has been unwarily drawn into such a contract or not, and the change of circumstances since the execution, and give damages accordingly ; and though it has been truly said, that a great alteration of circumstances or character would be a ground of relief here, yet that cannot be offered at law against the penalty, and bonds tend in themselves to prevent such circumstances from being properly considered ; bonds of this sort, therefore, deserve less favour upon this account, though perhaps that alone would not be sufficient to set them aside. As to the cases cited, none of them came up to this : *Key v. Bradshaw* (2 Vern. 102). The reason of that case was the inequality of circumstances, and the party being a servant, and the danger of admitting such transactions into families. *Baker v. White* (2 Vern. 215), went upon the general restraint of marriage.”

In another respect, our Courts have very properly not followed the civil law, by which proxenetæ, or matchmakers, were allowed to stipulate for a reward not exceeding a certain amount, for promoting marriages ; for it has been held in equity, from a very early period, that

all contracts or agreements for promoting marriages for reward (usually termed marriage brokerage contracts) are utterly void, upon the principle, that every contract relating to marriage ought to be free and open, whereas marriage brokerage contracts necessarily tend to a deceit on one [*232] *party to the marriage, or to the parents or friends: *Roberts v. Roberts*, 3 P. Wms. 76; *Chesterfield v. Janssen*, 2 Ves. 156; ante, Vol. 1, p. 586.

Nor does the Court interpose for the particular damage done to the party only, but likewise from a public consideration, marriage greatly concerning the public. Per Lord Talbot, in *Law v. Law*, Ca. t. Talb 142.

A leading case upon this subject is *Hall v. Thynne*, Show. P. C. 76. There Thynne, having an intention to make his addresses to Lady Ogle, gave a bond of 1000*l.* penalty, to pay 500*l.* ten days after his marriage to one Potter, who assisted in promoting the marriage, which afterwards took effect. After the death of Thynne, Potter brought an action upon the bond against the executors, and proving the marriage, recovered a verdict for the 1000*l.* Thereupon the executors filed a bill in chancery, for relief, as the bond was given for an unlawful consideration. Upon hearing the cause at the Rolls, Sir John Trevor, M. R., decreed the bond to be delivered up, and satisfaction to be acknowledged upon the judgment: this decree being reversed by Lord Keeper Somers, the executors appealed to the House of Lords. It was argued, on behalf of the appellants, that such bonds to matchmakers and procurers of marriage were of dangerous consequence, and tended to betraying, and oftentimes to the ruin, of persons of quality and fortune. That, if the use of such securities and contracts should be allowed and countenanced, they might prove the occasion of many unhappy marriages, to the prejudice and discomfort of the best of families. That such bonds and securities had always been discountenanced, and relief in equity given against them, even so long since as the Lord Coventry's time, and long before, and particularly in the case of *Arundel v. Trevillian*, 4 Feb. 11 Car. 1, (1 Ch. Rep. 87); and that marriage ought to be procured and promoted by the mediation of friends and relations, and not of hirelings. That, if such bonds were not vacated, when questioned in a Court of equity, it would be an evil example to executors, trustees, guardians, servants, and other people having the care of children; and therefore it was prayed that the decree of the Lord Keeper might be reversed, and it was reversed accordingly: *S. C.*, 1 Eq. Ca. Ab. 89, pl. 3; 3 P. Wms. 76; 3 Lev. 414. The vice of such a consideration is now, it seems, pleadable at law: *Collins v. Blantern*, 2 Wils. 347.

And so far has the principle been carried, that Lord Redesdale declared a bond void which was given as a remuneration to the obligee for having assisted the obligor in affecting an elopement and marriage

without the consent of the wife's friends, although it *was given voluntarily after marriage, and without any previous agreement [*233] for the same. "What," said his Lordship, "is the view which Courts of justice take of transactions of this description? Here was a young lady taken from her friends, carried off to Scotland, and there married, and a young man without fortune put into a situation to demand, by force of his marital rights, possession of her property; and a person concerned in the transaction, which is iniquitous on the part of the husband, is to increase the distress of the injured family, by obtaining from the husband a reward for his assistance in it. Thus the wife is to be injured even beyond the injury which she has received by the conduct of her husband; for, after marriage, everything the husband is bound to pay is an injury to the wife. This is so considered in various cases in Courts of justice. A father prevails on his son, previous to his marriage, to enter into a voluntary bond; the son does so, and the transaction is concealed from the family of the wife. The son shall be relieved, and why? Because the bond is a fraud upon the marriage contract. It may have been agreed between the father and the son, and perhaps the father, in consequence of that agreement, settled more than he could afford; but if the effect is to alter the condition in which the wife would otherwise be, such a bond is not suffered to have operation; and this not so much for the sake of the husband, as for the sake of the wife and her family:" *Williamson v. Gihon*, 2 S. & L. 357, 362.

The fact of the match being an equal or proper one, as in *Hall v. Potter*, will not render a marriage brokage contract valid: *Cole v. Gibson*, 1 Ves. 506; and such contract being contrary to public policy, is not capable of confirmation: *Cole v. Gibson*, 1 Ves. 503, 506, 507; *Roberts v. Roberts*, 3 P. Wms. 74, and Cox's note (1); and money paid pursuant to such contract may be recovered back in equity: *Smith v. Bruning*, 2 Vern. 392; *Goldsmith v. Bruning*, 1 Eq. Ca. Ab. 89, pl. 4.

Upon the same principle, every contract by which a parent or guardian obtains any security for promoting or consenting to the marriage of his child or ward, is void: *Keat v. Allen*, 2 Vern. 588; *S. C.*, Prec. Ch. 267. So in *Duke of Hamilton v. Lord Mohun*, 2 Vern. 652; *Gilb. Eq. Rep.* 297, the mother being guardian on the marriage of her daughter insisted upon having from the intended husband a bond, in a penalty that he would give her a release of all accounts as guardian, within two years after the marriage. The bond was set aside, as the case was in the nature and reason of marriage brokage bonds, and that there was no difference between giving a bond for procuring [*234] a marriage, *and a bond to release part of what became due.

Upon similar grounds, all contracts upon a treaty for a marriage, tending to deceive or mislead one of the parties to it, or their relatives, will be held void. Thus a security given by a son without the privity of his parents, who provided for him on his marriage, to return part of

the portion of his wife is void: *Turton v. Benson*, 1 P. Wms. 496; and see *Kemp v. Coleman*, Salk. 156. So where, upon a marriage, a settlement was agreed to be made of certain property, by relations on each side, and after the marriage one of the parties procured an underhand agreement from the husband to defeat the settlement, it was set aside, and the original agreement carried into effect: *Peyton v. Bladwell*, 1 Vern. 240; *Stribblehill v. Brett*, 2 Vern. 445; *S. C.*, Prec. Ch. 165.

So, where a man, on the treaty for the marriage of his sister, let her have money privately, in order that her portion might appear as large as was insisted on by the intended husband, and she gave a bond to her brother for the repayment of it, it was decreed to be delivered up: *Gale v. Lindo*, 1 Vern. 475; and see *Lamlee v. Hanman*, 2 Vern. 499. So, where a father, having, upon the marriage of his son, made a settlement of an annuity upon the wife, in full for her jointure, and in lieu of dower, the son, privately, without the knowledge of his intended wife or her father, gave a bond to indemnify his father against the annuity or rent-charge, it was held void by Sir W. Grant, M. R., as a fraud upon the faith of the marriage contract. "In what," said his Honor, "does the fraud consist? In affecting to put the party contracting for marriage in one situation by the articles, and in putting that party in another, and a worse situation, by a private agreement. The parent, in this case, professes himself to settle the jointure. The son, therefore, according to that, was to have no part of the burden thrown upon his property; but, by the private agreement, the burthen is thrown altogether back upon the son. It is of no consequence that the lady is equally, or more, secure; for the contract proceeds upon this, that he has found the means of providing for her without resorting to his own fortune. Whereas, the effect of the private agreement is to throw the burthen entirely upon his fortune; by which he is to that extent prevented from providing for his family, as he otherwise might. This is just as much a fraud upon the marriage contract, as if, receiving a fortune, he returns part of it. His capacity of providing for his family is equally diminished in both cases:" *Palmer v. Neave*, 11 Ves. 165.

Relief will be granted in such transactions, although the party
 [*235] *to the marriage seeking it be particeps criminis; thus, in *Redman v. Redman*, 1 Vern. 343, upon a treaty of marriage between A. and the daughter of B., B. would not consent to the marriage, because A. owed 200*l.* to C. A.'s brother thereupon gave his bond to secure the debt, and A.'s bond was cancelled; A., however, without the knowledge of B., but with the privity of his daughter, gave a counter-bond to his brother. Upon A.'s death, it was held, that the wife, though a party to the fraud, might set aside the bond; and the Lord Chancellor said, that if A. had been alive, and a party, he might also have been relieved

The principle upon which this class of cases proceeds was much discussed in the leading case of *Neville v. Wilkinson*, 1 Bro. C. C. 543. There Mr. Neville, being about to marry, inquiry was made by the lady's father to what extent he was indebted. Wilkinson, who was applied to, at the desire of Neville concealed a demand which he had against him; after the marriage he attempted to recover it, and a bill was filed by Mr. Neville to restrain him. Lord Thurlow held, that Wilkinson, having made a misrepresentation, a Court of equity must hold him to it; observing that the principle on which such cases had been decided was, "that faith in such contracts was so essential to the happiness both of the parents and children, that whoever treats fraudulently on such an occasion, shall not only not gain, but even lose by it." And see *Scott v. Scott*, 1 Cox, 366; *Shirley v. Ferrers*, cited 11 Ves. 536; *The Vauxhall Bridge Company v. The Earl of Spencer*, Jac. 67.

But equity will not interfere if another equally innocent person would thereby be injured. Thus, in *Roberts v. Roberts*, 3 P. Wms. 65, A. treated for the marriage of his son, and in the settlement on the son there was a power reserved to the father to jointure any wife whom he should marry in 200*l.* per annum, he paying, or securing the payment, of 1000*l.* to the son. The father, treating about marrying a second wife, the son, pursuant to an agreement with the second wife's relations, released the 1000*l.*, but at or soon after the marriage, took a new bond from his father, without the privity of the second wife or her relations. Upon a bill being filed by the father, Sir Joseph Jekyll, M. R., refused to set aside the bond given to the son, observing, that, whatever arguments could be made use of in favour of the father's second wife or of the father, to prove that he ought to be discharged of the bond for payment of the 1000*l.*, the very same arguments might be argued on behalf of the son and his wife, to prove that it ought to be paid. Thus, supposing it to be a hardship upon the father's second wife that her husband should be forced *to pay this 1000*l.*, in breach of the public and open agreement made by the son, was it not equally a [*236] hardship upon the son's wife, and as much a violation of the open and fair agreement made on her marriage, that the 1000*l.* should not be paid upon the father's making a second jointure, the consequence of which would be, that, as the agreement on the son's marriage was first, it ought to have the preference? Qui prior est in tempore, potior est in jure. See the remarks on this case in *Lee v. Hayes*, 17 J. C. L. R. (N. S.) 394.

As to settlements or contracts by a woman about to be married in fraud of marital rights, see *Countess of Strathmore v. Bowes*, ante, Vol. 1, p. 406, and note.

As to Conditions annexed to Gifts for the purpose of effecting the separation of Husband and Wife.—Upon principles of public policy it has been held, that where bequests are made to married women upon

condition of their living separate from their husbands, the condition is void, being considered *pro non scripto*, and the bequest will be good. Thus, in the old case of *Tennant v. Brail*, Toth. 141, where a man bequeathed a sum of money to his daughter "if she will be divorced from her husband," it was held that the gift was good, though the condition was void. So in the case of *Brown v. Peck*, 1 Eden's Rep. 130, where a testator directed "that if his niece lived with her husband, his executors should pay her 2*l.* per month, and no more; but if she lived from him, and with her mother, then they should allow her 5*l.* per month." It was held by Lord Keeper Henley, that the niece was entitled to the monthly payment of 5*l.*; and his Lordship thought "that the condition annexed, being impossible at the time of imposing it, and contra bonos mores, the legacy was simple and pure."

The same principle was acted upon in the recent case of *Wren v. Bradley*, 2 De G. & Sm. 39: there a testator bequeathed an annuity to his daughter, a married woman, "in case she should be living apart from her husband, and should continue so to do" during the life of his widow, with a direction that if at any time the annuitant should cohabit with her husband, the annuity should cease. By the same will, he bequeathed a share in the residue, upon trust to pay the income to the same daughter during such time as she should continue to live apart from her said husband; but should she at any time cohabit with him, the testator directed that during such time the income should be paid between other legatees. The will also contained a trust for children of the daughter by any other husband. At the date of the will the daughter and her husband were living apart; but before and at *the [237] date of the testator's death they were reconciled and living together, and so continued to live. It was held by Sir J. L. Knight Bruce, V. C., that the daughter was entitled to the bequests. "It is impossible," said his Honor, "to read the will without perceiving that the testator's wish and object were to obstruct a reconciliation, and prevent the wife from living with her husband; and that, by that wish, by that object, its provisions to her were influenced and directed. The weight of authority, and the principles of the civil law, as far as I consider them applicable, seems to me to render a decision in this case in the daughter's favour consistent at once with technical equity and moral justice."

This principle is not applicable where the bequest is of such a nature as not to influence the conduct of the husband and wife, and the bequest to the husband or wife living apart from each other is to take effect immediately on the death of the testator. See *Shewell v. Dwaris*, Johns. 172: in that case a testatrix made a bequest of a moiety of her residuary personal estate to her nephew, provided and on the express condition that he should be residing with his then present wife, if she should be living at the time of the testatrix's decease; but in case

they should not at that time be living together as man and wife, then (subject as aforesaid) she gave and bequeathed one half of such moiety of the said residue unto the wife absolutely, and the other half part thereof to the husband. It was held by Sir W. Page Wood, V. C., that the bequest was good notwithstanding the rule which avoids gifts providing for a future separation. "The rule," said his Honor, "which avoids gifts providing for a future separation between husband and wife does not apply to a case like the present. Here the gift is by will, and merely provides for either contingency, namely, that of the husband and wife living together or separate at the moment when the will must take effect, namely, at the death of the testatrix. The bequest cannot influence their conduct, but takes effect immediately on the death, according to the then state of facts."

As to separations effected between husband and wife by their mutual consent, see the note to *Stapilton v. Stapilton*, post.

In determining the validity of a condition there are two considerations: What did the grantor intend; is his purpose one that the law can approve? It is a common learning that the dominion resulting from ownership is not absolute, but must be so exercised as not to inflict needless injury on others. For a like reason, one cannot in conferring a right of property stipulate that it shall be held or used in a way harmful to the community, or prejudicial to the grantee. He cannot, for instance, provide that the estate which he conveys shall be inalienable, or that it shall not be liable to the demands of creditors, or that the grantee shall reside on the land, and not elsewhere; see *Maddox v. Maddox*, 11 Grattan, 804; *Newkirk v. Newkirk*, 2 Caines, 345; 1 Smith's Leading Cases, 721, 7 Am. ed. These remarks apply to conditions in absolute restraint of marriage. Whether such a prohibition is beneficial or

injurious to the community as checking the growth of population, is a question about which judges and political economists may differ; see *The Commonwealth v. Stauffer*, 10 Barr, 350; but there is no doubt that it may mar the happiness of the person who is subjected to it. If this were all, it might still be enough to render such a condition illegal, because society is concerned in whatever affects the individual. But there is another consideration of greater moment. To give the means that facilitate marriage on the one hand, and at the same time provide that it shall not be contracted on pain of forfeiture, is to put the donee under a violent temptation to reconcile interest and inclination, by forming an illicit connection. A stipulation for the performance of an illegal act is clearly void, and a stipulation which operates as an inducement to a course which the law condemns is not less objectionable; see *Dent v. Bennett*, 5 Beavan, 539,

544. The authorities accordingly agree that a condition imposing an absolute restraint on marriage without sufficient cause, is invalid, and the estate of the grantee absolute; see *Waters v. Tazewell*, 9 Maryland, 291; *Maddox v. Maddox*, 11 Grattan, 804. It follows that a limitation over on the breach of such a condition will also fail. The dicta in *The Commonwealth v. Stauffer*, 10 Barr, 350, and *Otis v. Prince*, 10 Gray, 582, may appear to look the other way, but the point can hardly be regarded as having been before the court in either instance. In *Otis v. Prince*, Thomas, J., seems to have thought that an absolute prohibition of marriage, though contrary to legal policy as a condition, may be valid in the form of a conditional limitation; but such a view is hardly consistent with the opinion of Lord Hardwicke, in *Scott v. Tyler*, ante, 472, 475.

The principle applies with as much force to contracts *inter vivos*, as to testamentary gifts; see *Lowe v. Peers*, 4 Burrow, 2225; *Phillips v. Medbury*, 7 Conn. 568; *Waters v. Tazewell*, 9 Maryland, 291. In *Waters v. Tazewell*, a provision in a marriage settlement, that the husband should not contract a second marriage, was accordingly held to be contrary to legal policy and void. A like view was taken in *Harley v. Rice*, 10 East, 22, of a wager that the defendant would not marry within six years.

Conditions against marriage are also invalid where though not absolute, they are in effect pro-

hibitory, or unduly limit the opportunity for choice. In *Maddox v. Maddox*, 11 Grattan, 804, the testator bequeathed his property to his daughter "during her single life and forever, if her conduct should be orderly and she remain a member of Friends' Society. Furthermore, I give and bequeath all the remaining part of my estate to my nearest relations that may be living at my death, and that shall be at the time members of the Society of Friends." The court held that the condition infringed "the perfect, absolute and unqualified freedom of religious opinion in matters of religion, which the civil institutions of Virginia secured to all who dwelt under them." It was not less unreasonable in another particular, because the marriage of the legatee to any one who was not a Quaker, would lead to her expulsion from the Society of Friends, and a consequent forfeiture of the legacy. Lee, J., said, "conditions in restraint of marriage annexed to gifts and legacies are allowed when they are reasonable in themselves, and do not unduly restrict a just and proper freedom of choice. But where a condition is in restraint of marriage generally, it is deemed to be contrary to public policy, at war with sound morality, and directly violative of the true economy of social and domestic life. Hence such a condition will be held utterly void. In *Elizabeth Castle's Case*, Law Jurist. Dec. 1846, the Vice Chancellor declared in general terms that limitations in restriction of

marriage were objectionable, and in *Long v. Dennis*, 4 Burr. R. 2052, Lord Mansfield said, "conditions in restraint of marriage are odious, and are, therefore, held to the utmost rigor and strictness. They are contrary to sound policy." Accordingly even in those cases in which restraints of a partial character may be imposed on marriage, as in respect of time, place or person, they must be such only as are just, fair and reasonable, and where they are of so rigid a character, or made so dependent on peculiar circumstances, as to operate a virtual, though not a positive restraint on marriage, or unreasonably restrict the party in the choice of marriage they will be ineffectual and utterly disregarded. Thus, a condition in restraint of marriage excluding men of a particular profession has been held void; 1 Equ. Ca. Ab. 100. So a contract not to marry within six years is void, because it tends to discourage marriage; *Hartly v. Rice*, 10 East's Rep. 22. So a covenant with a woman not to marry any other person, has been held not to be binding; *Lowe v. Peers*, 4 Burr. R. 2225. So a condition annexed to a legacy to a daughter forbidding her to marry any man who had not a clear unincumbered estate in fee or freehold perpetual of the yearly value of five hundred pounds was declared by the Lord Chancellor to be worthy of condemnation in every court of justice, and it was held void as leading to a probable prohibition of marriage. And Judge Story lays it down

that restraints in respect of time, place or person may be so framed as to operate a virtual prohibition upon marriage, or at least upon its most important and valuable objects, and he illustrates by a condition that a child should not marry till fifty years of age, or should not marry any person inhabiting in the same town, county or state, or should not marry any person that was a clergyman, a physician or a lawyer, or any person except of a particular trade or employment, all of which he tells us would be deemed mere evasions of the law; 1 Story Eq. Jur. 283. In this he seems to be borne out by the opinion of Lord Chancellor Clare in *Keily v. Monck*, 3 Ridgway, Parl. R. 205."

It is said in the English note that "where property is limited to a person until marriage, and upon marriage then over, the limitation is good." It is not easy to reconcile this conclusion with the opinion of Lord Thurlow that "gifts generally prohibiting marriage are contrary to the common weal and good order of society." If such is the policy of the law the testator obviously should not be allowed to evade it by a change in the form of the devise, which does not vary the effect. Whether the terms of the will are that the bequest shall become void in the event of marriage, or that it shall go to a third person, the legatee is equally compelled to choose between the loss of fortune and remaining single. The words which avoid his interest may consequently be rejected and effect

given to the rest. The case is substantially the same where words of limitation are used as the means of imposing a restraint which the law will not allow ; and it would consequently appear a bequest to one while he remains unmarried, or during his residence at a particular place, or so long as he belongs to a certain religious denomination, should be viewed as absolute.

There is more difficulty where the restraint is put in the form of a condition precedent, and it may be said, that if the terms on which the legatee is to take are not fulfilled, it must fail, whether they are or are not contrary to the law. Technically speaking, the argument may be sound ; but it would seem to be as true of such a case as it is of a gift until marriage, that a settled policy of the law should not be "put aside" by a "turn of phrase." Lord Thurlow observed in the principal case, that "if the bequest had been to the daughter at twenty-one or twenty-five, in case she were then unmarried, she could not have claimed the legacy at any other time or in any other case." He went on to say, that the daughter having married at eighteen, improvidently, and as it appeared, against the anxious prohibition of her mother, never came under the description to which the gift of £10,000 was attached. The point actually determined, that the daughter had forfeited the legacy by marrying without her mother's consent, is in entire accordance with the main current of decision. In this respect, the con-

dition was not contrary to legal policy, or unreasonable. We are not, therefore, compelled to believe that a restraint on marriage, which would be invalid as a condition, can be effectually imposed through a *designatio personæ*, which will exclude the legatee if she enters into the marriage state. The true view seems to be, that where a condition precedent is contrary to legal policy, and inseparable from the bequest, the gift will fail, whether the condition is or is not fulfilled. What the wisdom of the law deprecates, is an injurious stress on the mind of the legatee in a matter where choice ought to be free. The principle may be vindicated by holding the bequest void, or by disregarding the condition ; and where the case admits of it, the latter course should be pursued "*ut res magis valeat* ;" *Brown v. Peck*, 1 Eden, 140. There is, nevertheless, a distinction in this regard between "real and personal estate. For, if the condition regard real estate, and be in general restraint of marriage, there, although it is void, yet if there is not a compliance with it, the estate will never arise in the devisee, but if it be a legacy of personal estate, under like circumstances, the legacy will be held good and absolute as if no condition had been annexed to it ; *Story's Eq. sect 289*.

The principle is clearly stated in *Scott v. Tyler*, *ante*, 472, in the following terms. "In amplification of this law, it seems to have been well settled in all times, that if, instead of creating a condition absolutely

enjoining celibacy, or widowhood, the same be referred to the advice or discretion of another, particularly an interested person, it is deemed a fraud on the law, and treated accordingly; that is, the condition so imposed is holden for void."

"Upon the same principle, in further amplification of the law, all distinction is abolished between precedent and subsequent conditions; for it would be an easy evasion of such a law, if a slight turn of the phrase were allowed to put it aside. It has rather, therefore, been construed, that the condition is performed by the marriage which is the only lawful part of the condition, or by asking the consent; for that also is a lawful condition, and, for the rest, the condition not being lawful, is holden *pro non adjecta*."

In *Brown v. Peck*, 1 Eden, 140, the testator directed his executors to pay his niece £5 per month if she resided with her husband, and £15 per month if she lived apart from him, and with her mother. The lord keeper said, that the condition was *contra bonos mores*, and the legacy pure and simple. The legatee was consequently entitled to the larger sum, although she had not complied with the terms prescribed. The principle is obviously the same whether the object of the donor is to prohibit marriage, or to separate husband and wife. But it seems that a court cannot treat a devise of land as absolute, although the condition on which it is limited to take effect contravenes the rules or policy of

the law. See *Taylor v. Mason*, 9 Wheaton, 350.

The rule was accurately stated as follows in *Maddox v. Maddox*, 11 Grattan, 804, 816: "It may be said, however, that as the restriction in the residuary clause is in the nature of a condition precedent, no estate can vest, if it be not complied with, whether it be valid or void. This is undoubtedly true in reference to devises of real estate with a precedent condition in restraint of marriage; for though void, yet if it be not complied with, no estate arises in the devisee. If it be a legacy of personal estate, however, under like circumstances, the legacy will be held good and absolute, as if no condition whatsoever had been annexed to it. (1 Story's Eq. Jur., § 289.) And there would be every reason for applying the same doctrine to a restriction like that in this case."

Where the restraint on marriage is not absolute, or is designed for a purpose that the law approves, or regards with indifference, it may be upheld on the general principle that the power of disposition implies the right to prescribe the terms on which the gift shall be enjoyed. A minor may consequently be prohibited from marrying without the consent of his parents or guardian; *Collier v. Slaughter*, 20 Alabama, 263; or, as it would seem, from entering into the married state until he is of full age. For, as such a restraint merely postpones choice until a period when it presumably can be made to more advantage

there is no reason why it should not be enforced by the courts.

It has also been held, for reasons which, though unlike, are not less valid, that a gift to a widow while she remains such, or on condition of her not marrying, is not contrary to any legal rule. If such conditions are not always beneficial, they may serve a salutary purpose, and this is a sufficient reason for suffering the will of the testator to have its course. The question may arise between creating an express trust for the nurture and education of children, and leaving the estate to their mother, whose maternal instincts will probably render her the best trustee, if no one else has an equal claim upon her heart. The donor may, therefore, reasonably provide that the property shall be hers during widowhood, and go over in the event of her taking another husband. The right to impose such a condition is, therefore, generally recognized by the courts; *Little v. Bardwell*, 21 Texas; *Vance v. Campbell*, 1 Dana, 229; *McCullough's Appeal*, 2 Jones, 197; *Phillips v. Medbury*, 7 Conn. 568; *Chapin v. Marvin*, 12 Wend. 538; *Commonwealth v. Stauffer*, 10 Barr, 350; *Bannerman v. Weaver*, 8 Maryland, 517; *Gough v. Manning*, 26 Id. 347; *Neal v. Ward*, 3 Harris & McHenry, 93.

In *Phillips v. Medbury*, the violation of such a proviso in a devise was accordingly held to work a forfeiture, which the heir might enforce by entry. "It is insisted," said Daggett, J., "that limitations of this kind,

when introduced into a will, are merely *in terrorem*, and shall not work a forfeiture of the estate devised. They are also compared to bonds given not to marry, which are always void on the ground of public policy. A bond not to marry, or not to marry any one except the obligee, is doubtless void. Marriage should be free; should proceed from choice, not from compulsion. This is a salutary rule of the common law; *Lowe v. Peers*, 4 Burr. 2225. Hence, also, all marriage brokerage contracts are discountenanced. But declaring restraints upon marriages in wills void, as made *in terrorem*, is another and different doctrine. It is not a doctrine of the common law, but introduced into the Court of Chancery in England from the canon law. As that court is considered as possessing the power over legacies, it has adopted the rule of the canon law to a certain extent. It has declared, for example, in many cases where the deviser has imposed an unreasonable restraint upon a young male or female, and annexed it to a devise, that it should be deemed *in terrorem*; and, therefore, that the devise should, notwithstanding, take effect. But in all these cases, it is admitted, that this power is not given by the common law; nor is it ever exercised in relation to real estate, but only as to personal estate, which is in the case of legacies, subject to the control of a court of chancery. Nor is it applied to a widow. It would seem very reasonable that a man leaving

a widow with seven children, as is the present case, should be permitted to encourage her, by a suitable provision in his will, to remain single, and not subject his own offspring to the probable evils of a step-father to waste her substance, and thereby render her less able to support and educate them. Indeed, it entirely accords with reason, as it appears to me, that she should have an option to take such provision, and remain unmarried, or refuse it, and be thrown upon the general provision of the law—her dower. Nor have I been able to find any case, or any dictum of any judge or chancellor, in opposition to these principles. In *Amos v. Horner*, 1 Eq. Ca. Abr. 112, and in *Scott v. Tyler*, 2 Bro. Can. Rep. 487, 488, they are expressly recognized. In the latter case, Lord Thurlow, after a very elaborate discussion, by very able counsel, in which all the cases are examined, declares the result to be, that ‘a condition that a widow shall not marry, is not unlawful. An annuity during her widowhood, a condition to marry or not to marry Titus, is good.’ ”

The better opinion seems to be, that a condition that a widow shall not take a second husband, can only be imposed for the sake of the offspring of the first marriage, and will be invalid if she has no children, or on their decease. The point has not been determined, but would seem to be a just inference from the principle that an absolute restraint of marriage is void unless there is some sufficient cause.

It is an open question, whether

the prohibition of a second marriage, which is confessedly good in the case of a wife, can be imposed on a husband. In *Waters v. Tazewell*, 9 Maryland, 291, the court seems to have thought that it cannot; but it is not easy to see why such a distinction should be made between the sexes. If a widow may reasonably be required to choose between remaining sole, and relinquishing the estate which she receives from her husband to their children, a like condition may with no less justice be imposed on a widower.

To make a condition in restraint of marriage effectual, it must not only be consistent with legal policy, but such that the courts can afford a remedy if it be not fulfilled. It is an established rule which seems to have been derived from the civil through the canon law, that a court of equity, or ecclesiastical court, will not enforce a forfeiture. Where personal property is bequeathed to one with a proviso, that on the happening of a particular event it shall go to another, the rule does not apply, because the person who is to take in the second place has an equal claim to the aid of the court with the first taker; *Gough v. Manning*, 26 Maryland, 347, 361; *Mitchell v. Mitchell*, 29 Id. 581, 592. But a condition that a bequest shall fail if an act be done or refrained from, without a limitation over, will be regarded as imposed for the purpose of deterring the legatee, with a knowledge that it will not be compulsory on him. The rule is well settled

and has been repeatedly applied to bequests conditioned against marriage; *M'Ilvain v. Githen*, 3 Wharton, 584; *Cornell v. Lovat*, 11 Casey, 100, 104; *Hoopes v. Dundas*, 10 Barr, 75; *Otis v. Prince*, 10 Gray, 582; *Maddox v. Maddox*, 11 Grattan, 804; *Parsons v. Winslow*, 6 Mass. 279. It is not enough that the will contains a general or residuary bequest, there must be a distinct provision that the legacy shall vest in a third person on the breach of the condition; *M'Ilvain v. Githen*, 3 Wharton, 581; *Hoopes v. Dundas*, 10 Barr, 75; *Cornell v. Lovat*, 11 Casey, 100, 104. In *Maddox v. Maddox*, the court said "there is no bequest over of the third thus given to her in case of her breach of the condition, and the condition therefore will be treated as *in terrorem* merely, and the legacy becomes pure and absolute; 1 Roper, Leg. Ch. 13, § 1, p. 654; *Garrett v. Pritty*, 2 Vernon Rep. 293; *Wheeler v. Bingham*, 3 Atkins R. 364; *Lloyd v. Branton*, 3 Meriv. R. 108, 117; nor will the residuary clause be regarded as equivalent to a bequest over. To render the condition effectual, there must be an express bequest over on breach of the condition, or a special direction that the forfeited legacy shall fall into the residuum; *Wheeler v. Bingham*, 3 Atkins, 364; *Lloyd v. Branton*, 3 Merivale, 108; *Keely v. Monck*, 3 Ridgway P. C. 205, 252."

There is no such difficulty in the case of real estate, because the heir may always enter for condition broken, and a recovery may

then be had in ejectment in a court of common law. A condition which consists with legal policy may therefore be enforced, although the estate is not given to a third person in the event of breach. It has accordingly been held in numerous instances, that a devise to a widow on condition that she does not marry, is valid although the will does not say who is to take advantage of the forfeiture; *The Commonwealth v. Stauffer*, 10 Barr, 350; *Cornell v. Lovat*, 11 Casey, 100, 104.

In *Cornell v. Lovat*, 11 Casey, 100, 104, it was said to be "the settled rule in Pennsylvania, that where realty is devised with a condition in restraint of future marriage, effect will be given to the condition by making the breach of it work a forfeiture, whether there is a limitation over to another in that event or not."

In *Otis v. Prince*, 10 Gray, 582, the court seems to have thought that a limitation over is essential to the validity of a condition in restraint of marriage, although the subject matter of the devise is land. Thomas, J., said "the estate is devised in trust to pay the net income to the plaintiff so long as he shall remain unmarried, and in the event of his marriage, or dying unmarried, to convey it to his legal heirs."

"The condition is subsequent, and the restraint upon the marriage of the grandson without limitation as to time or person. It is therefore clearly against the policy of the law and void, unless

there is a valid gift over; *Parsons v. Winslow*, 6 Mass. 169; *Lloyd v. Branton*, 3 Meriv. 108; *Morley v. Rennoldson*, 2 Hare, 570; 1 Jarmon on Wills, 843; 1 Story on Eq. 280-288."

The trustees upon the marriage are to convey the legal estate to the heirs of the plaintiff. It is very familiar law that a devise to the heirs of one living is void; *Nemo est Hæres viventis*, Shep. Touchst. 415; 6 Cruise Digest, tit. 38, c. 10, 37.

There are exceptions to the rule as well settled as the rule itself, as where, in the case of a devise, it is plain from the whole will that the testator intended to use the words heirs or legal heirs as words of description or purchase. Upon the examination of the will of Mr. Otis, we find no manifestation of such purpose. Assuming that there was no inadvertency or mistake in the drafting of this clause there are no clear indications that the words legal heirs were to be used in any other than their ordinary legal sense. The result is that the equitable devise over is void; *Heard v. Horton*, 1 Denio, 165."

A gift over is not essential to the validity of a condition precedent in restraint of marriage even where the property bequeathed is personal. The law was so held in *Scott v. Tyler*, ante, and again in *Collier v. Slaughter*, 20 Alabama, 263, of the bequest of a legacy to vest "on the legatee's arriving at the age of twenty-one, or marrying before that time with the approba-

tion of her guardian." The court held that the condition was not in terrorem, but an indispensable requisite which must be complied with in order to entitle the legatee, and that the consent of her grandfather was not sufficient, although she had no guardian and both her parents were dead.

The authorities agree that a gift to a widow until she marries, or *durante viduitate*, is valid, although the testator has omitted to provide who is to have the property when her interest terminates. The principle has been frequently enunciated in the United States, and applies whether the property in question is real or personal. For where the estate is only given until the happening of a particular event, and ceases when that occurs, the court is not called on to enforce a forfeiture; *Mitchell v. Mitchell*, 18 Maryland, 405; 29 Id. 581; *Phillips v. Medbury*, 7 Conn. 578; *Vance v. Campbell*, 1 Dana, 229; *McCullough's Appeal*, 2 Jones, 197; *Beekman v. Hudson*, 20 Wend. 53; *Holtz's Estate*, 2 Wright, 422; *Cornell v. Lovat*, 11 Casey, 100; *Pringle v. Dunkley*, 14 Smedes & Marshall, 16; *Hughes v. Boyd*, 2 Sneed, 512; *Bennett v. Robinson*, 10 Watts, 348. In *Bennett v. Robinson*, a devise of the profits of land to the testator's wife so long as she remained a widow, was held to be determined by her marriage. So the power conferred by the appointment of the testator's wife as the guardian of his minor children *durante viduitate*, will fail if she takes a second husband, al-

though the will does not name any one to take her place; *Holmes v. Field*, 12 Illinois, 424.

In *Holtz's Estate*, the testator gave his executors the sum of \$5,000, in trust to invest the same, after the death of his wife, and pay the interest "unto my daughter-in-law, Mary H. Holtz, wife of my son Peter, if she shall be living and the wife and widow of my son, for her sole and separate use, upon her own receipt, and for and during all the term she shall continue the wife or widow of my son," with a limitation over for life to another. The court held the following language in giving judgment: "In this bequest no prior estate or interest is given to Mrs. Holtz for life or for any other period to which a condition is appended. The interest of the fund is directed in the first instance to be paid to her for and during all the term she shall continue the widow of testator's son. No estate is to be defeated by her marriage, for none is given. The period of her marriage is fixed as the limit at which the payment of the interest is to cease as to her, and then the same is given over to another beneficiary. No other expressions in the will indicate any other intention. In case of the marriage of the annuitant, the testator directs that the interest and income of the trust fund shall be paid to her daughter, if then living, for and during the term of her life; and further, in case of the termination of the interest bequeathed as to the sum so held in trust, the said sum is expressly

included in the residue of the estate and bequeathed to the three daughters of the testator. It appears, therefore, that the bequest was a restricted one, with a limitation over for life to another, at its termination by marriage; and a further disposition of it if, by the decease of the second *cestui que trust*, the fund should come into the residue of the estate. Under no fair construction can this be considered a bequest upon a condition *in terrorem*."

In view of this distinction, it is material to distinguish between a limitation and a condition. In *Hoopes v. Dundas*, 10 Barr, 75, the testator bequeathed an annuity to the widow of his deceased son during the term of her natural life, if she so long remained his widow and unmarried, with a residuary devise over of his estate. Gibson, C. J., said that it was settled under *McIlvain v. Githen*, that "a condition in restraint of marriage is invalid where there is no bequest over, and the question before the court was a single one, is this a condition or a limitation? The bequest was "the same in substance as if the testator had said I give my daughter-in-law an annuity for life, but if she marry again it shall cease. The words will bear no other interpretation, for with little or no exception the word "if" has always been held to make a condition." It was said to follow that as there was no gift over, the consideration must be regarded as *in terrorem*, and the bequest absolute.

In *Mitchell v. Mitchell*, 18

Maryland, 405, 29 Id. 581; the terms of the bequest were "that if the legatee should unite herself to any religious sisterhood and continue therein for ten years, the property devised in trust for her should devolve on the testator's other children," and it was held to create a conditional limitation which a court of equity would enforce on the happening of the event provided for in the will.

The law will not sanction any stipulation or proviso which has a direct or necessary tendency to sever husband and wife, or to prevent a reconciliation where they are already separated. A condition in a gift to a married woman that she shall leave her husband, or shall not return to him, is consequently invalid, and the principle applies where the illegal end is sought to be attained through a limitation, *ante*, 500. But the mere circumstance that a man and wife live apart, will not preclude either of them from being the recipient of a bequest or legacy, although the incidental effect may be to prolong the difference by affording the means of a separate maintenance.

The question was considered in *Cooper v. Remsen*, 5 Johnson Ch. 459, on grounds that are not altogether satisfactory. The testator bequeathed to his daughter "during her separation from her husband \$1,000 a year, to be paid out of his real estate." The daughter was living separate from her husband when the will was executed; but they afterwards came together and were cohabiting as

man and wife when the testator died. Some three months afterwards they again separated and continued to live apart. Chancellor Kent said, "there is a wide difference between a bequest to a daughter during her separation from her husband, when the separation is then actually existing without being procured by the testator, and a legacy to her *if she lives apart from her husband*, for that would be to hold out a temptation to a separation, which would be *contra bonos mores*. The legacy would be simple and pure in the latter case, according to the decision of Lord Northington in *Brown v. Peck*, 1 Eden, 140, but in the former case, the legacy depends upon the fact of a separation, which has already taken place, and is in that aspect, a kind and charitable provision." It was held to follow that if as these considerations indicated, the condition did not conflict with the policy of the law in the first instance, nothing that occurred afterwards could render it illegal. And as the legatee was not within the terms of the condition when the will took effect by the death of the testator, the legacy failed, and was not revived by the subsequent separation.

Marriage is a valuable consideration, and will sustain a promise by either of the parties to make a settlement on the other, or by a third person to provide adequately for one or both of them; and in *Donnellan v. Lennox*, 6 Dana, 89, the court upheld an agreement to compromise a suit in consideration of a promise of marriage. But a

promise to compensate a third person for his services as a broker or agent in procuring a marriage, is contrary to the policy of the law, and invalid. See *Boynton v. Hubbard*, 7 Mass. 168. "Marriage brokerage bonds," said Parsons, C. J., in *Boynton v. Hubbard*, "which are not fraudulent on

either party, are yet void, because they are a fraud on third persons, and a public mischief, as they have a tendency to cause matrimony to be contracted on mistaken principles, and without the advice of friends, and they are relieved against as a general mischief, for the sake of the public."

[*238]

*ROBINSON v. PETT.¹

DE TERM. PASCHÆ, 1734.

REPORTED 3 P. WMS. 132.

NO ALLOWANCE TO AN EXECUTOR OR TRUSTEE FOR HIS CARE AND TROUBLE.—*The Court never allows an executor or trustee for his time and trouble, especially where there is an express legacy for his pains ; neither will it alter the case, that the executor renounces, and yet is assisting in the executorship ; nor even, though it appears that the executor has deserved more, and benefited the trust, to the prejudice of his own affairs.*

The question was, whether an executor who had renounced, but had yet been assisting in the trust, according to the request of the testator, should have any additional consideration, when he had an express legacy for such his assistance.

Robert Pett, a considerable draper and mercer at Aspsallstoneham, in Suffolk, made his will in October, 1710, whereby he devised the surplus of his real and personal estate to his grandchildren, and appointed the defendant Pett, who had been first his servant, and afterwards his journeyman, together with one Larkin, executors, giving to each of his executors 100*l.* for their trouble about the execution of their trust, and directing, that if the defendant Larkin should refuse the executorship, he should lose his legacy ; but if the defendant Pett should refuse to take on him the executorship, yet that he should have his 100*l.* paid him, providing he would be aiding and assisting in the management and execution of the trusts.

Larkin only proved the will, and the defendant Pett renounced the executorship.

On a bill brought by the plaintiffs, the grandchildren,

¹ *S. C.*, 2 *Eq. Ca. Ab.* 454, pl. 10.

*against the executors, for an account of the personal estate, the defendant Pett was allowed his 100*l.* legacy; [*239] but he likewise insisted to have 400*l.* more for his extraordinary pains, trouble, and expense of time in and about the affairs of the testator, particularly for having made up some very intricate accounts, and got in some desperate debts; and there was some proof that the defendant Pett had greatly benefited the testator's estate, and prejudiced his own (he himself being a mercer), and that he had neglected his own trade, and lost some customers while he was looking after the concerns of his testator.

This cause was first heard before the Master of the Rolls, Sir Joseph Jekyll, who declared it to be a rule so settled, *that a trustee or executor in trust should not have any allowance for his care and trouble, unless there were some particular words in the will for that purpose*,¹ that he could not break into it, and that there was the less occasion to do so in the present case, as the testator had here given the defendant an express legacy of 100*l.* for his care and trouble; so that the testator himself had set an estimate and value upon it of 100*l.*, which, since the defendant had accepted, the Court would not increase.

From this decree there was an appeal to the Lord Chancellor, before whom it was insisted by the Attorney and Solicitor-General (who had both signed the petition of appeal), that the defendant Pett having renounced the executorship, and the other executor only having proved the will, the defendant Pett was as a stranger; and in regard that he appeared to have done these eminent services to the estate so much to his own prejudice, he was entitled to a quantum meruit in the same manner as if he had not been an executor; so that this was out of the common case, and to be considered as if the defendant had been employed in the nature of a bailiff, &c.; for which reason it was prayed that the Master might be directed to have regard to, and make some allowance for, the great trouble and successful pains taken by the defendant, in relation to the affairs of the testator.

*LORD CHANCELLOR TALBOT.—It is an established rule, [*240] *that a trustee, executor, or administrator, shall have no allowance for his care and trouble*; the reason of which seems to be, *for that, on these pretences, if allowed, the trust estate might be loaded, and rendered of little value*;² besides the great difficulty there might be in settling and adjusting the quantum of such allowance, especially as one man's time may be more valuable than that of another; and there can be no hardship in this respect upon any trustee, who may choose whether he will accept the trust or not.

The defendant's renouncing the executorship is not material, because he is still at liberty, whenever he pleases, to accept the executorship; otherwise, if both the executors had renounced,

¹ See *Ellison v. Airey*, 1 Ves. 115; *Willis v. Kibble*, 1 Beav. 560.

² See *Moore v. Frowd*, 3 My. & Cr. 50, where Lord Cottenham approves of this reason.

and the ordinary had thereupon granted administration.¹ And if this were to make any difference, it would be an art practised by executors to get themselves out of this rule, which I take to be a reasonable one, and to have long prevailed. But further, in the present case, the testator has by his will expressly directed what should be the defendant's recompense for his trouble, in case of his refusing the executorship; viz., that he still should have the 100*l.* legacy, to which I can make no addition. However, it being a hard case, let the defendant take back the deposit.²

There is no rule better established than that stated by Lord Talbot in the principal case, viz., *that a trustee, executor, or administrator shall have no allowance for his care and trouble.* It proceeds upon the well-known principle, almost invariably acted upon *by Courts [*241] of equity, that a *trustee shall not profit by his trust.* "The reason of the rule," observes Lord Cottenham, "is well stated in *Robinson v. Pett*: 'The reason seems to be, for that, on these pretences, if allowed, the trust estate might be loaded and rendered of little value.' It is not because the trust estate is in any particular case charged with more than it might otherwise have to bear, but that the principle, if allowed, would lead to such consequences in general:" *Moore v. Frowd*, 3 My. & Cr. 50; and see *New v. Jones*, 1 Hall & T. 634; *Hamilton v. Wright*, 9 C. & F. 111.

And so strict is the rule, that, although the trustee or executor may, by the direction of the author of the trusts, have carried on a trade or business at a great sacrifice of time, he will be allowed nothing as a compensation for his personal trouble or loss of time. Thus, in *Brocksope v. Barnes*, 5 Madd. 90, the testator directed certain businesses to be carried on by his trustees and executors, and directed several onerous trusts to be performed by his trustees, but gave no legacies or re-

¹ Where there are two executors, and one renounces, he is still at liberty to accept of the executorship. *Secus* where both renounce and administration is granted; though in this matter the common lawyers differ from the civilians; the latter holding that a renunciation once made, though only by one of them, is peremptory. See *Howes and Downes v. Lord Petre*, Salk. 321; *The King v. Simpson*, 3 Burr. 1463. As to the necessity of an executor intending to act before he can claim a legacy, see *Harrison v. Rowley*, 4 Ves. 212, 216; *Harford v. Browning*, 1 Cox, 302; *Reed v. Devaynes*, 2 Cox, 285, 3 Bro. C. C. 95; *Brydges v. Wotton*, 1 V. & B. 134; *Stackpoole v. Howell*, 13 Ves. 417; *Dix v. Reed*, 1 Sim. and Stu. Eq. 277; *Calvert v. Selbon*, 4 Beav. 222; *Wildes v. Davies*, 1 Sm. & G. 485; *Hanbury v. Spooner*, 5 Beav. 630; *Compton v. Bloxham*, 2 Coll. 201; *Piggott v. Green*, 6 Sim. 72; *Hollingsworth v. Grassett*, 15 Sim. 52; *Cockerell v. Barber*, 2 Russ. 685; *Angerman v. Ford*, 29 Beav. 349; *Lewis v. Matthews*, 8 L. R. Eq. 277; *Lewis v. Lawrence*, 8 L. R. Eq. 345; *Bubb v. Yelverton*, 13 L. R. Eq. 131.

² Reg. Lib. B. 1732, fol. 322, 1733, fol. 333, by which it appears the Master of the Rolls directed generally, that all parties should have just allowances, and on appeal by the defendant *Pett*, this decree was affirmed, but the particular gravamen is not stated.

ward to them for their trouble. Upon a petition being presented by one of them to ascertain what would be proper to be allowed to him as a compensation or recompense for his loss of time, personal trouble, and expense in the management and settlement of the testator's affairs, Sir John Leach, V. C., said, "The trustee is, of course, entitled to all reasonable expenses which he may have incurred in the conduct of the trust, and requires no order for that purpose; but the general rule must be applied to him, *that a trustee is not entitled to compensation for personal trouble and loss of time.*" And see *Barrett v. Hartley*, 2 L. R. Eq. 789.

The rule is also applicable to an executor carrying on the business of his deceased partner: *Burden v. Burden*, 2 V. & B. 170; *Stocken v. Dawson*, 6 Beav. 371; and an executor or trustee will not be entitled to make a profit out of his trust by his professional business. Thus, a factor acting as executor, is not so entitled (*Scattergood v. Harrison*, Mos. 128); nor is a commission agent (*Sheriff v. Axe*, 4 Russ. 33). So, an executor and trustee, acting as auctioneer in the sale of the trust property, cannot charge for commission, (*Kirkman v. Booth*, 11 Beav. 273;) nor can an attorney or solicitor charge his *cestui que trust*, save for expenses and costs out of pocket (*New v. Jones*, 1 Hall & T. 632; *Bainbrigge v. Blair*, 8 Beav. 588; *Todd v. Wilson*, 9 Beav. 486; *Gomley v. Wood*, 3 J. & L. 702; *Pollard v. Doyle*, 1 Drew. & Sm. 319); nor can his partner (*Collins v. Cary*, 2 Beav. 129; *Christophers v. White*, 10 Beav. 523; but see *Clack v. Carlon*, 30 L. J. N. S. Ch. 639); but *the costs of his town agent in a cause will be allowed (*Burge v. Brutton*, 2 Hare, 373); and under peculiar [*242] circumstances an inquiry may be directed to give some remuneration or compensation to a solicitor for his loss of time and trouble (*Marshall v. Hollowell*, 2 Swanst. 453; *Bainbrigge v. Blair*, 8 Beav. 595).

Upon the same principle an assignee of a bankrupt, who had acted as solicitor to the fiat, although allowed to charge for his clerk's time employed in the business of the bankruptcy as costs out of pocket, was not allowed any profit thereupon: *Ex parte Newton*, 3 De G. & Sm. 584.

A chairman or director of a Railway Company stands in a fiduciary relation towards the Company, and will not, as a general rule, be allowed to derive any profit beyond his salary from his office. Thus, in the case of *The Luxembourg Railway Company v. Sir William Magnay*, 25 Beav. 586, a railway company furnished a director with a large sum of money to enable him to purchase the "concession" of another line. He purchased it, as it turned out, from himself, he being the concealed owner of it. It was held by Sir John Romilly, M. R., that the transaction could not stand. And see *Benson v. Heathorn*, 1 Y. & C. C. 326; *Maxwell v. The Port Tenant, &c., Company*, 24 Beav. 495; *The North Midland Railway Company v. Hudson*, 25 Beav. 593,

595, cited; *Bluck v. Mallalue*, 27 Beav. 398; *Gaskill v. Chambers*, 26 Beav. 360; *Hodkinson v. The National Live Stock Insurance Company*, 26 Beav. 473; 4 De G. & Jo. 422; *In re The Anglo-Greek Steam Navigation and Trading Company (Limited)*, 35 Beav. 399, 410; *Kimber v. Barbor*, 20 W. R. (M. R.) 602.

A company, however, may in their articles of association, stipulate that they will not avail themselves of the benefit of the general rule. Thus in the *Imperial Mercantile Credit Association v. Coleman*, 6 L. R. Ch. App. 558, by the articles of association of a financial company, it was provided that a director should vacate his office, if he participated in the profits of any work done for the company, without declaring his interest at a meeting of directors; and that no director so interested should vote at any meeting or on any committee of the directors, or on any question relating to such contracts or work. A director having undertaken to obtain money for certain railway debentures at 5l. per cent. commission, offered them to the company at $1\frac{1}{2}$ l. per cent. commission. The offer came before a committee of directors, of which he was not a member, and they recommended the Board to accept the offer. The recommendation came before a board meeting of the directors, at which the director making the *offer was present. He [243] stated that he was interested in the matter, and proposed to retire, but was told by the chairman that it was unnecessary, and the offer was accepted by the Board. The director appeared to have previously given full information to the two managers of the company as to his interest in the debentures. It was held by Lord Hatherly, L. C., reversing the decision of Sir R. Malins, V. C., that according to the articles of association, it was contemplated that a director might have an interest in business brought by him to the company; and that under the circumstances, this director could retain the difference between the $1\frac{1}{2}$ l. per cent. and the 5l. per cent. commission.

As a mortgagee with a power of sale stands in a fiduciary relation with regard to the mortgagor, he will not be allowed, either alone or conjointly with his partner in any business, to derive any profit from the sale. Thus, in the recent case of *Matthison v. Clarke*, 3 Drew, 3, a mortgagee with power of sale employed the firm of auctioneers, of which he was a member, to sell the mortgaged property for him. It was held by Sir R. T. Kindersley, V. C., that they were not entitled to any commission. So in another recent case, where B., a solicitor, one of the mortgagees with a power of sale, arranged with another solicitor to "act as his agent" in the matter of the mortgage on agency terms. It was held by Sir J. Romilly, M. R., that a sum of money paid to B. as his share of the profits, inured for the benefit of the persons entitled to the equity of redemption. *In re Taylor*, 18 Beav. 165; and see *Broad v. Selfe*, 11 W. R. (M. R.) 1036.

A general release, where the cestui que trust has been assisted by

an independent solicitor, may prevent a cestui que trust from insisting upon his right to have a settled account opened against a solicitor being a trustee, although he may have charged for professional services: *Stanes v. Parker*, 9 Beav. 385; *In re Sherwood*, 3 Beav. 338, 341. Secus, if he had not such assistance: *Todd v. Wilson*, 9 Beav. 486. And see *Barrett v. Hartley*, 2 L. R. Eq. 789.

Although it is clear that a solicitor made party to a cause as trustee, who either acts for himself or employs his partner to do so, will be allowed his costs out of pocket only (*Lyon v. Baker*, 5 De G. & Sm. 622; *Pollard v. Doyle*, 1 Drew. & Sm. 319), it was upon no very intelligible principle held by Lord Cottenham, in *Cradock v. Piper* (1 Hall & T. 617, 628; 1 Mac. & G. 664, affirming the decision of Sir L. Shadwell, V. C., 17 Sim. 41), that the circumstance of a solicitor being a trustee will not prevent him from receiving his usual costs, where he acts as solicitor in a suit for any of the cestuis que trust, or *where he acts for himself and his co-trustees, or cestuis que [*244] trust jointly, provided the costs are not increased by his being one of the parties for whom such joint appearance is made. And see *Fraser v. Palmer*, 4 Y. & C. Exch. Ca. 517; but see *Bainbrigge v. Blair*, 8 Beav. 588; and *Manson v. Baillie*, 2 Macq. 80, where Lord Cranworth, C., observed, "that he was inclined to think that the true principle was considerably trenched upon by Lord Cottenham, when he said that a solicitor might act as a solicitor for his co-trustee in, and be allowed professional charges, as he apprehended that the true principle is that *each* trustee should be a check and control on each and all of the co-trustees, a principle which was placed in danger by the allowance of a pecuniary profit (p. 82). Lord Brougham also disapproved of the decision of *Cradock v. Piper*, and expressed great doubts as to the soundness of that decision to the length to which it goes" (p. 91).

Certainly there is no inclination to extend the doctrine laid down by Lord Cottenham in *Cradock v. Piper*, for it has been decided that it does not apply to the case of a solicitor being a trustee and acting for himself and co-trustee in the administration of the trust estate out of Court: *Lincoln v. Windsor*, 9 Hare, 158; *Broughton v. Broughton*, 2 Sm. & Giff. 422; 5 De G. Mac. & G. 160.

Where a solicitor who is a trustee is a defendant as a trustee, and is held to be entitled to his costs, the course of the Court is to direct them to be taxed as between solicitor and client (*York v. Brown*, 1 Coll. 260). In a recent case, where a mortgagee had acted as his own solicitor in a suit in defence of his own title, Sir R. T. Kindersley, V. C., refused to allow him, as against a second mortgagee, any other costs except his costs out of pocket: *Sclater v. Cottam*, 3 Jur. N. S. 630.

A solicitor who is trustee, is not obliged to account for any profits, which he may have made professionally, by his charges against a mortgagor, upon the security of whose property he advanced monies be-

longing to the trust. Thus, in *Whitney v. Smith*, 4 L. R. Ch. App. 513, a trustee, who was a solicitor, sold out stock forming part of the trust estate, and invested it on mortgage. He acted in the transaction as solicitor for the mortgagor as well as for the trust estate, but made no charge against the trust estate for his services, being paid for them by the mortgagor. He also derived some profit as a solicitor in consequence of the employment of part of the mortgaged estates for building purposes. It was held by the Lords Justices of the Court of Appeal, that the plaintiff could not charge him with the profit thus made, as [*245] having been made by the employment of the trust estate in his business. "No doubt," said Lord Justice Giffard, "if trust money is laid out in such a thing as the purchase of cotton, or if it is lent out upon bills of exchange, or if it is put into a business and actually turned over and used in the business, the cestuis que trust are entitled, if they think fit, to an account of the profits, and to have the profits. But what has taken place here is this—the money has been lent by the trustee upon certain securities which, probably, were not securities justified by the trust. He happened to be a solicitor, and I have no doubt that the loan of that money tended to bring him custom in his profession of a solicitor. But no case has gone the length of saying, that because a loan of that sort made by a trustee who happens to be a professional man, tends to bring him custom in that profession, he charging the estate nothing for his work and labour, it not being in any sense the produce of the trust estate—no case has gone the length of saying that the cestuis que trust are entitled to the profits of that. I think it very unjust that they should be so entitled. The utmost the matter comes to is this: that he, being a solicitor, the loans probably put him in the way of getting some business, and by that means conduced to his getting profits from that business. But that is not fairly the produce or profit of the trust estate, or a matter with which the cestuis que trust have anything to do."

There are, however, some few exceptions to the rule laid down in the principal case. Thus, the trustees and guardians managing the estate of West India proprietors, according to the Acts of Assembly, are entitled to a commission not above 6l. per cent. as long as they personally take care of the management and improvement of the estates committed to their charge; but not if they leave the island and trust the management to others, acting as attornies (*Chambers v. Goldwin*, 5 Ves. 834; 9 Ves. 254, 257, 267, 273; *Denton v. Davy*, 1 Moore, P. C. C. 15; and see *Henckell v. Daly*, Ib. 51). But although they have no right to be paid their commission during absence, they are entitled to what they have actually paid to others for the management of the estate, provided the payments be in themselves reasonable; as to which, if it be disputed, an inquiry will be directed (*Forrest v. Elwes*, 2 Mer. 68); and although a trustee individually abstains from acting in the trusts of a

will, yet if he is qualified, and is ready and willing to act when called upon by his co-trustee, he is entitled to a share of the commission under the Jamaica Act, 24 Geo. 2, c. 10, s. 8 (*Grant v. Campbell*, 1 Moore, P. C. C. 43); and mortgagees in possession *are not entitled to any commission, except what is paid by them to the factor for commission; *Chambers v. Goldwin*, 5 Ves. 807; 9 Ves. 268. [*246]

So, an executor appointed in the East Indies was formerly entitled, in passing his accounts in the Courts of equity in this country, to the commission of 5*l.* per cent. upon the receipts or payments, according to the practice in the East Indies. See *Chetham v. Lord Audley*, 4 Ves. 72, where Lord Rosslyn allowed the commission, observing, that the appointment of an executor in India, no legacy being given to him, was the appointment of an agent for the management of the estate; that there would be no possibility of getting the business done at all without the allowance; and if the executors in England were to get a person to do the business in India, they could not get it done so cheap.

But an Indian executor would not have been entitled to commission if he had a legacy for his trouble, nor would he, after a long lapse of time, be admitted to renounce the legacy in order that he might claim the commission; *Freeman v. Fairlie*, 3 Mer. 24.

The law of India is now altered, and no commission will be allowed to an executor there unless it is expressly given to him by the testator. See note to *Matthews v. Bagshaw*, 14 Beav. 126.

The general principle that a trustee cannot make a profit for himself by the use of the trust property, applies to an agent entrusted with money or any other property, for the purpose of using it for the owner's benefit. Thus, in *Attorney-General v. Edmunds*, 6 L. R. Eq. 381, it having been the practice in the Inland Revenue Department for the purchasers of stamps to be allowed a reduction on payment in cash, the Clerk of the Patents had been accustomed to purchase stamps in the Revenue Office for the accommodation of the patentees, he paying the reduced amount for the stamps, and afterwards receiving the amount in full from the patentees. It was held by Lord Justice Giffard, that the Clerk of Patents was liable to account for any profit that might have been made on the purchase of stamps purchased with public moneys, but not for any profit made on the purchase of stamps purchased with his own money. So in *Shallcross v. Oldham*, 2 J. & H. 609, the master of a ship having authority to employ the vessel on freight to the best advantage, but not to purchase a cargo on the owner's account, being unable to procure remunerative freight, loaded the ship with a cargo of his own. It was held by Sir W. Page Wood, V. C., that he was liable to account to the owners for all the profits made by the sale of the cargo, and not merely for *the proper freight. See also *Gardner v. M'Cutcheon*, 4 Beav. 534. [*247]

So likewise, in the absence of any agreement express or implied, a

part owner or partner in ships who acts as ship's husband is not entitled to charge the usual commission: *Miller v. Mackay*, 31 Beav. 77.

The managing owner of a ship however is, it seems, competent to appoint himself to act as broker to the ship in collecting and distributing freight, there being no incompatibility between those services (as it appears there would be between the services of ship's Chandler or ship's carpenter), and his fiduciary character as managing owner; see *Smith v. Lay*, 3 K. & J. 105, in which case, however, before allowing the managing owner a commission in respect of the services in question, Sir W. Page Wood, V. C., directed an inquiry, whether according to the custom of shipowners or otherwise, he being managing owner, was entitled to any, and what commission in respect of duties performed by him, and which duties are ordinarily performed by ship-brokers.

In *Waters v. Earl of Shaftesbury*, 2 L. R. Ch. App. 231, the agent of a landholder who had contracted with the Land Drainage Company under their Act (12 & 13 Vict. c. 91), to execute the drainage works as agent and surveyor of the company, (the landowner finding money for the purpose,) and being paid an agreed amount by the company, it was held by Lord Chelmsford, L. C., varying the decree of Sir John Stuart, V. C., that notwithstanding the apparent terms of the contract, it might be shown that the agent was not the real contractor, and was not entitled to any profit on the contract.

The creator of the trust may authorise the trustee to make professional charges (*Douglas v. Archbutt*, 2 De G. & Jo. 148), or he may, as was admitted by Sir Joseph Jekyll, M. R., in the principal case, direct generally, compensation to be made to an executor or trustee, for his care and trouble, or he may himself fix it at a particular sum of money, or a salary; see *Webb v. The Earl of Shaftesbury*, 7 Ves. 480, and *Baker v. Martin*, 8 Sim. 25; in which case a testator had directed that 100*l.* a year should be annually paid to one of his executors, for his trouble in superintending his concerns, until a final settlement of his affairs should take place. The executor proved and acted. Some time after the testator's death, a suit was instituted for the administration of his estate, but no receiver was appointed, and some of the assets were still outstanding; it was held by Sir L. Shadwell, V. C., that the annuity had not ceased, as it was not shown that the trouble of the executors had ceased.

But where the creator of the trust does not himself fix the amount [*248] of compensation, a reference will be directed to settle what will be a proper allowance: *Ellison v. Airey*, 1 Ves. 115; *Willis v. Kibble*, 1 Beav. 559; *Jackson v. Hamilton*, 3 J. & L. 702. So, as observed by Lord Langdale, M. R., in *Bainbrigge v. Blair*, 8 Beav. 597, a testator, though knowing that if his trustee acted as solicitor, and were allowed to make his professional charges, he would be enabled

to make business for himself, might, nevertheless, insert an authority in the will permitting it (and this is not unfrequently done), and there would be then no question about the matter.

Although trustees or executors will not generally be entitled to any allowance for their trouble, they may, nevertheless, contract with their cestui que trust to receive some compensation for acting, or to make professional charges for acting. Such contract, however, would be most carefully watched by the Court, and, unless it were perfectly fair, and obtained without any undue pressure upon the cestui que trust, would not be enforced. See *Ayliffe v. Murray*, 2 Atk. 58, in which case two persons, executors and trustees under a will, refused to prove the will, or act in the trust, or suffer the cestui que trust to take out letters of administration cum testamento annexo, till he had executed a deed by which he was to pay 100*l.* to Ayliffe, one of the executors, who was the solicitor who drew the will, and 200*l.* to the other, over and above their legacies, within six months after they should have exhibited an inventory. Upon a bill being brought for a specific performance of the contract, and for an account, Lord Hardwicke declared, that the deed was unduly obtained, and decreed that no allowance should be made for the sum of 100*l.* and 200*l.* "With regard to the merits," observed his lordship, "whether, upon general grounds, a trustee may make an agreement with his cestui que trust for an extraordinary allowance, over and above what he is allowed by the terms of the trust, I think there may be cases where this Court would establish such agreements, but at the same time would be extremely cautious and wary in doing it.

"In general, this Court looks upon trusts as honorary, and a burthen upon the honour and conscience of the person intrusted, and not undertaken upon mercenary views; and there is a strong reason, too, against allowing anything beyond the terms of the trust, because it gives an undue advantage to a trustee to distress a cestui que trust; and, therefore, this Court has always held a strict hand upon trustees in this particular. If a trustee comes in a fair and open manner, and tells the cestui que trust that he will not act in such a troublesome and burthen-some office unless *the cestui que trust will give him a further compensation, over and above the terms of the trust, and it is [*249] contracted for between them, I will not say this Court will set it aside; though there is no instance where they have confirmed such a bargain. . . . I consider the case in this light:—Two trustees are making an ill use of an authority they had under the will, to extort a reward from a cestui que trust. If they had told him, Give us a further reward, or we will renounce, they had acted fairly, and something may have been said in favour of the contract. The personal estate was vested in them before probate, and could not be got out of them without an actual renunciation; the real estate likewise vested in them, and could not be taken out of them but by an actual assignment; and, sensible of these

difficulties upon the defendant, the plaintiffs would not act, in order to force him into their terms.

“This case has been compared to several other cases of fraud, and, amongst the rest, of marriage brokage bonds, and not improperly; for the person who has the reward there, has as much trouble as the trustees have here, and the party giving the reward in those cases, full as willing as the defendant in this; and yet the Court always set those bargains aside as unconscionable. Consider the ill consequences of such a case; suppose it should be necessary that a will should be immediately proved, as in the case of a widow and children. Shall a trustee in whom the testator reposed a trust and confidence, and depended upon his honour and kindness, insist upon such hard terms as to have an unreasonable reward, before he will either prove the will or act in the trust?”

In the recent case of *In re Wyche*, 11 Beav. 209, on an application within twelve months, Lord Langdale refused to order the taxation of a bill paid under other professional advice, to a trustee who had acted as solicitor for a lady, he having, however, first declared that he would not act, except on the ordinary terms of being paid as between solicitor and client; and the cestui que trust acquiesced in this proposal, and signed a retainer in such special terms as to provide for it. “It is said,” observed his Lordship, “that it is extremely difficult for a trustee against a cestui que trust, or for a solicitor against a client, to make the client pay more than the rules of law allow. I will not venture to say, that, in such a case as this, it cannot be done; because, if the parties understand the principle that a trustee, acting as a solicitor in the trust matters, is only entitled to the costs out of pocket,—if the cestui que trust has clear knowledge and proper protection, I should hardly say that such an *agreement is illegal, or that it cannot [250] be carried into effect. This lady, from the first, did know that a trustee, acting as solicitor, was not entitled to ordinary costs as between solicitor and client; and it does not appear that she had other professional advice besides that given by the trustee himself.” See also *In re Sherwood*, 3 Beav. 338.

And even if a trustee makes a valid contract with his cestui que trust for compensation for the trouble incident to the trust, it will not be allowed if the trustee, in consequence of his death or otherwise, fail to complete his contract. Thus, in *Gould v. Fleetwood*, Mich. 1732, at the Rolls, an executor in trust, who had no legacy, and where the execution of the trust was likely to be attended with trouble, at first refused, but afterwards agreed with the residuary legatees, in consideration of 100 guineas, to act in the executorship, and he dying before the execution of the trust was completed, his executors brought a bill to be allowed these 100 guineas out of the trust money in their hands, insisting that the residuary legatees might as well make a contract with

the executor touching the surplus (which was their own property), as the testator himself, and that no harm could happen thereby to the trust estate; but Sir Joseph Jekyll, M. R., said, that all bargains of this kind ought to be discouraged, as tending to eat up the trust; and here the executor had died before he had finished the affairs of the trust. Wherefore the plaintiff's demand was disallowed: 3 P. Wms. 251, n. (A.); 2 Eq. Ca. Ab. 453, pl. 8.

Nor will a contract by a trustee with his cestui que trust for professional charges be enforced, unless in distinct terms it takes the trustee out of the general rule; *Moore v. Frowd*, 3 My. & Cr. 45. See, also, *Matthison v. Clarke*, 3 Drew. 3; *Broughton v. Broughton*, 5 De G. Mac. & G. 160.

But it seems that a trustee may by implication, if clear, be authorized to make professional charges. Thus, in *Douglas v. Archbutt*, 2 De G. & Jo. 148, property was assigned to the plaintiff (who was known to the assignor to be an auctioneer, although not so described in the deed) upon trust to sell by public auction or private contract, and out of the sale monies to pay the costs, charges, and expenses of preparing for making and completing such sales, "including the usual auctioneer's commission." It was held by the Lord Justices, affirming the decision of Sir John Romilly, M. R., that the plaintiff, if he acted as auctioneer at the sale, could retain his own commission. "The deed," said Lord Justice Turner, "contemplates a sale by auction. If the words 'including the usual auctioneer's commission' had not been inserted, it would have been *competent to the plaintiff under the other words to charge any auctioneer's commission paid by [*251] him. These words, therefore, were not wanted for that purpose, and for what purpose can they have been inserted but to authorise the plaintiff to charge auctioneer's commission, if he himself acted as auctioneer?"

Although a solicitor appointed executor "is to be at liberty to charge for his professional services," he will only be entitled to charge for services strictly professional, and not for matters which an executor ought to have done without the intervention of a solicitor, such as for attendances to pay premiums on policies, attending at the bank to make transfers, attendances on proctors, auctioneers, legatees, and creditors: *Harbin v. Darby*, 28 Beav. 325.

A trustee may contract with the Court, that he will not undertake the trust without proper compensation; and if he have undertaken the trust upon the understanding that application should be made to the Court for compensation, a reference will be made to Chambers to ascertain and settle what would be a reasonable allowance both for his past and future services. See *Marshall v. Holloway*, 2 Swanst. 432, 453, 454; *Brocksope v. Barnes*, 5 Madd. 90; *Morrison v. Morrison*, 4 My. & Cr. 215.

Upon the same principle in the Bankruptcy Act of 1869 (32 & 33

Vict. c. 71), it is enacted that "a trustee (appointed under the Act) shall not without the consent of the committee of inspection, employ a solicitor or other agent, but where the trustee is himself a solicitor he may contract to be paid a certain sum by way of percentage, or otherwise as a remuneration for his services as trustee including all professional services, and any such contract shall, notwithstanding any law to the contrary, be lawful." Sec. 29.

But, although trustees and executors will not, in the absence of contract, be allowed any remuneration for their own trouble and loss of time, they may, in special cases, employ agents, whose expenses will be allowed out of the estate. Thus, a trustee, upon making out a proper case, may employ a bailiff to manage an estate and receive the rents (*Bonithon v. Hickmore*, 1 Vern. 316; *Stewart v. Hoare*, 2 Bro. C. C. 663); even although a recompense may have been given to him by the creator of the trust for his trouble. Thus, in *Wilkinson v. Wilkinson*, 2 S. & S. 237, a testator gave annuities of five guineas each to his trustees, for the care and trouble they might have in the execution of the trusts, and appointed them executors. Amongst other property, the testator was entitled to about fifty houses in London, thirty four of which were let at weekly rents. The trustees employed a person to collect those [*252] *rents and the Master, on passing their accounts, allowed the salary they had paid to him; and Sir J. Leach, V. C., overruled an exception taken to the Master's report on account of that allowance. "It does not appear to me," observed his Honor, "that the annuity of five guineas to each trustee makes any difference in this case. It is given to them as a recompense for the care and trouble which will attend the due execution of their office; and, if it be consistent with the due execution of their office that they should employ a collector to receive the rent, they will still be entitled to the annuity. A provident owner might well employ a collector to receive such rent; and the labour of such collection cannot be imposed upon trustees."

So an executor, although he may be a solicitor, may employ another solicitor to do business for him in the management of the testator's affairs (*Macnamara v. Jones*, 2 Dick. 587; *Stanes v. Parker*, 9 Beav. 389); or an accountant, if the accounts are of a difficult or complicated nature (*Henderson v. McIver*, 3 Madd. 275; *New v. Jones*, 1 Hall & T. 634); or an agent to collect debts at a commission; but the Court will reduce it if too high. See *Weiss v. Dill*, 3 My. & K. 26, where an executor, having charged for the employment of an agent, at 5*l.* per cent., to collect debts to the amount of 2000*l.*, an exception, taken to the Master's report, who allowed only 2½*l.* per cent., was overruled by Sir John Leach, M. R. "Generally speaking," said his Honor, "executors are not allowed to employ an agent to perform those duties which, by accepting the office of executors, they have taken upon themselves; but there may be very special circumstances in which it may be thought

fit to allow them such expenses as they may have incurred by the employment of agents. It is for the Master to determine whether an executor, who makes a claim for the employment of an agent, ought to be allowed to charge his testator's estate with such a burthen. The Master has here thought that the executor ought not to be allowed to charge the testator's estate with the whole commission claimed, but that $2\frac{1}{2}$ l. per cent. is a fit allowance. I have some doubt whether in this case the Master ought to have made any allowance; but with the allowance of $2\frac{1}{2}$ l. per cent. which he has made, the defendants must be content." And see *Hopkinson v. Roe*, 1 Beav. 180; *Day v. Croft*, 2 Beav. 488; *Harbin v. Darby*, 28 Beav. 325, where it is laid down that an executor will not be allowed the charges of a solicitor for doing things which the executor ought strictly to have done himself.

Upon the principle, that a trustee should not profit by his trust, a person, whether he is sole trustee *or a trustee jointly with others, will not in general be appointed receiver with a salary, [*253] for this would be a mode of giving a trustee emolument (*Anon.*, 3 Ves. 515; — *v. Jolland*, 8 Ves. 72; *Sykes v. Hastings*, 11 Ves. 363; *Sutton v. Jones*, 15 Ves. 584; *Nicholson v. Tutin*, 3 K. & J. 159); "unless no one else can be procured who will act with the same benefit to the estate, where there is a necessity, from the circumstance, that, by any one else, the estate would not be so well managed" (*Sykes v. Hastings*, 11 Ves. 364, per Lord Eldon; *Newport v. Bury*, 23 Beav. 30); and even where a trustee offers to act as receiver without a salary, the Court will only appoint him to the office on the ground that it is for the benefit of the estate, because it is the duty of the trustee to examine with an adverse eye, and see that the receiver does his duty: *Hibbert v. Jenkins*, cited 11 Ves. 363, 364. "The consequence is," says Lord Eldon, "the case of appointing a trustee to be receiver is extremely rare, and only where he will act without emolument:" *Sykes v. Hastings*, 11 Ves. 364. It is no objection, however, that a person is trustee to preserve contingent remainders: *Sutton v. Jones*, 15 Ves. 587. So, it is competent for the Court, as a matter of discretion, to appoint an executor and trustee, consignee, with the usual profits; and where a discretion of that kind has been exercised and acted upon, it will not at a subsequent period be withdrawn: *Marshall v. Holloway*, 2 Swanst. 432; *Morrison v. Morrison*, 4 My. & Cr. 215, 224.

Where a person standing in a fiduciary position has sold property of his own to his cestui que trusts, they must either adopt the bargain or repudiate it altogether.

If they repudiate it, the transaction can only be set aside upon the terms of their restoring to the trustee the property which they received from him, the principle of the Court being to place the parties in exactly the same situation as they were in before the transaction.

If the return of the property to the trustee becomes impossible,

through no fault of the trustee, his cestui que trust would have to allow him the value of it, he not being allowed to make any profit therefrom: *The Bank of London v. Tyrell*, 27 Beav. 273; 10 H. L. Cas. 26.

But if the cestuis que trust, impeaching a sale to them by their trustee, sold the property in question pending the litigation concerning the transaction, they will be entitled to no relief. See *The Great Luxembourg Railway Company v. Sir William Magnay*, 25 Beav. 586: there a railway company furnished a director with a large sum of money to enable him to purchase the "concession" of another line. He purchased, as it turned out, from himself, being the concealed *owner [254] of it. It was held by Sir John Romilly, M. R., that the transaction could not stand, but that the company must adopt or repudiate the transaction altogether; and, the company having sold the concession pending a suit impeaching the transaction, it was also held that they could have no relief either as to the application of the money or otherwise. See note to *Fox v. Mackreth*, ante, Vol. 1, p. 148.

Upon the same principle as that laid down in *Robinson v. Pett*, if a trustee or executor improperly keeps in his own possession trust money which ought to have been invested, or paid over to the person entitled to it, although it be not shown that he made a profit by so doing, he will be charged interest, at a rate which may be varied at the discretion of the Court. See *Tebbs v. Carpenter*, 1 Madd. 290, 306, where Sir T. Plumer, after an elaborate examination of the authorities, observed, that it appeared that a distinction had been taken, as in every moral point of view there ought to be, between *negligence* and *corruption* in executors.

Where money is thus improperly retained, it appears to be immaterial how the sum has arisen, whether from a legacy, or a distributive share, or a residue, or the arrears of income. In the latter case, the claim for interest is not made on account of the arrears, but for the improper keeping back of a sum of money, from whatever source derived, which the executor or trustee ought to have paid over. Per Lord Chelmsford, L. C., in *Blogg v. Johnson*, 2 L. R. Ch. App. 228. And in a proper case interest will be given though it be not prayed for by the bill: *Pearse v. Green*, 1 J. & W. 135; *Johnson v. Prendergast*, 28 Beav. 480; *Blogg v. Johnson*, 2 L. R. Ch. App. 229.

A special case is necessary to induce the Court to charge executors with more than 4l. per cent. upon the balances in their hands: *Court v. Roberts*, 6 C. & F. 65; *Attorney-General v. Alford*, 4 De G. Mac. & G. 843; *Penny v. Avison*, 3 Jur. N. S. 62; *Stafford v. Fiddon*, 23 Beav. 386; *Johnson v. Prendergast*, 28 Beav. 480. And no interest will be charged against money found to be in the hands of executors or trustees, unless the retention thereof was improper: *Blogg v. Johnson*, 2 L. R. Ch. App. 225.

If, however, a trustee or executor employ the trust funds in a trade or adventure of his own, whether he keeps them separate from, or mixes them with, his own private monies, and notwithstanding the difficulties which in the latter case may arise in taking the accounts, the cestui que trust, if he prefers it, may insist upon having the profits made by, instead of interest on the amount of, the trust funds so employed. In the important and leading case of **Docker v. Somes*, [255] 2 My. & K. 655, trustees having paid part of the trust funds to their bankers, to the credit of their general account, without distinguishing the same from the monies employed in their own business of ship-chandlers and sail-makers, it was argued that the trustees ought only to be charged interest for the trust monies employed by them. Lord Brougham, however, in an elaborate judgment, held that the cestui que trusts might at their option charge them either with interest or with a proportionate share of the profits. "Wherever," said his Lordship, "a trustee, or one standing in the relation of a trustee, violates his duty and deals with the trust estate for his own behoof, the rule is, that he shall account to the cestui que trust for all the gain which he has made. Thus, if trust money is laid out in buying and selling land, and a profit made by the transaction, that shall go, not to the trustee who has so applied the money, but to the cestui que trust whose money has been thus applied. In like manner (and cases of this kind are more numerous), where a trustee or executor has used the fund committed to his care in stock speculations, though the loss (if any) must fall upon himself, yet, for every farthing of profit he may make, he shall be accountable to the trust estate. So, if he lay out the trust money in a commercial adventure, as in buying or fitting out a vessel for a voyage, or put it in the trade of another person, from which he is to derive a certain stipulated profit, although I will not say that this has been decided, I hold it to be quite clear, that he must account for the profits received by the adventure, or from the concern. In all these cases it is easy to tell what the gains are. The fund is kept distinct from the trustee's other monies, and whatever he gets, he must account for and pay over. It is so much fruit, so much increase, on the estate or chattel of another, and must follow the ownership of the property and go to the proprietor. . .

"Such being the undeniable principle of equity, such the rule by which breach of trust is discouraged and punished—discouraged by intercepting its gains, and thus frustrating the intentions that caused it—punished by charging all losses on the wrongdoer, while no profit can ever accrue to him—can the Court consistently draw the line, as the cases would seem to draw it, and except from the general rule those instances where the risk of the malversation is most imminent—those instances where the trustee is most likely to misappropriate, namely, those in which he uses the trust funds in his own traffic? At first

sight this seems grossly absurd, and some reflection is required to understand how the Court could ever, even in appearance, *coun- [*256] tenance such an anomaly. The reason which has induced judges to be satisfied with allowing interest only, I take to have been this: they could not easily sever the profits attributable to the trust money from those belonging to the whole capital stock; and the process became still more difficult where a great proportion of the gains proceeded from skill or labour employed upon the capital. In cases of separate appropriation, there was no such difficulty, as where land or stock had been bought and then sold again at a profit; and here accordingly, there was no hesitation in at once making the trustee account for the whole gains he had made. But where, having engaged in some trade himself, he had invested the trust money in that trade along with his own, there was so much difficulty in severing the profits, which might be supposed to come from the money misapplied, from those which came from the rest of the capital embarked, that it was deemed more convenient to take another course, and, instead of endeavouring to ascertain what profit had been really made, to fix upon certain rates of interest as the supposed measure or representative of the profits, and to assign that to the trust estate

“This principle is undoubtedly attended with one advantage—it avoids the necessity of an investigation, of more or less nicety, in each individual case, and it thus attains one of the important benefits resulting from all general rules. But mark what sacrifices of justice and of expediency are made for this convenience. All trust estates receive the same compensation, whatever risks they may have run during the period of their misappropriation—all profit equally whatever may be the real gain derived by the trustee from his breach of duty; nor can any amount of profit made be reached by the Court, or even the most moderate rate of mercantile profit—that is, the legal rate of interest—be exceeded, whatever the actual gains may have been, unless by the very clumsy and arbitrary method of allowing rests, in other words, compound interest, and this without the least regard to the profits actually realised; for, in the most remarkable case in which this method has been resorted to (*Raphael v. Boehm*, stated in 11 Ves. 92, and 1 Madd. 300, which indeed is always cited to be doubted, if not disapproved), the compound interest was given with a view to the culpability of the trustee’s conduct, and not upon any estimate of the profits he had made by it.

“But the principal objection which I have to the rule, is founded upon its tendency to cripple the just power of this Court in by far the most wholesome and indeed necessary exercise *of its functions, [*257] and the encouragement thus held out to fraud and breach of trust. What avails it towards preventing such malversations, that the contrivers of sordid injustice feel the power of the Court only where

they are clumsy enough to keep the gains of their dishonesty severed from the rest of their stores? It is in vain they are told of the Court's arm being long enough to reach them, and strong enough to hold them, if they know that a certain delicacy of touch is required, without which the hand might as well be paralysed or shrunk up. The distinction,—I will not say sanctioned, but pointed at by the negative authority of the cases,—proclaims to executors and trustees, that they have only to invest the trust money in the speculations, and expose it to the hazards of their own commerce, and be charged 5*l.* per cent. on it, and then they may pocket 15*l.* or 20*l.* per cent. by a successful adventure. Surely the supposed difficulty of ascertaining the real gain made by the misapplication, is as nothing compared with the mischiefs likely to arise from admitting this rule, or rather this exception to one of the most general rules of equitable jurisdiction.

“Even if cases were more likely to occur than I can think they are, of inextricable difficulties in pursuing such inquiries, I should still deem this the lesser evil by far, and be prepared to embrace it.

“Mr. Solicitor-General put a case of a very plausible aspect, with a view of deterring the Court from taking the course which all principle points out. He feigned the instance of an apothecary buying drugs with 100*l.* of trust money, and earning 1000*l.* a year by selling them to his patients; and so he might have taken the case of trust money laid out in purchasing a piece of steel, or skein of silk, and these being worked up in goods of the finest fabric, Birmingham trinkets, or Brussels lace, where the work exceeds by 10,000 times the material in value. But such instances in truth prove nothing; for they are cases not of profits upon stock, but of skilful labour very highly paid; and no reasonable person would ever dream of charging a trustee, whose skill thus bestowed had so enormously augmented the value of the capital, as if he had only obtained from it a profit; although the refinements of the civil law would certainly bear us out, even in charging all gains accruing upon those goods, as in the nature of accretions belonging to the true owners of the chattels. . . .

“The last person who can be heard to argue from the difficulty of tracing or apportioning the profits of the misapplied fund, is the man whose breach of trust has caused the misapplication, and created the difficulty.

“When did a Court of justice, *whether administered according to the rules of equity or of law, ever listen to a wrong-
doer's argument to stay the arm of justice, grounded on the steps he himself had successfully taken to prevent his iniquity from being traced? Rather let me ask, when did any wrong-doer ever yet possess the hardihood to plead, in aid of his escape from justice, the extreme difficulties he had contrived to throw in the way of pursuit and detection, saying, ‘You had better not make the attempt, for you find I

have made the search very troublesome?' The answer is, 'The Court will try.' See also *Palmer v. Mitchell*, 2 My. & K. 672, n.; *Wedderburn v. Wedderburn*, 2 Kee. 41; 4 My. & Cr. 41; 22 Beav. 84, 100, 124; *Fosbrooke v. Balguy*, 1 My. & K. 226; *Willett v. Blandford*, 1 Hare, 253; *Portlock v. Gardner*, Ib. 603; *Parker v. Bloxam*, 20 Beav. 295; *Cummins v. Cummins*, 8 Ir. Eq. Rep. 723; *Vyse v. Foster*, 20 W. R. (V. C. B.) 697.

Should, however, in any case a serious difficulty arise in tracing and apportioning the profits derived by a trustee or executor from the employment of trust funds together with his own, in any trade or speculation, it may be a reason for preferring a fixed rate of interest to an account of the profits, and it seems the Court would allow interest at 5l. per cent. per annum, with yearly rests, that is, with compound interest (*Jones v. Foxall*, 15 Beav. 392); and the same interest will be charged by the Court, if the trustee or executor, who is a trader, pays the trust fund into his own account at his bankers' (*Williams v. Powell*, 15 Beav. 461, 468); unless he can show that he has not had the benefit thereof in his trade: Ib.

As, however, the business of a solicitor is not a trade, in which compound interest is made on the money employed therein, compound interest will not be charged on trust moneys paid by a solicitor into the account of his firm, but only interest at 5l. per cent.: *Burdick v. Garrick*, 5 L. R. Ch. App. 233.

The rule laid down in the principal case, was enforced recently by Sir John Stuart, V. C., in the very singular case of *Sugden v. Crossland*, 3 Sm. & G. 192. There a trustee in consideration of 75l. paid to him by the defendant agreed to retire from the trust and cause the defendant to be appointed a trustee in his place. The arrangement was subsequently carried out. His Honor declared the deed appointing the defendant a trustee to be void, and the sum of 75l. should be treated as part of the trust fund. "It is a well-settled principle," he observed, "that if a trustee make a profit of his trusteeship, it shall inure to the benefit of his *cestui que trusts*. Though there is some [*259] peculiarity in the case, there does *not seem to be any difference in principle whether the trustee derived the profit by means of the trust property, or from the office itself."

If, however, a person is merely a constructive trustee, from having employed the money of another in a trade or business, and does not expressly fill any fiduciary character, as that of trustee or executor, although he must account for the profits of the money he employed, he will have an allowance made to him for his loss of time, skill, and trouble. Thus, in *Brown v. Litton* (1 P. Wms. 140; 10 Mod. 20), the captain of a ship having 800 dollars on board, which he intended to invest in trade, died on his voyage, and the mate, becoming captain, took the 800 dollars, and investing them in trade, made great improve-

ments thereof, and on his return to England, the executrix of the first captain brought a bill against him for an account. The defendant admitted the receipt of the money, and offered to repay the same with interest, whereas the plaintiff insisted on the profits produced in trade, and the several investments that had been made therewith. Lord Keeper Harcourt, however, considering that the defendant was like a trustee, held that he ought clearly to account for the profits made of the money; but that, to recompense him for his care in trading with it, the Master should settle a proper salary for the pains and trouble he had been at in the management thereof. And his Lordship compared it to the case of two joint traders, where, if one dies, and the survivor carries on the trade after the death of the partner, the survivor shall answer for the gain made by this trade; and, that this being an island, all imaginable encouragement ought to be given to trade; and such construction was for the benefit of him who carried out this money with that intent; and there was no reason that his death should so far injure his family and relations, as to deprive them of the benefit which might accrue from it in the way of trade. In *Brown v. De Tastet*, Jac. 284, on the death of one of the partners in a business, the survivor, retaining his capital, and employing it in the trade, was decreed by Lord Eldon to account for the profits derived from it, but proper allowances were to be made to him for his management of the business. And see *Crawshay v. Collins*, 15 Ves. 218; 1 J. & W. 267; 2 Russ. 325; *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Cooke v. Collingridge*, Jac. 607.

Although trustees employing the trust funds in any trade or business are liable to account for the profits made thereby, nevertheless, when without authority they lend the trust funds to traders, who with notice of the trust employ such funds in their *business, such traders will not be liable to account to the cestui que trust for [*260] a share of the profits of the business: *Stroud v. Gwyer*, 28 Beav. 130; *Townend v. Townend*, 1 Giff. 210; *Macdonald v. Richardson*, 1 Giff. 81; *Simpson v. Chapman*, 4 De G. Mac. & G. 154.

Upon the principle laid down in *Robinson v. Pett*, a trustee will not be allowed to have the sporting over the trust estate, nor to appoint gamekeepers to preserve the game for his own amusement: see *Webb v. The Earl of Shaftsbury*, 7 Ves. 488, where Lord Eldon directed an inquiry whether the liberty of sporting could be let for the benefit of the cestuis que trust; and if it could not, he thought the game would belong to the heir. If it was necessary for the preservation of the game, that the trustees should appoint a gamekeeper, he would not be prevented from appointing one, but for that purpose only; for he could not under the will have an establishment of pleasure on the trust estate; and see *Hutchinson v. Morritt*, 3 Y. & C. Exch. 547.

So, likewise, a person standing in a fiduciary relation towards another will not be allowed to benefit by his trust by obtaining a renewal of a lease (see *Keech v. Sandford*, and note, ante, Vol. 1, p. 24); or by purchasing from his cestui que trust (*Fox v. Mackreth*, ante, Vol. 1, p. 115). And the principle is applicable to receivers (*In re Ormsby*, 1 Ball & B. 189); and committees of lunatics' estates: *Anon.*, 10 Ves. 103.

Upon the same principle, where the Court of Madras had under its general jurisdiction made a general order authorizing the registrar of the Court to institute proceedings in certain cases on behalf of infants, and it appeared that the registrar was entitled to receive fees upon proceedings in such suits, as well as on commission upon the amount of monies paid into Court, it was held by the Judicial Committee of Privy Council, that such general order was void, it being against public policy to allow an officer of the Court to institute suits, in the conduct of which he might have a direct personal interest, and that all orders made in a suit instituted by the registrar in pursuance of such order ought to be reversed. "Whatever," said Pemberton Leigh, P. C., "may be the propriety of making provision by the appointment of a public officer for the institution of suits on behalf of infants, it is of the utmost importance that no person should be appointed for that purpose of whom even a suspicion can exist, that he may be biassed by any personal interest, either in the institution of the suit, or in the mode of conducting it:" *Kerakoose v. Serle*, 4 Moore, P. C. C. 459.

The principle that a person in a fiduciary position should not derive [*261] any profit thereby, seems *to have been departed from in those cases which have decided, after some conflict of judicial opinion, that it is not illegal or contrary to public policy for a member of the British legislature to make a profit by an agreement for the withdrawal of his opposition to a bill affecting his property, although it is evident that by such an agreement he necessarily places his private interest in conflict with his duty as a legislator. See *Simpson v. Lord Howden*, 1 Keen, 583: there, by agreement between Lord Howden, a peer of Parliament, and the proprietors of shares in a projected railway, it was stipulated on one hand that Lord Howden should withdraw his opposition to a bill in Parliament for establishing the railway according to a certain line, and on the other hand, that the proprietors, on the bill passing, should pay certain sums to Lord Howden by way of compensation for the injury his land would sustain, and use their best endeavours to procure a deviation from the original line in the next session of Parliament. After the bill for establishing the railway had passed, the proprietors filed a bill to have the agreement delivered up to be cancelled, as being contrary to public policy, and therefore void. Lord Langdale, M. R., overruled a general demurrer for want of equity.

"The plaintiffs," said his Lordship, "allege that the agreement is illegal and against public policy, on three grounds:—First, they say that it was a fraud on the other landowners through whose ground the line of railway was intended to pass. Secondly, that it was a fraud on the legislature by procuring an Act of Parliament on a representation that one line of railway was best, and intended to be pursued, but which, in fact, was not intended to be adopted. Thirdly, that it was an illegal act in Lord Howden, who, as a member of Parliament, had no right to make an agreement which necessarily placed his private interest in conflict with his duty as a legislator. It is said, and truly said, that every member of the legislature ought to preserve his judgment free, unbiased, and disinterested, for the performance of his legislative duties; and it is argued that it is illegal to enter into an agreement which gives him a direct and immediate interest in the very subject with reference to which that duty is to be performed. I do not think it is necessary for me to determine on the present occasion whether this agreement can properly be considered as a fraud on the landowners through whose grounds the line of railway was to pass, or how far the character of the defendant, as a member of Parliament, precludes him from any right, which persons not invested with that character, may have, to enter into such an agreement. It has been held that the *with- [*262] drawing opposition to a bill in Parliament may be a good consideration for a contract, and it certainly may be so in cases where the provisions of the Act are consistent with, and are not intended to be thwarted by, the provisions of the agreement; but it by no means follows that it should be so in this case. I do not, however, enter particularly into that question, because it appears to me that the second of the grounds alleged by the plaintiffs for considering this agreement invalid is sufficient to enable me to decide on this demurrer." On appeal, the decision of Lord Langdale was reversed by Lord Cottenham, C. (3 My. & Cr. 97; 1 Railway Cas. 326). The agreement was afterwards held by the Court of Exchequer Chamber, reversing the decision of the Court of Queen's Bench, to be valid at law: *Lord Howden v. Simpson*, 1 Railway Cas. 347. See also *Lord Petre v. The Eastern Counties Railway*, 1 Railway Cas. 462. See, however, *Earl of Shrewsbury v. North Staffordshire Railway Company*, 1 L. R. Eq. 593.

It is not, however, permitted to a person who is a member of a body not of a governing or legislative character, to make, contrary to his duty as a member of such body, a bargain for his own private advantage. Thus, in *Bowes v. The City of Toronto*, 11 Moo. P. C. C. 463, the mayor and corporation of the city of Toronto, in Canada, were authorized by the Canadian Act, 13 & 14 Vict. c. 84, to issue debentures to a certain amount, to assist in the construction of the Toronto, Simcoe and Lake Huron Railway. At that period the appellant Bowes

was the mayor and a member of Finance Committee, and took an active part in passing a by-law which authorized the issue by the corporation of debentures for the completion of the railway. Bowes at that time was engaged in co-partnership with Hall, and their firm, Bowes and Hall, purchased of Story and Company, contractors for the railway company, some of the debentures so issued, which had been assigned to Story and Company by the corporation. Bowes and his partner afterwards sold the debentures, and thereby realized a large profit. This transaction was without the knowledge of the corporation. It was held by the Judicial Committee of the Privy Council (affirming the decree of the Court of Chancery in Canada), that Bowes must, in the circumstances of his being a member of the corporation, and the manner in which he acted throughout the transaction, be treated as the trustee of the corporation, and was not entitled to any benefit received from the sale of the debentures, and was liable to account to the corporation for the ascertained and unquestioned amount of profit made [*263] and received by him in the transaction *in which he had engaged in respect of the sale of the corporation debentures, and that it was immaterial that the profit from the sale of the debentures was made by Bowes and his partner, Hall, jointly, and not by Bowes alone. "It has been argued," said Lord Justice Knight Bruce, in delivering judgment, "that the governing body of the corporation was a deliberative body, and on that ground out of the operation of any civil rules or principles applicable to agents and trustees, and the reported cases of *Lord Petre v. The Eastern Counties Railway* (1 Railway Cases, 462), and *Simpson v. Lord Howden* (3 My. & Cr. 97), were mentioned; and it was said that members of the British legislature often vote in Parliament respecting matters in which they are personally interested, and do so without censure or risk. We are of opinion, however, that neither the governing character nor the deliberative character of the corporation council makes any difference, and that the council was in effect and substance a body of trustees for the inhabitants of Toronto—trustees having a considerable extent of discretion and power, but having also duties to perform, and forbidden to act corruptly. With regard to members of a legislature, properly so called, who vote in support of their own private interests, if that ever happens, there may possibly be insurmountable difficulties in the way of the practical application of some acknowledged principles by Courts of civil justice, which courts, however, are nevertheless bound to apply those principles where they can be applied. The Common Council of Toronto cannot in any proper sense of the term be deemed a legislative body, nor can it be so treated. The members are merely delegates in and of a provincial town for its local administration. In every purpose at present material, they must be held to be merely private per-

sons, having to perform duties, for the proper execution of which they are responsible to powers above them. We agree that the cases of *Lord Petrie v. The Eastern Counties Railway*, and *Simpson v. Lord Howden*, must at present be viewed as correct expositions of English law; but so viewed, they do not, we conceive, affect the controversy before us."

Although trustees and executors are not allowed any remuneration for their trouble, they will be allowed all proper expenses out of pocket, whether they be provided for in the instrument creating the trusts or not: *Hide v. Haywood*, 2 Atk. 126; *Worrall v. Harford*, 8 Ves. 8; *Dawson v. Clarke*, 18 Ves. 254; *Attorney-General v. The Mayor of Norwich*, 2 My. & Cr. 424. Thus, they will be allowed the expense of travelling (*Ex parte Lovegrove*, 3 D. & C. 763); of fees for counsel (Cary, 14); costs of a *law suit (*Amand v. Bradbourne*, 2 Ch. [*264] Ca. 138; *Fearn v. Young*, 10 Ves. 184); unless such expenses were improper (*Malcomb v. O'Callaghan*, 3 M. & C. 52); or the litigation was occasioned by their own negligence: *Caffrey v. Darby*, 6 Ves. 488, 497.

But it seems they will in no case be allowed interest on costs: *Gordon v. Trail*, 8 Price, 416.

Although a trustee ought to keep an account of his expenses, his not having done so will not, it seems, disentitle him to an allowance: *Hethersell v. Hales*, 2 Ch. Rep. 158.

And he will have a lien on the trust estate for his expenses (*Ex parte James*, 1 Deac. & C. 272); but it will not extend to the persons employed by him in the affairs of the trusts (*Worrall v. Harford*, 8 Ves. 8; *Lawless v. Shaw*, L. & G., t. Sugd. 154, reversed Dom. Proc. 5 C. & F. 129); and if the trust estate no longer exists, the trustee may proceed in equity against the *cestui que trust* personally: *Balsh v. Hyham*, 2 P. Wms. 453.

A trustee may, however, from accidental circumstances, profit by his trust, as where the *cestui que trust* dies intestate without heirs; for in that case the lord cannot claim by escheat, and, subject to the right of creditors, the trustee may retain possession, not by any title of his own, but because no other person can show a title. This was determined after much discussion in the important case of *Burgess v. Wheate*, 1 Eden, 177. There A., being seised in fee *ex parte paterna*, conveyed real estate to trustees, in trust for herself, her heirs and assigns, to the intent that she should appoint, and for no other use, intent or purpose whatsoever. A. died without having made any appointment, and without heirs *ex parte paterna*. It was held by Lord Keeper Henley, and Sir John Clarke, M. R., first, that the maternal heir was not entitled; and, secondly, that there being a *terre tenant*, the Crown, claiming by escheat, had not a title by *subpœna* to compel

a conveyance from the trustee, the trust being absolutely determined; but no opinion was given upon the right of the trustee: and see *Attorney-General v. Sands*, Hard. 496; *Tudor's L. C. Real. Prop.* p. 664, 2nd ed.; *Davall v. New River Company*, 3 De G. & Sm. 394; *Cox v. Parker*, 22 Beav. 168.

Upon the same principle, where land is devised to trustees upon trust to convert into money for purposes which either fail or never take effect, and the testator dies without heirs, the lord cannot claim by escheat, as there are tenants in possession; nor has the Crown any right to come into equity to ask that the land should be converted, in order that it may take the money as bona vacantia, nor even if the land [*265] has been unnecessarily converted, can the *Crown make good any claim, as the money will be the absolute property of the trustees: *Taylor v. Haygarth*, 14 Sim. 8; *Walker v. Denne*, 2 Ves. Jun. 185; *Cradock v. Owen*, 2 Sm. & Giff. 241.

But a trustee must convey to trustees according to the directions of a testator, although the trusts for which the conveyance was directed may have failed or never arisen; *Onslow v. Wallis*, 16 Sim. 483, 1 Mac. & G. 506. See also *Jones v. Goodchild*, 3 P. Wms. 33.

In case of the attainder of the cestui que trust for felony, it seems to have been the opinion of Lord Keeper Henley and Sir Thomas Clarke, M. R., that if he were pardoned by the Crown, he might enforce the trust; see 1 Eden, 210, 255. Lord Mansfield, however, observed, that he could find no clear and certain rule to go by; and yet he thought equity would follow the law throughout; 1 Eden, 236.

It seems, however, doubtful whether the heir of a person executed for felony could sue the trustee. See Br. Ab. tit. "Feff. al. Us." 34. But see now 53 & 34 Vict. c. 23, abolishing the forfeiture of lands and goods for treason and felony.

It is however clear, that upon the failure of the heirs of the cestui que trust, the heir of the trustee cannot come into equity as plaintiff, to assert his right. See 1 Eden, 212; and *Williams v. Longsdale*, 3 Ves. 752, in which case a copyhold (duly surrendered) was devised to A. and his heirs, in trust for B. and his heirs. Upon the death of B. without heirs, it was held by Lord Rosslyn, that the heir of the trustee had no equity to compel the lord to admit him; and his bill was dismissed, without costs. "The only point," observed his Lordship, "determined in *Burgess v. Wheate*, was that the Crown entitled, as it was supposed, by escheat upon the death of the cestui que trust, had not a title by subpoena in this Court to make the heir of the trustee, having merely a legal estate, convey; that there was no equity for this Court to exercise jurisdiction. Is not the converse of that equally true? If the lord has no equity in that case, can I find any ground of equity where the person having the legal estate, and telling me he has no beneficial interest,

desires me to act for his benefit upon the estate of the Lord? The Court considers the mere legal estate as nothing."

But the Court of King's Bench will by mandamus compel the lord to admit the heir of a trustee, although he has a mere legal title; *The King v. Coggan*, 6 East, 431; *S. C.*, 2 Smith, 417; *King v. Wilson*, 10 B & C. 80.

Lord Mansfield asked, in *Burges v. Wheate* (see 1 Eden, 185), whether, in the event of the attainder of the cestui que trust, the right would not result to the *creator of the trust; but no notice appears to have been taken of this observation, nor does the ques- [*266] tion ever appear to have been determined, and since the passing of 33 & 35 Vict. c. 23, it has ceased to be important.

If the cestui que trust of real or personal chattels, having no next of kin, dies, either intestate (*Jones v. Goodchild*, 3 P. Wms. 33; *Rutherford v. Maule*, 4 Hagg. 213; *Taylor v. Haygarth*, 14 Sim. 8), or, if under the old law, having made a will, he appointed an executor, who either expressly or by implication was excluded from all beneficial interest, so as to be converted into a mere trustee (*Middleton v. Spicer*, 1 Bro. C. C. 201; *Barclay v. Russell*, 3 Ves. 424; *Henchman v. Attorney-General*, 3 My. & K. 492; *Cave v. Roberts*, 8 Sim. 214), the Crown in either case, by virtue of its prerogative, may claim the chattels as bona vacantia; *Powell v. Merrett*, 1 Sm. & Giff. 381; *Cradock v. Owen*, 2 Sm. & G. 241; *Read v. Stedman*, 26 Beav. 495; *Dacre v. Patrickson*, 1 Drew. & Sm. 182. But if under the old law there was nothing in the will to convert the executor into a trustee; or if, since the passing of 11 Geo. 4 & 1 Will. 4, c. 40, it appears to be the intention that he shall be the beneficial owner, the Crown cannot make good its claim. See note to *Attorney-General v. Sands*, Tudor's L. C. Real Prop. 676, 2nd ed.; see also *Dyke v. Walford*, 5 Moore, P. C. C. 434; *Ellcock v. Mapp*, 3 H. L. Cas. 492; *Russell v. Clowes*, 2 Coll. 648.

As aliens could not before the Naturalization Act, 1870 (33 & 34 Vict. c. 14), hold lands as against the Crown, it was contended, but unsuccessfully, that trustees to whom lands were devised in trust for an alien, were entitled to hold the lands discharged of the trust. See *Barrow v. Wadkin*, 24 Beav. 1; 3 Jur. N. S. 679; 5 W. R. 695, where Sir John Romilly, M. R., held that the trust ought to be executed for the Crown. See also *Sharp v. St. Sauveur*, 7 L. R. Ch. App. 343, overruling *Rittson v. Stordy*, 3 Sm. & Giff. 230.

It has been before shown that an alien, although he could not hold land, was entitled to the proceeds of lands devised to trustees to sell for his benefit; *Du Hourmelin v. Sheldon*, 1 Beav. 79; 4 My. & Cr. 525; and see ante, Vol. 1, p. 845.

These questions will not now often arise, inasmuch as, by the Naturalization Act, 1870 (which is not, however, retrospective) aliens may hold property of every description, like British-born subjects.

*The subject of a trustee's compensation, is intimately connected with that of his liability. Where he is treated as a paid agent, and has undertaken the trust as such, it would seem that his accountability should be much greater than where his services have been gratuitously rendered. "That a trustee is answerable for negligence, only where it is so gross as to be evidence of wilful misconduct, is not to be disputed. But the reason of the rule shows, that it is not for cases in which the trustee is to receive a stipulated compensation. It is said that a trustee, even of a charity, may not be charged for more than he has actually received, except for very supine negligence, and that the gratuitous nature of the service distinguishes him from a bailee for hire. . . . But the foundation of the rule fails entirely, when the trust has been accepted on terms of receiving a stipulated reward;" *Ex parte Cassel*, 3 Watts, 443. There would seem, however, to be a medium degree of accountability, arising in cases where the trust has been undertaken, not, indeed, wholly gratuitously, nor yet with any stipulated reward, but with the expectation of receiving such compensation as comes within a court's discretion to allow, and these are the cases of most frequent occurrence in this country, and whose classification will be here attempted.

Although as a general principle of equity, no rule can be more

salutary, and none is more universally recognized, than that a trustee shall not profit by his trust (see the notes to *Fox v. Mackreth*), yet when carried to the extent of denying a reasonable compensation for his services, it can scarcely be said to have, at the present day, any application on this side of the Atlantic. "The state of our country, and the habits of our people are so different, as to have induced the legislatures of nearly all the states to introduce provisions by statute, for competent remuneration to those to whom the law commits the care and charge of the estate of infants and deceased persons, and the courts make a reasonable allowance to receivers appointed by them, besides reimbursing their expenses. . . . And the equity of the statute is, by construction, generally extended to conventional trustees, when the agreement is silent;" *Boyd v. Hawkins*, 2 Dev. Equity R. 334.

The rule of *Robinson v. Pett*, was, however, at an early day, adopted in parts of this country. In the State of New York, in the early case of *Green v. Winter*, 1 Johnson, Ch. 37, Mr. Chancellor Kent declared, that even were he free from the weight of English authority, he would greatly hesitate before he undertook to question the wisdom of this rule, and in the subsequently carefully considered case of *Manning v. Manning*, Ib. 534, the same learned judge enforced his views by a

*This note was originally from the pen of Wm. Henry Rawle, Esq. It has been re-written for the present edition by Angelo T. Freedley, Esq.

reference to the rule of the civil law, and added, "nor does the rule strike me as so very unjust, or singular and extraordinary; for the acceptance of every trust is voluntary and confidential; and a thousand duties are required of individuals, in relation to the concerns of others, and, particularly, in respect to numerous institutions, partly of a private, and partly of a public nature, in which a just indemnity is all that is expected and granted. I should think it could not have a very favorable influence on the prudence and diligence of a trustee, were we to promote, by the hopes of reward, a competition, or even a desire for the possession of private trusts, that relate to the moneyed concerns of the helpless and infirm. To allow wages or commissions for every alleged service, how could we prevent abuse?"

But, as was pertinently said by Story, "to say that no one is obliged to take upon himself the duty of a trustee, is to evade and not to answer the objection. The policy of the law ought to be such as to induce honorable men, without a sacrifice of their private interest, to accept the office, and to take away the temptation to abuse the trust for mere selfish purposes, as the only indemnity for services of an important and anxious character;" Eq. Jur. § 1268, n. Such is the view generally taken throughout this country; *Barney v. Saunders*, 16 Howard (U. S.), 542; *Shirley v. Shattuck*, 6 Cushman, 26; and though at an early period some of the states recognized the

English rule, yet in them, as was the case in New York, its judicial adoption called forth almost immediate legislative action, while in others, the allowance of a compensation to all acting in a fiduciary capacity has either formed a part of their local common law, or has proceeded from an equitable construction of some statute.

The rules upon this subject, are however, to a great extent so local, as almost to defy their uniform classification. In some parts of the country, statutes have fixed precisely both the amount of compensation and the manner in which it shall be allowed, while in others they are less exact, sometimes merely declaring the general principle. As to the latter, however, courts have endeavored to form a standard with as much precision as the varying circumstances of each case have admitted, and in some of the older states, the allowance of compensation is reduced to rules, which are gradually becoming both more precise, and more general in their application.

In NEW YORK, the doctrine adopted by Chancellor Kent in *Green v. Winter* and *Manning v. Manning*, *supra*, met with little favor, as the decisions were soon after followed by the Act of 1817, which made it lawful for the Court of Chancery, in the settlement of accounts of guardians, executors and administrators, to make to them a reasonable allowance for their services as such, over and above their expenses; *Matter of*

Roberts, 3 Johns. Ch. 43. An order in chancery, made in the same year, (3 Johns. Ch. 630,) reduced these provisions to some precision, by directing that the allowance for receiving and paying money should be five per cent. on all sums not exceeding one thousand dollars—two and a half per cent. on sums between one and five thousand—and one per cent. for all above that amount, and the revised statutes afterwards adopted the same rule (2 Rev. St. 93), but by the Act of 1863, the compensation of executors and administrators (which includes guardians; *Foley v. Egan*, n. to *Morgan v. Hannas*, 13 Abb. Prac. Rep. N. S. 362), is increased by raising the limit upon which two and a half per cent. is allowed, from four thousand to nine thousand dollars; Laws of 1863, Ch. 362, § 8; 6 New York Stat. at Large, 126. The revised statutes also provided that any provision made by a testator for specific compensation is to be deemed a full satisfaction for his services, unless by a written instrument filed with the surrogate he elect to renounce such legacy; and in 1849, it was further provided, that in all cases such allowance should be made for their actual and necessary expenses, as should appear just and reasonable (3 Rev. St. 180, ed. of 1859). These provisions have been held to be retrospective, and, therefore, to apply, in cases of accounts settled since its passage, to services performed before that time; *Daking v. Demming*, 6 Paige, 95.

Although these statutes only specifically enumerate guardians, executors and administrators, yet, by an equitable construction, their provisions have been extended to committees of the estates of lunatics; *Robert's Case*, 3 Johns. Ch. 43; *Livingston's Case*, 9 Paige, 440 (though not, of course, to committees of their persons; *In re Colah*, 3 Daly, 530), to trustees; *Meacham v. Sternes*, 9 Paige, 403; *Duffy v. Duncan*, 32 Barbour, 590; *Ogden v. Murray*, 39 N. Y. 202; and, in the absence of proof of the services performed, to receivers; *Muller v. Pondir*, 6 Lansing, 481; although as the compensation of a receiver rests within the discretion of the court, a higher rate may be awarded; *Gardiner v. Tyler*, 3 Transcript Ap. 161. In *Jewett v. Woodward*, 1 Edw. Ch. 199, it seems to have been thought that this did not apply to trustees under voluntary assignments, but in *Meacham v. Sternes*, *supra*, it was said that, in the absence of all agreement, a trustee under any express trust "will be allowed the same fixed compensation for his services by way of commissions, as is allowed by law to executors and guardians, to be computed in the same manner," and, therefore, a trustee under an assignment for the benefit of creditors was held to be within the equity of the statute. The doctrine thus announced has been repeatedly approved; *Duffy v. Duncan*, *supra*; *Cowing v. Howard*, 46 Barbour, 586; *Ogden v. Murray*, *supra*; *In re Schell*, 53 N. Y. 263; and with respect to testa-

mentary trustees, incorporated into the statute law by the act of 1866 (ch. 115, 6 N. Y. Stat. at Large, 700), which provides that "The surrogate shall allow to the trustee or trustees the same compensation for his or her services, by way of commissions, as are allowed by law to executors and administrators, and also all such allowance for expenses as shall be just and reasonable," under which it has been held to be compulsory upon the surrogate, upon each settlement of a trustee's account, to allow full commissions; *Pirnie's Estate*, 1 Tucker, 119.

Where, however, the instrument creating the trust itself provides a compensation, this will be its measure, and, therefore, where a testator declared that his executors should "retain and pay to themselves out of the rents and income all costs, charges, and expenses they have to pay or be put unto in the fulfilment of this my will, and a reasonable compensation for their services," it was held that the compensation was to be determined with reference to the duties performed, without regard to the statute; *In re Schell*, 53 N. Y. 263. "The object of the statute," said the court, "is to furnish a general and arbitrary rule for cases not otherwise provided for, but it should not govern where the testator has, by reason of peculiar circumstances existing in reference to his estate, required extraordinary services on the part of those to whose care he has confided it, and has specially provided that their compensation shall be

reasonable, which is equivalent to declaring that it shall be proportioned to the value of the services they may render. By such a direction the testator necessarily confides to the tribunals under whose jurisdiction the administration of his estate may come, the adjustment of the compensation of his trustees, and this is a duty which those tribunals must perform upon the evidence before them." It is obvious, however, that this only applies to solvent estates, and that an insolvent assignor cannot, in his assignment, provide a more liberal compensation than that allowed by the statute; *Barney v. Griffin*, 2 Comstock, 372; as otherwise, under the name of commissions fraudulent preferences might easily be created, and in *Nichols v. M'Ewen*, 21 Barb. 66, a provision for the payment of "a reasonable counsel fee" to the assignee, in addition to the other expenses and commissions, was held to render the instrument void as to creditors, as being apparent evidence of an intent to defraud them.

As to the right to compensation, no distinction exists between realty and personalty; *De Peyster's Case*, 4 Sandf. Ch. 514. "It seems to have been supposed," said Davies, J., in *Wagstaffe v. Lowerre*, 23 Barb. 224, "that the trustee in this case is limited to his commissions on that part of the estate which has become personal property; and this doubtless has arisen from assuming such to be the intent of the statute in the case of executors and administrators. The

statute alludes to personal estate, simply because that is all executors and administrators have in charge. In reference to them, the statute allows commissions on all sums of money that they may receive and pay out. But commissions on the whole amount of the trust estate in their hands, under their control, and managed by them, was intended, and has been uniformly allowed, even though a very small part was in money actually received or paid out. If the estate of the deceased consisted of stocks, or bonds and mortgages, it might be and often is the case, that the executor actually receives and pays out only the interest or income; yet he would be entitled to and does receive his commissions upon the whole amount of the estate. The compensation is given to him for his care and management of the estate, and not for the simple act of receiving and paying out. And I am unable to see why the trustee, in this case, should be restricted to his commissions upon the sums of money he receives and pays out, and the personal property which he transfers. The reasons for his compensation apply, in my judgment, with greater force even, in regard to real estate than personal. The responsibility and difficulty of managing a trust estate, consisting of stocks, bonds and mortgages, are far less than that consisting, like the present, of unproductive real estate, lying in the suburbs of a large and growing city. This property has been subject to the system, prevailing here, of local improve-

ments, by opening streets and avenues, regulating and paving streets, constructing sewers and other like operations. It has always been subject to annual taxation, and constant watchfulness is required to save property thus circumstanced from total loss and confiscation."

In *M'Whorter v. Benson*, Hopk. 28, it was held, that the discretion of the court was limited as to the manner of compensation, and that it had no power to sanction any specific charge or per diem allowance. Nor was such a mode of compensation deemed at all expedient. "It is evident," said Sandford, Ch., "that all attempts to assess the value of services performed in these trusts, by placing each case upon its peculiar circumstances and intrinsic merit, must terminate in a power of mere discretion, a discretion to a great extent merely arbitrary. This mode of assessment would be so extremely uncertain in its operation, that it would frequently defeat the very justice which it proposes to attain; and its certain effect would be, to produce extensive litigation in adjusting the rewards of executors, administrators and guardians.

. . . It has also been proposed, to make the compensation depend upon time, by making an allowance for each day employed in the business of the trust. This would indeed be a universal rule, embracing all services; but the principle would be most pernicious. No rule could be more dangerous than that which should declare that every guardian, executor and ad-

ministrator, shall receive a daily allowance for time employed in his trust. Much of the utility of these trusts always consists in attention, superintendence, fidelity, and economy; and cares and services like these cannot be measured with any exactness by days or months. The duties of these trusts do not, in general, require entire days of attention, but they are usually performed, as occasion may require, with little or no interruption of the private pursuits of the trustee. The injustice of allowing daily wages, the temptation to abuse which would be offered by such a rule, and the difficulty of preventing abuses in its execution, are decisive objections to its adoption. If we regard the duration of these trusts, this fact affords no rule of compensation. One of these trusts continuing five years, may be far more arduous and may require much greater services than another extending to fifteen years, for its entire execution. The idea of compensation measured merely by time, must therefore be rejected."

The rule of this case has been subsequently approved, both upon principle, and as a correct interpretation of the statute; *Reviser's note to* § 54, tit. 3, ch. 6, pl. 2; *Vanderheyden v. Vanderheyden*, 2 Paige, 288; *Valentine v. Valentine*, 2 Barb. Ch. 438; though in *Jewett v. Woodward*, 1 Edw. Ch. 199 (which, however, was decided before the doctrines relating to this subject were well settled), a per diem allowance was given to a trustee under an assign-

ment for the benefit of creditors. Indeed, notwithstanding the emphatic opinion of Chancellor Kent, in *Green v. Winter*, *supra*, p. 538, the rule adopted by him in that very case made the distinction between it and the general current of American authority rather one of kind than of principle, as he gave a per diem allowance to the trustee, not, indeed, as *compensation*, but by way of *indemnity*.

Compensation to a fiduciary being thus the subject of positive enactment in New York, seems to be thought a matter of right and not of grace, and in cases coming within the statute the surrogate has no discretion to refuse to allow it; *Halsey v. Van Amringe*, 6 Paige, 12; *Dakir v. Demming*, Id. 95. Hence a receiver or guardian when required by order of court or act of Assembly to settle annual accounts is entitled to full commissions upon each settlement; *In re Bank of Niagara*, 6 Paige, 216; *Morgan v. Hannas*, 49 N. Y. 667; *S. C.* more fully reported, 13 Abb. Prac. Rep. N. S. 369. So executors have been allowed commissions even when charged with compound interest; *Vanderheyden v. Vanderheyden*, 2 Paige, 287; *Rapalje v. Norsworthy*, 1 Sandf. Ch. 399; or when guilty of gross negligence amounting to a breach of trust; *Meacham v. Sternes*, 9 Paige, 398; and this has been carried to the extent of allowing commissions to a trustee *ex maleficio*; *Iddings v. Bruen*, 4 Sandf. Ch. 223, 268; *Cowing v. Howard*, 46 Barb. 579; but compensation was obviously refused in a case where

the directors of a company constituted themselves trustees of the same corporation; *Ogden v. Murray*, 39 N. Y. 202. Commissions have also been allowed to a trustee upon the payment of a debt due to himself; *Meacham v. Sternes*, 9 Paige, 399; *Hosack v. Rogers*, Id. 462; and upon amounts charged in the inventory, but which the executor did not receive; *Meacham v. Sternes*, *supra*; and where the executor instead of calling in the bonds and assets of the estate, merely transferred them to the trustee of the legatees, with their assent; *Cairns v. Chaubert*, 9 Paige, 161; and where, being discharged from his trust, he transferred the property to his successor in the same condition in which he received it from his predecessor; *De Peyster's case*, 4 Sandf. Ch. 514; although in the very recent case of *Foley v. Egan*, 13 Abb. Prac. Rep. N. S. 361, n. (the facts of which are not reported), the Supreme Court apparently refused to allow a guardian upon retiring from the trust, commissions upon such portions of the capital as were invested by his predecessor.

On the other hand, commissions have been refused where the executor has died before converting the personalty into money for the purposes of administration; *Cairns v. Chaubert*, 9 Paige, 160; nor will they be allowed upon the transfer of stock specifically bequeathed; *Schenck v. Dart*, 22 N. Y. 420; *Burtis v. Dodge*, 1 Barb. Ch. 78; nor where it appears that the trust has been expressly undertaken from motives of benevolence; *Ma-*

son v. Roosevelt, 5 Johns. Ch. 534. So in order to save an estate from double commissions by reason of frequent changes of trustees, the vice chancellor held, in *Jones' case*, 4 Sandford Ch. 616, upon English authority, that a trustee's petition for his discharge, upon no other cause assigned than his wish to be relieved from his duties, would only be granted by his paying the costs of the petition and appointment of his successor, and by being allowed no commissions upon the capital of the estate; and see *Foley v. Egan*, 13 Abb. Prac. Rep. N. S. 361, n.

It will be observed, that the statute does not specify how much is to be allowed for receiving, and how much for paying out the amounts on which commissions are to be charged; "and it may sometimes happen," as was said by Walworth, Ch., in *Kellogg's case*, 7 Paige, 267, "that upon a loss of the fund, without any fault of the guardian or other trustee, or upon a change of trustees, the guardian or trustee may be entitled to compensation for one service and not for the other." The rule in general was, therefore, said to be, "to allow one-half commission for receiving and one-half for paying out the trust moneys." In that case, the guardian had been allowed commissions for receiving and paying out the amount of a legacy bequeathed to his ward, although its principal part had been invested by him. "This mode of computing the commissions would be correct, if the infant were now of age, and this was a final settle-

ment of the account of the guardian, with a view to turn over the whole fund to his ward. . . . But it certainly was not the intention of the Legislature, or of this court, to sanction the principle of allowing to the guardian or trustee full commissions upon every receipt and reinvestment of the trust fund committed to his care and arrangement. The result of such a principle of computing the allowance for commissions, if the investments were made from year to year, and the accounts rendered annually, would be to give the trustee his full commissions upon the principal of the trust fund every year, as well as upon the income received and expended from time to time. . . . The proper rule, therefore, for computing the commissions upon the first annual statement, or passing of the accounts of the guardian, receiver or committee, who is required to render or pass his account periodically, during the continuance of the trust, is to allow him one-half of the commissions, at the rates specified in the statutes, upon all moneys received by him as such trustee, other than the principal moneys received from investments made by him on account of the trust estate. And he is also to be allowed his half commission on all moneys paid out by him in bonds and mortgages, stocks, or other proper securities, for the benefit of the trust estate under his care and management, leaving the residue of his half commissions upon the fund which has come to his hands, and which remains invested

or unexpended at the time of rendering or passing such account for future adjustment, when such funds shall have been expended, or when the trustee makes a final settlement of his account upon the termination of the trust. And upon every other periodical statement of the account during the continuance of the trust, half commissions should be computed in the same manner upon all sums received as interest or income of the estate, or as further additions to the capital thereof, since the rendering or passing of his last account, and half commissions upon all sums expended, except as investments." See also, *In re Bank of Niagara*, 6 Paige, 216; *Livingston's case*, 9 Id. 403; *Morgan v. Hannas*, 13 Abb. Prac. Rep. N. S. 369; *S. C.*, 49 N. Y. 667. "And where," said Walworth, Ch., in *Hosack v. Rogers*, 9 Paige, 468, "an executor or trustee who has a large claim against the estate, and is entitled to a preference, receives and applies moneys in part payment of principal and interest, if the amount so paid is large, it appears to be equitable that his commissions on the amount so applied should be first deducted, so as to give him the interest on the balance of the principal of his debt from that time, after deducting the commission on such partial payment. But where that is done, the subsequent commissions should be computed in such a manner that the aggregate amount of the whole commissions allowed will not exceed the statute allowance upon all his receipts and disbursements."

Where the trustees are more

than one in number, the commissions are computed upon the aggregate sums received and paid out by all of them collectively, and not upon the amounts received and disbursed by each individually. In *Valentine v. Valentine*, 2 Barb. Ch. 430, it was intimated that the surrogate could apportion the commissions according to the services performed, but this has since been doubted; *White v. Bullock*, 20 Barb. 99; *S. C.* on appeal. 15 How. Prac. Rep. 104; and as the act of 1817 gave the surrogate no express power of apportionment, it has been held that, in the absence of any action on his part, a court of law possessed no such jurisdiction; and hence in an action by one executor against his co-executor for an equal share of the commissions charged in the account, the plaintiff, notwithstanding he had rendered no services whatever while the defendant had solely managed the trust, was held to be entitled to recover; *White v. Bullock*, 15 How. Prac. Rep. 103, reversing *S. C.* 20 Barb. 99. By the act, of 1849, however, (Ch. 150, § 1, 2 N. Y. Stat. at Large, 95) it is provided, that in the case of two or more executors or administrators, the surrogate shall apportion the commissions "according to the services rendered by them respectively," and a somewhat similar enactment prevails with regard to trustees, it being provided that, "If there be more than one trustee, and the estate be insufficient to give full commissions to each trustee, the surrogate shall apportion such compensation among the said trus-

tees according to the services rendered by them respectively;" but the practice prevailing prior to the act of 1849, has, with respect to large estates of personalty, been re-enacted by the act of 1863, which declares that, "If the personal estate of the testator or intestate shall amount in value to not less than one hundred thousand dollars, over and above all debts and liabilities of the testator and intestate, and there shall be more than one executor and administrator, then, instead of apportioning the compensation hereinbefore mentioned among such executors or administrators, each and every of such executors or administrators shall be entitled to, and shall be allowed the full amount of compensation to which he would have been entitled by the provisions of this act if he had been sole executor or administrator; provided, however, that the whole amount of the compensation of such executors or administrators shall not exceed what would be by the provisions hereof paid to three executors or three administrators; and that if there shall be more than three executors or administrators, then, what would be the compensation of three executors or three administrators shall be divided among them in equal shares," Laws 1863, ch. 361; 6 New York Stat. at Large, 127; and in cases coming within this provision, full commissions will be given to all irrespectively of the services rendered; *Nest's Estate*, 1 Tucker, 130.

The allowance to a fiduciary cannot, in the absence of any pro-

visions to the contrary, exceed the amount prescribed by the statutes, even though he performs services not falling within his ordinary duties and which materially benefit the estate, as the word "commissions" is construed to include not merely a per centage, but a full compensation measured by a fixed standard for all personal services rendered to the trust; *Stevenson v. Maxwell*, 2 Sandf. Ch. 284; *Vanderheyden v. Vanderheyden*, 2 Paige, 288. Hence, a receiver is not allowed additional compensation by reason of having acted as counsel for himself and his co-receiver; *In re Bank of Niagara*, 6 Paige, 213; so of a trustee; *Binsse v. Paige*, 1 Abb. Ct. Ap. Dec., 138; so, where an executor acting, at the request in writing of his co-executors and the adult legatees, as counsel for the estate, rendered important services greatly increasing its value, his claim for fees was disallowed as against those not *sui juris*; *Munn's Estate*, 1 Tucker, 136; affirmed, *Collier v. Munn*, 41 N. Y. 143; so, too, an executor will not be allowed additional commissions for acting as agent; *Fisher v. Fisher*, 1 Bradf. 335; unless a special authority be given by the will; *Clinch v. Ecford*, 8 Paige, 412; *Gilman v. Gilman*, 2 Lansing, 1; nor can an executor receive extra compensation as trustee for fulfilling the duties of a trust attached to his office of executor; *Holley v. S. G.*, 4 Edw. Ch. 284; *Valentine v. Valentine*, 2 Barb. Ch. 430; *Drake v. Price*, 1 Selden, 430; *Westerfield v. Westerfield*, 1 Bradf. 198; *Mann v. Law-*

rence, 3 Id. 424; *Lansing v. Lansing*, 45 Barb. 182.

In *Morgan v. Morgan*, 39 Barb. 20, a guardian was allowed to charge for mechanical labor performed by himself upon the property of his ward, as the Supreme Court, while conceding that the compensation of a guardian was governed by the rule applicable to executors, yet held these rules not to be "so narrow and restricted that they deny all compensation to a guardian for services of a personal or professional character, rendered by him for the benefit of the ward, and in doing which he has bestowed personal labor and incurred actual expenses, which have been useful and serviceable to the estate," but this is clearly opposed to the weight of authority, and was subsequently overruled by the Court of Appeals; *Morgan v. Hannas*, 13 Abb. Prac. Rep. N. S. 361; *S. C.* 49 N. Y. 667.

But although a fiduciary cannot himself by acting as counsel, agent or the like, or by any other extra services, receive a compensation in excess of the statutory provision, yet the courts have shown no disposition to restrict the employment of others in such relations, if necessary for the trust, and hence executors have been allowed salaries paid to clerks, agents, &c., when required in the management of the estate; *McWhorter v. Benson*, Hopk. 28; *Vanderheyden v. Vanderheyden*, 2 Paige, 287; *Cairns v. Chaubert*, 9 Id. 164; *In re Livingston*, Id. 442; *Glover v. Holley*, 2 Bradf. 291; *Duffy v. Duncan*, 32

Barb. 591; as also for other general necessary expenses; *Downing v. Marshall*, 37 N. Y. 380.

As to costs and counsel fees, it is familiar that, in England, it rests within the discretion of the Court of Chancery to allow trustees, in action brought by or against them, to charge the estate with their costs "as between solicitor and client," which, of course, include proper counsel fees, upon the doctrine that a trustee acting in good faith, is entitled to full indemnity for all proper and necessary expenses. This rule also exists in New York, not having been touched by legislation; hence an executor asking, upon reasonable grounds, for a construction of the will, or for directions as to the disposition of the estate, is allowed, in addition to the taxable costs provided by the code, to payment out of the estate of all reasonable expenses, including his counsel fees. *In re Howe*, 1 Paige, 214; *Irving v. McCay*, 9 Id. 533; *Downing v. Marshall*, 37 N. Y. 380, and in the very recent case of *Wetmore v. Parker*, 52 N. Y. 466, this doctrine was affirmed, the court saying "whether the rule should be applied to cases of executors asking for a construction of a will merely, and whose accounts must be rendered to, and passed upon by, the surrogate, or limited to cases where the fund is definitely and finally disposed of by the court, might, as an original question, well be doubted; but as the decision [*Downing v. Marshall*] extends the rule to cover the for-

mer, we are not inclined to disturb it."

So, where an executor in good faith, and under advice of counsel, brings an action for the purpose of protecting the estate from loss, the expense of the litigation will be allowed him, although his attempt was unsuccessful, and the result proved that other modes of proceeding would have been better; *Collins v. Hoxie*, 9 Paige, 87; so, counsel fees are allowed to trustees who have not improperly or unnecessarily litigated; *Jewett v. Woodward*, 1 Edw. Ch. 200; but, obviously, not to those guilty of negligence, fraud or wilful misconduct; *Willcox v. Smith*, 26 Barb. 330; *Spencer v. Spencer*, 11 Paige, 299; *Smith v. Rockefeller*, 3 Hun, 295; nor where the professional services are more for the benefit of the trustee than of the estate; *Meacham v. Sternes*, 9 Paige, 407; and, therefore, executors are not permitted to charge the fund with the expenses of their unsuccessful resistance to an application for an order requiring them to account, nor for the expenses incurred in proceeding against them for contempt in not so accounting; *Gilman v. Gilman*, 2 Lansing, 1. Nor can the estate be charged with fees paid by the executor for services rendered upon the final settlement of their accounts before the surrogate, nor for drawing up the accounts in a proper form for such settlement; *Burtis v. Dodge*, 1 Barb. Ch. 91; *Willcox v. Smith*, 26 Barb. 300. "These rules" it was said in *Willcox v. Smith*, "harmonize,

and they are founded on solid reason. It is not often that executors or administrators need the services of counsel in making final settlements of their accounts before the surrogate, if they have properly managed the estates in their hands, and are diligent in making settlements; and when they are negligent, or permit their accounts to become confused, or suffer the estate under their control to decrease unnecessarily, they ought to pay counsel out of their own funds for assisting them in closing up the trusts. And the reasons are too obvious to be stated which uphold the rule that permits the surrogate to allow them all actual and necessary expenses incurred by them, which appear reasonable and just, in bringing and defending actions in good faith, with the expectation of benefiting the estates under their control, and in managing such estate solely for the benefit of those interested in them."

Executors, however, will not be justified in paying unreasonable or extortionate charges; *Frith v. Campbell*, 53 Barb. 325; and the discretion of the court below in granting an allowance for counsel fees, has been held to be the subject of review; *Downing v. Marshall*, 37 N. Y. 394; though this has recently been doubted; *Wetmore v. Parker*, 52 N. Y. 467. Nor is a master in taking an account in anticipation of a decree, and before the question of costs has been disposed of by the court, authorized to make allowances for counsel fees in that suit, unless di-

rected to do so by the order of reference; *Hosack v. Rogers*, 9 Paige, 463.

But while it is thus well settled that those suing or defending in *autre droit*, are, independently of legislation, entitled to full indemnity from the estate for their proper expenditures, yet it is equally well settled that the other parties to the action can only recover the statutory taxable costs; *Halsey v. Van Amringe*, 6 Paige, 12; *Rose v. Association*, 28 N. Y. 184; *Downing v. Marshall*, 37 Id. 380.

In PENNSYLVANIA, although compensation to executors has been said to "extend as far back as the testamentary law can be traced; *Wilson v. Wilson*, 3 Binn. 560; yet the only statutory provision upon the subject was an act passed in 1713 (1 Dall. Laws, 99), which authorized orphans' courts to order the payment by executors, of such reasonable fees for copies and "all other charges, trouble and attendance which any officer or other person should necessarily be put to," as the court should deem just, and by an equitable construction of this statute, its provisions were extended to trustees; *Prevost v. Gratz*, 3 Wash. C. C. R. 434. With respect to trustees under assignments for the benefit of creditors the act of 24th March, 1818, provided that the court should allow the assignee "such pay or commission for his trouble and services, as the court, in its discretion, might think reasonable;" and the revised statute of 14th June, 1836,

which has supplied all former enactments, has provided, not only with reference to assignees for the benefit of creditors, but to trustees generally, "that it shall be lawful for the court, whenever compensation shall not have been otherwise provided, to allow such compensation to assignees and other trustees, out of the effects in their hands, for their services, as shall be reasonable and just."

Compensation to a fiduciary thus resting in the discretion of the court, is, therefore, purely matter of grace; *Ex parte Cassel and Spayd*, 3 Watts, 443; and will be withheld whenever the conduct of the party merits such a punishment. "Although it is perfectly just and reasonable," as was said in *Swartswalter's Accounts*, 4 Watts, 79, "that every one acting under proper authority in the character of a trustee, should receive a fair compensation for his services, yet it is of infinite importance to the public, as well as to the individuals interested in the execution of the trust, that he should perform the duties of it with the most strict honor and integrity. . . . Now it is certainly inconsistent with every principle of retributive justice, that a trustee who betrays the confidence reposed in him, and attempts to defraud the *cestuis que trust*, by appropriating the trust funds to the discharge of a pretended claim of his own, should receive the same reward that is due to virtue only, and given as a remuneration for services rendered with a view to advance the interests of the *cestuis que trust*. On

principles of policy, as well as those of morality and justice, in order to insure a faithful and honest execution of the trust as far as practicable, it would be inexpedient to allow to the trustee who has acted dishonestly, and with an intent fraudulently to convert the trust funds to his own use, the same compensation with him who has acted uprightly in all respects, and with a single view to promote the true interests of his *cestuis que trust*. The withholding compensation altogether in the first case, and bestowing it only in the latter, may have a tendency to deter trustees from attempting anything unfair in the execution of the trust, and induce them, at the same time, to perform their duties with common honesty, at least, if not with all the skill and diligence that might possibly be applied;" and hence it has been consistently held, that compensation will be denied to fiduciaries who have shown a want of good faith and ordinary care and diligence in the execution of their trust; *Stehman's Appeal*, 5 Barr, 413. Thus commissions are obviously forfeited where an executor misapplies the assets of the estate by employing them in his business; *Robinett's Appeal*, 12 Casey, 174; or assumes a position hostile to the trust; *Drysdale's Appeal*, 2 Harris, 531; *Greenfield's Estate*, 12 Id. 232; *Landis v. Scott*, 8 Casey, 498; *Stearly's Appeal*, 2 Wright, 525; or sets up a spurious or unfounded claim; *Swartswalter's Accounts*; *Robinett's Appeal*, *supra*; or resists, for his own advantage, the

payment of a just one; *Witman's Appeal*, 4 Casey, 396; or, by his wilful misconduct, lessens the income; *Berryhill's Appeal*, 11 Casey, 245. So where an assignee for the benefit of creditors, having purchased debts at a discount, charged the estate with the full value of the same; *Hermstead's Appeal*, 10 P. F. Smith, 109; so, too, where the estate was diminished by reason of his assignee having allowed the proceeds thereof to be paid to his sureties as an indemnity for prospective loss; *Dyott's Estate*, 2 Watts & Serg. 565 (and the same wholesome rule was applied to the case of an attorney who neglected to pay over money received for his client until sued by the latter; *Bredin v. Kingland*, 4 Watts, 420); and, generally, compensation is denied when the accounts of the fiduciary are either so erroneously or fraudulently kept, that they fail to disclose the true state of the trust; *Swartswalter's Account*, 4 Watts, 79; *Stehman's Appeal*, 5 Barr, 413; *McCahan's Appeal*, 7 Barr, 59; *Cassey's Estate*, 11 Wright, 427; *Wistar's Appeal*, 4 P. F. Smith, 60; *Lamb's Appeal*, 8 Id. 142; *Hermstead's Appeal*, 10 Id. 429; *Norris' Appeal*, 21 Id. 126; *Morton's Estate*, 7 Philada. 490; for "the duty of a trustee or an agent in charge of property to keep regular and correct accounts, is imperative, and if he does not, every presumption of fact is against him. He cannot impose upon his principal, a *cestui que trust*, the obligation to prove that he has actually received what he might have

received, and what it is his duty to endeavor to obtain. By failing to keep and submit accounts, he assumes the burden of repelling the presumption, and disproving negligence and faithlessness;" *Landis v. Scott*, 8 Casey, 498.

But, on the other hand, in the absence of any evidence of actual fraud, compensation will not be refused to executors for a mere mistake of judgment in the construction of their testator's will; *Myer's Appeal*, 12 P. F. Smith, 109; or for an error in distributing the estate, when no practical loss results; *Brennan's Estate*, 15 P. F. Smith, 16; so, where an executor deposited the funds of the estate in his private bank account, but obtained no benefit therefrom, the court, while expressing strong disapprobation of the practice, yet allowed commissions thereon; *Parker's Estate*, 14 P. F. Smith, 307.

Upon similar doctrines necessarily depends the right of a fiduciary to charge the subjects of his trust with expenses incurred in actions brought by or against him. Necessary and reasonable costs, including counsel fees, will, therefore, be allowed to one acting in good faith for the apparent benefit of the estate, "on the principle that a trust estate must bear the expense of its administration;" *Trumper's Appeal*, 3 Watts & Serg. 443; *Pusey v. Clemson*, 9 Serg. & Rawle, 204 (where the fund was charged with counsel fees for advice as to the manner of stating the accounts); *Drysdale's Appeal*, 2 Harris, 537; *Beck v. Ulrick*, 4

Id. 500; *Callender v. Keystone Co.* 11 Id. 471; *Heckert's Appeal*, 12 Id. 483; *Lowrie's Appeal*, 1 Grant, 373; *Wilson's Appeal*, 5 Wright, 94; *McElhenny's Appeal*, 10 Id. 349; *Grave's Appeal*, 14 Id. 193.

Such allowances, however, will be denied where the litigation is conducted for the benefit of the fiduciary; *Sterrett's Appeal*, 2 Pa. 426; *Brinton's Estate*, 10 Barr, 409; *Withers' Appeal*, 1 Harris, 582; *Raybold v. Raybold*, 8 Id. 308; *Martin's Appeal*, 11 Id. 433; *Witman's Appeal*, 4 Casey, 376; *Stephens' Appeal*, 6 P. F. Smith, 409; or is caused by his misconduct; *Berryhill's Appeal*, 11 Casey, 245; *Gable's Appeal*, 12 Id. 395; or by his assertions of unfounded demands; *Sterrett's Appeal*, 2 Pa. 419; *In re Harlan*, 3 Pa. Law Jour. 116; *Bell's Estate*, 2 Parsons Eq. 200; or, when in possession of assets, by resisting the payment of just claims; *Callaghan v. Hall*, 1 Serg. & Rawle, 246; *Armstrong's Estate*, 6 Watts, 236; *Gossner's Estate*, 6 Wharton, 401; or, obviously, by the presentation of erroneous or fraudulent accounts; *Burr v. McEwen*, Baldw. 164; *Landis v. Scott*, 8 Casey, 504; *Lamb's Appeal*, 8 P. F. Smith, 143; *Norris' Appeal*, 21 Id. 106; though they have been allowed when the errors in the account were either unintentional or in favor of the estate; *Yoder's Appeal*, 9 Wright, 394; *McElhenny's Appeal*, 10 Id. 348. In *Parker's Estate*, 14 P. F. Smith, 308, the court, while allowing commissions to an executor who had mingled the funds of the estate with his

own money, yet imposed the costs of the audit upon him.

"Where an estate is so situated that legal advice is proper to direct the course of the executors, or where they must bring suits to recover part of the estate, or defend suits brought against them, counsel must be employed, and where they are employed to obtain what is honestly supposed to be the rights of the estate, the estate ought to pay the reasonable counsel fees. But where executors neglect to settle and pay, and are sued by creditors, or cited by heirs, and employ counsel to defend them in their iniquity, no counsel fees should come from the estate. The man who is doing wrong, must himself pay the expense of that wrong;" *Sterrett's Appeal*, 2 Penn. 426. In *Robinett's Appeal*, 12 Casey, 174, an administratrix surcharged with the profits of a business carried on with the funds of the intestate, was yet allowed the expenses consequent upon the ensuing litigation, and in *Smith's Appeal*, 4 Wright, 424, the same allowance was made to an executor, when the balance originally charged against him was diminished upon each subsequent hearing, but these cases must be regarded as exceptional.

With respect to costs incurred by an executor in an issue *devisavit vel non*, or in otherwise supporting the will of his testator, it was held in the early case of *Bradford v. Boudinot*, 3 Wash. C. C. R. 122, that the executor in that case was not only authorized, but that it was his duty, believing the

will to be that of his testator, to support the decision of the register in its favor, and that he was entitled to the aid of the estate to discharge all reasonable costs and expenses incurred on that account. So, in the later case of *Geddis' Appeal*, 9 Watts, 284, it was said that an executor, having proved the will, was bound to support it against the attack of those who claimed an opposite interest; though the decision was only to the point that this must be deemed his duty, unless the devisees and legatees chose to abandon their claims under it, and required him to yield to their opponent, and it was considered to be hard to make him pay out of his own pocket, expenses incurred apparently for the benefit of others. In the previous case, however, of *Koppenhoffer v. Isaacs*, 7 Watts, 170, it had been briefly held, that the costs of a *devisavit vel non* must be borne by the parties who litigated for their particular interests; and the recent cases have denied the position that an executor is bound at all events to support his testator's will. "Generally, the ordinary costs and expenses incurred by him," as was said in *Mumper's Appeal*, 3 Watts & Serg. 443, "in either prosecuting or defending a suit, as executor, for the benefit of the estate, are to be paid out of it. This would seem to be right upon the general principle that a trust estate must bear the expense of its administration. But suppose, in this case, that the issue joined for the purpose of proving the validity of the

will, had been decided against the executor, can it be imagined that he would be entitled to retain out of the estate which had come into his hands, not only the legal costs of the issue for which judgment had been rendered against him, but likewise the \$600 paid by him to counsel for their advice and professional services given in order to sustain the will? As regards the quantum of the estate, it is a matter of indifference whether there be a will or not. Will or no will, is a question which cannot affect the estate, in this respect, in the slightest degree; but it may be, and generally is a matter of great interest to those who claim as legatees or devisees under the writing purporting to be a will. They are the only persons interested in establishing it as a will. While on the other hand, the heirs at law, or next of kin to the deceased, who are either excluded by the writing from receiving any portion of the estate, or as much of it as they would be entitled to in case of intestacy, are the persons principally interested in opposing the establishment of the writing as a will. If the person appointed by it as executor, be named also as a legatee or devisee, then, as such, he may be deeply interested also in establishing it to be the last will of the deceased. But it is clear that creditors and the rest of the world have no interest whatever in the question. It would, therefore, seem to be just, as well as equitable, that those who have an immediate and direct interest in the question, should be left to contest

and bear all the costs and charges attending it. It ought to be left to them to employ counsel or not, as they please; and consequently to bear the expenses of doing so. If left to those named in the writing as legatees, or devisees, to employ counsel, when thought advisable, they can, by agreement among themselves, apportion the expenses of it according to their respective interests, which would certainly be both equitable and just. But if it be left to the person or persons named in the writing as executors, who have no other interest in it, to employ and pay counsel out of the estate for their services rendered in establishing the will, it is not only leaving it to persons who have no private interest in the matter to restrain them from being prodigal at the expense of those immediately interested in establishing the writing as a will, but it will, wherever there are residuary legatees or devisees, throw the whole expenses upon them, if their interest should be sufficient to meet it; and if not more than sufficient, would leave them nothing. This, if just, would certainly not seem to be equitable. The person named as executor in the writing, when advised that its validity as a will is about to be contested, ought to give notice to those who are named in it as legatees or devisees, so that they may employ counsel, if deemed requisite, or authorize him to do so at their expense. If they, after being so notified, do not choose to employ counsel or authorize any to be employed on their behalf, they

must abide the consequences, and will have no reason to complain if the writing be not established as a will, seeing they were not willing to encounter the expense with which the employment of counsel would have been attended." And this decision was, in the subsequent case of *Royer's Appeal*, 1 Harris, 573, entirely approved and followed.

So where there is a contest between the executor and the distributees; *Heister's Appeal*, 7 Barr, 457; and it is, of course, quite clear, as was held in *Dietrich's Appeal*, 2 Watts, 332, that an administrator *pendente lite* who, of course, has nothing to do in his official capacity with such a contest, cannot charge the expenses of it in his account. (See to the same effect in Ohio, *Andrews v. Andrews*, 7 Ohio S. R. 150, *infra* p. 596.)

These cases are distinguishable from *Scott's Appeal*, 9 Watts & Serg. 100, where the whole estate having been devised to a charity, the executor was allowed counsel fees paid by him in opposing proceedings instituted for the purpose of escheating the estate, as the executor litigated "for the interest of the party who got the whole estate by the litigation, and who then refused to reimburse him for his expenses." See the distinction noticed in *Royers' Appeal*, 1 Harris, 573.

In *Greenfield's Estate*, 2 Harris, 489, a lady of large property, and advanced in years, executed a deed of all her estate, absolute on its face, to four persons, who, on the same day, declared by deed, that they held the estate in trust

to pay to each of themselves \$10,000—to pay the income to herself for life, and after her death to distribute the principal among sundry persons. A bill filed after her death to set aside these instruments on the ground of influence, was dismissed with costs, on the ground that the proofs not being sufficient to support the charges in the bill, there was nothing in the reservation of the compensation so contrary to equity as to invalidate the transaction. But this decree was reversed by the Supreme Court, who, while sustaining the deed and declaration, yet struck out the provision for compensation in the latter, holding that, by reason of the confidential relations existing between the parties, it rested upon the beneficiaries to show expressly that the arrangement was fair and conscientious beyond the reach of suspicion, and that the grantor was aware that, by the terms of the declaration, her estate was charged with the payment of this sum as compensation to the trustees even though they performed no services. “In denying to the defendants,” said the court, “the specific sums ascertained by their declaration, we do not mean to say they are entitled to no compensation for their care, labor, and responsibility in the management of the estate committed to them. This we leave to be ascertained as in other cases of trust, by the proper tribunal.” Upon subsequent settlement of the accounts of these trustees, commissions (of

the report) were allowed, except in the case of one of them, who had assumed a position hostile to the trust; S. C. 12 Harris, 238.

As to the manner in which compensation is given, the court did not, in the case of *Harland's Accounts*, 5 Rawle, 330, evince the same disapprobation of specific compensation, as has been expressed in New York, in *M'Whorter v. Benson, &c.*, *supra*, p. 542. “It may be awarded,” said Gibson, C. J., “in a gross sum, according to a common practice in the country, which I take to be the preferable one, as it necessarily leads to an examination of the nature, items, and actual extent of the services, which the adoption of a rate per cent. has a tendency to leave out of view;” and in *Armstrong's Estate*, 6 Watts, 237; *M'Farland Estate*, 4 Barr, 149; *Brinton's Estate*, 10 Id. 411; *Pedrick's Estate*, 5 Phila. Rep. 478, the allowance was made in a gross sum.

But in general, the prevailing practice is to allow compensation by means of commissions; and with respect to their amount, it may perhaps be said that in by far the great majority of estates administered either by executors or trustees, five per cent. is the usual commission charged; *Pusey v. Clemson*, 9 Serg. & Rawle, 209; *Burr v. M'Ewen*, Baldw. 386; *Pennell's Appeal*, 2 Barr, 216; *Hemphill's Estate*, Parsons Eq. 31; *Bird's Estate*, 2 Id. 171; *Mayberry's Appeal*, 9 Casey, 258; *Gable's Appeal*, 12 Id. 395; *Eshleman's Ap.*, 24 P. F. Smith, 42; *Wharton's Est.*, 32 Leg. Int. 90;

In *Pusey v. Clemson*, Tilghman, C. J., said, "In the cases which generally occur, it appears to me, after considerable research, that the common opinion and understanding of this country, has fixed upon five per cent. as a reasonable allowance. But to this rule there must be exceptions. There are estates where the total amount is small, and that, too, collected in dribblets. In such, five per cent. would be insufficient. [Thus, in a case where the sums were small, and had to be remitted by mail to the party entitled to receive them, ten per cent. was not deemed excessive; *Marsteller's Appeal*, 4 Watts, 268.] On the contrary, there are others, where the total being very large, and made up of sums collected and paid away in large masses, five per cent. would be too much. It must be left to the discretion of the courts, to ascertain those cases in which the general rule should be departed from. The personal care and anxiety of the executor is a fair subject of consideration. An estate not equal to the payment of its debts, is always attended with hazard, which should not be forgotten in fixing the compensation." In the case then before the court, however, the estate being large, "the trouble having fallen principally upon the counsel employed for the executors, for whose reward a very liberal allowance had been made, and all the expenses of the executors having been paid, over and above their commissions," and the money having come into the hands of the executors in large

sums, the commissions were reduced to three per cent. So in *Montier's Appeal*, 7 Phila. Rep. 491, it was said, "where the principal part of the personalty consists of a debt due by the accountant, and all the labor as to sale of the realty has devolved upon counsel, two per cent. commission on the purchase money would seem to be a reasonable allowance." In *Harland's Accounts*, 5 Rawle, 331, rather less than five per cent. for the management of a fund of \$40,000 accumulated to \$100,000, in twenty years, was claimed, which the court said, gave a sum to which objections could not be taken on either side, and this to compensate not only for labor expended, but for responsibility and expenses incurred in litigation; in *M'Farland's Estate*, 4 Barr, 149, the allowance was about the same, though on a much less estate, and the payment by administrators of \$1000, and one-third of an apparently desperate claim at Washington as a contingent fee to agents, was sanctioned under the circumstances. So in *Bird's Estate*, 2 Parsons Eq. 171, where the executor had charged five per cent. on an estate amounting to over \$100,000, and it appeared from the report of the auditor, as well as from the will, that there were important trusts devolving upon the executor—some difficult and complicated—that he had been intimately acquainted with the affairs of the estate in the lifetime of the deceased, and had now only charged the usual commission, the claim was allowed.

In *Stephenson's Estate*, 4 Whar-
ton, 104, a very precise basis was
attempted to be fixed by the court
with respect to executors, who, of
course, charge their commissions
on the whole amount of the estate.
"The responsibility which is in-
curred by the receipt and disburse-
ment of money, is a legitimate
subject of compensation, and an
unvarying rate per cent., without
regard to the magnitude of the
sum, will always be a just measure
of it, because the responsibility in-
creases in proportion to the
amount. It is, consequently, sus-
ceptible of a uniform measure,
which we think may be reasonably
put at two and a half per cent.
Not so the compensation of trou-
ble. The settlement of a very
large estate may be the business of
a few days, while that of a small
one may occupy as many years;
and the compensation for all be-
yond the responsibility, ought to
be graduated to the circumstan-
ces." In that case, a commission
of five per cent., charged by the
executors of an estate of \$350,000,
was reduced to three, "the bulk
of the property being readily con-
vertible into cash, and but little of
it outstanding." So in *Walker's*
Estate, 9 Sergeant & Rawle, 225,
where the estate consisted princi-
pally of bank stock, which was
transferred by the executors to the
legatees, three per cent. was said
to be a very ample allowance, and
the same rule was adopted on the
authority of these cases, in *Miller's*
Estate, 1 Ashmead, 335; *Whelen's*
Estate, 20 P. F. Smith, 431.

But where, in *Guien's Estate*, 1
Ashmead, 317, a testator gave to
his executors two per cent. on the
"net proceeds" of his estate,
which was supposed to be solvent,
but turned out otherwise, the com-
missions were raised to four per
cent. "An allowance made to the
executors of a solvent estate,"
said King, Pres. J., "in the ad-
justing of which little difficulty or
responsibility could arise, would
be manifestly inadequate to the
labor and responsibility of collect-
ing the scattered funds, settling
the complicated transactions, and
distributing the proportions of the
estate of an insolvent merchant
in large business. It may be said,
that the executors accepted this
trust with the compensation fixed,
and are bound by the acceptance.
The answer to this is, that if they
did so, it was with reference to the
state of things presented by the
will, the settlement of a solvent
estate, not the collection and dis-
tribution of the scattered assets of
a bankrupt estate. . . . To show
the effect produced by the insol-
vent condition of this estate, let
us suppose the testator had fixed
fifteen per cent. as the amount of
compensation to be taken by the
executors. This direction would
be certainly disregarded, and the
executors allowed no more than a
just compensation for their labor.
The best light in which such a di-
rection could be viewed, would be
as a legacy to the executors, and
as such it must await the satisfac-
tion of the debts of the decedent;
Fretwell v. Stacy, 2 Vernon, 434.

Otherwise, fixing an extravagant compensation to executors, would be an ingenious mode by which an insolvent could make valuable bequests. (See *Barney v. Griffin*, 2 Comstock, 372; *supra*, p. 541.) It is a bad rule that will not work both ways; and if the insolvency of the estate would defeat a liberal allowance for care and trouble given by the testator to the executor, it must leave the executor free to claim a sum beyond that fixed in the will, where the justice of the case demands that he should have it. Where an estate is insolvent, all the dispositions of the will are superseded, and the liabilities and rights of the creditors and their trustees, the executors, are to be ascertained by the general rules of law." These principles are so clearly explained, as to be of universal application. So in *Heckert's Appeal*, 12 Harris, 482, an assignment having been made for the benefit of creditors, of an estate which was large and complicated, and of which the trust lasted for thirteen years, during which the assignee resisted the solicitations of his assignor to sell the real estate when a much less price would probably have been obtained than was finally got, the final sale, for over \$116,000, raised the estate from insolvency and left a surplus for the assignor; and the Supreme Court, affirming the decision of the court below, confirmed the report of auditors who had allowed the accountant a yearly sum paid to an agent to look after the lands, his commissions, amounting to over \$6000,

and his counsel fees, over \$2500. "The law has fixed no rule," said Woodward, J., who delivered the opinion of the court, "for measuring the rate of compensation, and it is obvious, from the infinitely diversified circumstances attending trusts, that no inflexible rule can ever be prescribed. The amount of compensation must depend on the discretion, which is nothing else than the reason and conscience of the tribunals having jurisdiction of the trust. In the admeasurement of it, regard is to be had to the amount and character of the estate, and to the labor, skill, and success attending the administration of it. The auditors seem to have assessed this assignee's compensation with intelligent reference to these ruling points. We have considered all that has been urged against their conclusions, without perceiving any ground for reversing them."

Under ordinary circumstances, the usual commission on the sales of real estate, seems to be about two and a half per cent.; *Skinner's Est.*, 4 Phila. Rep. 189; *Eshleman's Ap.*, 24 P. F. Smith, 42; and seldom, perhaps, exceed three per cent.; *Duval's Ap.*, 2 Wright, 113; *Snyder's Ap.*, 4 P. F. Smith, 67; and, therefore, in *Nathans v. Morris*, 4 Wharton, 389, the commissions of trustees were fixed at three per cent. upon the proceeds of sale (about \$7500) of certain ground rents, sold by them in pursuance of directions in their testator's will; so where, in the case of an assignment for the benefit of creditors, the assignees sold the

real estate for \$44,000, of which they received but \$13,000, the remainder being, in pursuance of an agreement, credited to payments to certain lien creditors, the commissions were fixed at five per cent. on the personal estate, and two and a half per cent. on the gross proceeds of the real estate; *Shunk's Appeal*, 2 Barr, 307. But when the sale is attended with unusual difficulty a higher rate is sometimes reached, and in a case where the sale involved two applications to the Orphan's Court, the settlement of mortgages, judgments and other liens, and the advance of money, five per cent. was not considered unreasonable; *Robb's Appeal*, 5 Wright, 45; and in *Clark's Est.* 32 Leg. Int. 126, four per cent. was allowed. As a general rule commissions, as such, are not earned unless the land be actually sold, but where an executor, at the request of the distributees, refrained from exercising his power of sale, he was held entitled to compensation for services performed in regard to the land; *Twaddell's Ap.* 7 Leg. Gaz. 82.

With respect to commissions on re-investments by trustees, it was said in *Barton's Estate*, Parsons' Eq. 29, "if too freely given, they afford, in a trustee with large discretion, great temptations to repeated changes of the securities of the fund. . . . Two and a half per cent. on such re-investments, is greatly too large a commission. Purchases of city and county stocks are made through brokers, who for one-quarter of one

per cent., make the purchases, obtain the transfers, and pay over the price to the vendor. Now to allow a trustee two and a half per cent. on such re-investments, in addition to the usual brokerage, is too severe a tax on the trust fund. If called upon to fix a standard of compensation to a trustee, for investments so simple and free from care and responsibility, I would say one per cent. came nearer accuracy than two and a half." So, in the subsequent case of *Hemphill's Estate*, Parsons' Eq. 30, it was said: "As a general rule, commissions on the principal sum coming into the hands of a trustee, and on the re-investment thereof, will not be allowed; particularly when the usual commission of five per cent. has been charged on the interest and profits derived from such investments. Commissions and brokerage, and all other usual expenses paid by them are properly chargeable to the estate. But where the investments and re-investments are made without any extraordinary labor or trouble, the commission of five per centum charged on the annual receipts of income is an adequate compensation for the trustee's care and trouble, as well for making such re-investments as for receiving their income. There may arise cases in which, from their specialties, this general rule should not be applied; but these must always be regarded as exceptions," and upon appeal, this decision was affirmed by the Supreme Court; *Hemphill's Appeal*, 6 Harris, 303. In the very recent case, however,

of *Bell's Estate* (October, 1874, 1 Weekly Notes, p. 20), the Orphans' Court held, "That it was in the discretion of the court to allow commissions upon re-investments of the principal, when the change in the investments had been made in obedience to a decree of the court," and, therefore, an executor (acting also as the committee for one of the devisees, a lunatic), who had been compelled on four occasions, by decree of the Court of Common Pleas, to extinguish ground rents which formed part of the estate, and give security for the amounts received therefor, was allowed a commission of three and a half per cent. on the principal. In the previous case of *Pedrick's Estate*, 5 Phila. Rep. 478, the same court allowed one per cent. for such re-investment.

The commissions allowed to an executor or administrator, are generally considered to be a full equivalent for all personal services performed for the estate; but in *Lowrie's Appeal*, 1 Grant, 373, a different rule was applied to a trustee, who having, after his appointment, continued to act in his former position of counsel for the trust, was allowed for such services in addition to his commissions, and a similar decision was made in *Pedrick's Estate*, 5 Phila. Rep. 478. So in *McElhenny's Appeal*, 10 Wright, 348, the same doctrine was applied to a guardian who had improved the estate by the erection of a building thereon. "A guardian," said the court, "unlike an administrator, is a trustee for custody and management, not for mere col-

lection and distribution. The percentage on the sum collected, allowable to an executor or administrator, is not, therefore, always a just measure of what should be allowed to a guardian:" but though a guardian is required by statute to present an account of his management of the estate, at least once every three years, yet he is not entitled to charge commissions upon the balances appearing by such triennial accounts; *Foltz's Appeal*, 5 P. F. Smith, 428.

As commissions are given as a remuneration for trouble or responsibility, it follows that they will be refused when no services have been performed, or risk incurred; *Bell's Estate*, 2 Parsons' Eq. 200; *Conard's Appeal*, 9 Casey, 49; and, therefore, they cannot be charged upon rents derived from property of which the trustee is himself the tenant; *Landis v. Scott*, 8 Casey, 504; nor upon uncollected debts charged in the inventory, when no effort has been made to collect them; *Mayberry's Appeal*, 9 Casey, 258; so commissions are not allowed upon the capital of a specific bequest of an investment made by the testator; *McCauseland's Appeal*, 3 Wright, 466; but a different rule of course prevails where the bequest is not specific, and a portion of the estate has to be realized for the purpose of paying the legatees; *Luken's Appeal*, 11 Wright, 357; *Robinson's Estate*, 5 Phila. Rep. 99.

In *Solliday v. Bisset*, 2 Jones, 347, in which an action was brought against an executor, by the widow, for arrears of interest

due upon a fund set apart by the testator for her support, he claimed to set off commissions upon the amounts due her, but the court instructed the jury, that "a fund like this is the 'annuitant's bread,' and to carve commissions out of it, would, in many cases, reduce her to discomfort and suffering. Where the executor is to pay it, as in this case, he knows what he undertakes at the probate of the will, and what compensation he may expect, when he asks such probate. He gets full commissions for executing the will, and the testator does not contemplate giving him more out of the allowance made to his widow. There can be no great difficulty in procuring trustees to manage such funds for annuitants, especially where they are appointed by the will, and entitle themselves to commissions on the estate, by accepting the office of executor." The jury, were, therefore, instructed that under the evidence, the defendant was not entitled to such commissions, and this instruction was affirmed on error, although the case itself was reversed upon another point. But it may be observed of this case, that it was not that of an ordinary settlement of accounts, but the charge of commissions was set up, together with other matters of set-off, as a defence, at law, to payment of admitted arrears of income, and therefore received less favor than it would otherwise probably have been entitled to. And in the subsequent case of *Spangler's Estate*, 9 Harris, 335, in which the provision for the

widow was almost exactly similar, the Supreme Court allowed the executor his commissions on that fund, and in referring to the decision in *Solliday v. Bisset*, which had been cited and relied on in the argument, said, "it must have been by some oversight that this court, on that occasion, adopted the views of the court below. It surely was not intended to say that charity in a trustee, is matter of legal duty, or that either an executor or trustee is bound to administer the funds committed to him without compensation. It is more probable that the court meant to say no more than that a legacy of the annual income of a certain fund, is intended to be certain, like a definite legacy, and not chargeable with the expense of administering the fund. [See *Brown v. Kelsey*, 2 Cushing, 249.] It may be, also, that there was something special in the form of the bequest. . . . There is no shadow of reason for saying that an executor, acting as trustee after the general estate has been settled, is entitled to no compensation for investing and managing the trust funds remaining in his hands, in carrying into effect the trusts of the will. All trustees are entitled to a reasonable compensation for their services as they are rendered, and, unless a contrary intention appear, the compensation must come out of the income of the fund with which they are entrusted."

Although "commissions are due at the time the services are performed;" *Callaghan v. Hall*, 1

Serg. & Rawle, 247; yet interest thereon seems not to be allowed; *Armstrong's Estate*, 6 Watts, 236; nor in charging an accountant with interest, are his commissions to be included and interest calculated upon them; *Callaghan v. Hall*, *supra*; *Parker's Estate*, 14 P. F. Smith, 310; and on the other hand, where the estate has been increased by a charge of interest, the trustee, if allowed to claim commissions in that case, is not entitled to charge them upon the increase; *Say v. Barnes*, 4 Serg. & Rawle, 116; nor can an action for commissions be brought, until the account has been settled; *Carl v. Wonder*, 5 Watts, 97; *Fournier v. Ingraham*, 7 Watts & Serg. 27; and in *Adams' Appeal*, 11 Wright, 94, it was held that the commissions of an executor are not attachable at the suit of his judgment creditors. "We look upon an executor or administrator," said the Court, "as exercising a trust which should not be jeopardized or prejudiced by collateral and minor interests. He resembles a sheriff, prothonotary, or treasurer, in respect to his duties towards the trusts he is executing and the same general rule of policy applies to him."

It is well settled, that the number of executors or trustees makes no difference in their allowance; *Aston's Estate*, 4 Wharton, 240; and by the Act of 1864, it is provided, "That in all cases, where the same person shall, under a will, fulfil the duties of executor and trustee, it shall not be lawful for such person to receive, or

charge more than one commission upon any sum of money coming into, or passing through, his hands, or held by him for the benefit of other parties; and such single commission shall be deemed a full compensation for his services in the double capacity of executor and trustee; *Provided*, That any such trustee shall be allowed to retain a reasonable commission on the interest he may receive from any sum held by him in trust as aforesaid;" P. L. 1864, p. 53; Purdon, 445, pl. 197. This statute has been held to be merely prospective, and not to apply to accounts settled before its passage; *Pedrick's Estate*, 5 Phila. R. 478.

In case of question arising between co-executors or trustees as to their respective shares of compensation, it has been said that: "If the trouble of the executors has been unequal, as is generally the case, they should do justice among themselves, by assigning to each a share of the whole allowance proportioned to his trouble; or if they choose to divide it equally, it is their own concern, and they may settle it as they please;" *Walker's Estate*, 9 Serg. & Rawle, 226; *Aston's Estate*, 5 Wharton, 67; and in *Stevenson's Estate*, 1 Parson's Eq. 19, it was held to be the proper course to prefer the charge as an *entire* claim. "We do not say," said King, P. J., "that this court would not, under appropriate proceedings, settle such a question among executors or other trustees. All that is meant to be said is, that under a general reference to auditors to

settle an administration account, such auditors possess no authority to apportion commissions among joint accountants," but simply to decide what aggregate sum should be allowed as a whole. But though the Orphans' Court may possess such power, yet if it is not exercised, and one of two co-executors receives the whole compensation, the remedy of the other is not by petition to that court, but by a common law action on the implied assumpsit raised by the possession of the money; *Wickersham's Appeal*, 14 P. F. Smith, 67.

In the revised statutes of MAINE, the sixteenth section of the fee bill (Rev. St. 1857, tit. x., ch. 116, p. 659, taken in substance from the prior Act of 16th March, 1830, and the Revised Statutes of 1840), allows to executors, administrators, guardians, and trustees, one dollar for ten miles travel to and from the court, and the same for each day's attendance, "and a commission, at the discretion of the judge of probate, whether the account shall be settled at one or more times, not exceeding five per cent. on the amount of personal assets that may come to their hands, having regard to the nature, liability, and difficulty attending their respective trusts. In cases where legal counsel is necessary, a reasonable sum for professional aid shall be allowed at the discretion of the judge."

In NEW HAMPSHIRE, there appears to be no specific statutory

provision on the subject of the compensation of executors; the compiled statutes of 1853, merely declaring in the language of the prior revised statutes, that the estates of every person deceased, shall be chargeable with the just expenses of the administration thereof (Comp. Stat. p. 407; Gen. Stat. p. 363, § 15), and these appear to be commissions—the expense of attending probate court—and a per diem allowance thereat; *Tuttle v. Robinson*, 33 N. H. 118; *Wendell v. French*, 19 Id. 210; "and if the executor has, moreover, performed the duty of a counsellor-at-law, it would ill accord with the purposes of justice, and would not be promotive of the best interests of parties even, to hold that for such services rendered and duties performed, he is not entitled to receive an adequate compensation, commensurate with their real value and importance;" *Wendell v. French*. So a guardian litigating, in good faith, in reference to a doubtful question, is entitled to full reimbursement for all reasonable expenses incurred in such actions, whether successful or not; *Palmer v. Palmer*, 38 N. H. 418.

In the early case of *Gorden v. West*, 8 N. H. 444, the court disallowed commissions on the value of specific articles given over, or retained by the executor, in pursuance of the will, but, however, allowed two and a half per cent. commission on the principal of the moneys actually collected, the duties of a trustee being superadded to those of an execu-

tor; and something like a rule seems to have been intended to be laid down for future cases: "We are further of opinion," said Parker, J., "that in ordinary cases of a trust, five per cent. annually is as great an interest as should be exacted of a trustee; or in other words, when the trustee accounts for six per cent. annually, one per cent. is a proper compensation to be allowed for the care and custody of the funds, and for collecting the income." This one per cent. would seem to be one per cent. on the principal, a much larger allowance than that in other States, being over fifteen per cent. on the income. In *Wendell v. French*, *supra*, two and a half per cent. had been allowed an executor for collecting and disbursing the money of the estate; but it being in evidence that the money was at ready command, and the persons to whom it was to be paid few in number and easily ascertained, and the responsibility and danger of mistake slight, the court above reduced the commission to two per cent., though other charges, as for writing letters, &c., were allowed. In *Lund v. Lund*, 41 N. H. 364, it was said that upon the presentation of an administration account, the usual course was to omit the charge for commissions, and the judge of probate would insert such sum as he deemed reasonable upon considering the circumstances of the case.

In VERMONT, it has been said that the English rule as to the compensation of trustees "has

never obtained in this State;" *Hubbard v. Fisher*, 25 Verm. 542; and the revised statutes of 1850 allow to executors and administrators all necessary expenses in the care, management and settlement of the estate, and for their services such fees as the law provides, together with all extra expenses, but an agreement, made by those *sui juris*, to pay an administrator a compensation in excess of the amount allowed by statute is valid, and will be enforced; *Hubbell v. Olmstead*, 36 Verm. 620. There is also a similar statutory provision to that in New York, as to renunciation of any compensation allowed by the will; R. S. Ch. 53, § 12. The same provision was contained in the Revised Statutes of 1839. From the case of *Evarts v. Mason*, 11 Vermont, 122, it would seem that a very liberal provision was customary in that state, for travelling expenses, loss of time while absent, counsel fees, &c., though, in that case, a gross charge of \$300 for services in addition to all these expenses, was reduced one-half; and in *Towle v. Mack*, 2 Verm. 19, it was held, that although a trustee should be allowed the expense of litigation carried on in good faith for the trust, yet that after he had been called upon to surrender it to the *cestui que trust*, he could not be allowed the cost of defending his position in refusing to do so. Apart from this, an executor or guardian is, however, as a general rule, "allowed his expenditures in a law suit in which he fails, where he

acts in good faith, and with reasonable prudence;" *Eame v. His Creditors*, 4 Verm. 256; *Holmes v. Holmes*, 28 Id. 765; *Harwood v. Boardman*, 38 Id. 554, but they are not allowed when the suit is clearly unnecessary and badly conducted; *Eame v. His Creditors*, *supra*. As to the forfeiture of compensation by unfaithful administration, see the case of *Hapgood v. Jennison*, 2 Verm. 302, referred to in the next section of this note.

In MASSACHUSETTS, it is now provided by statute that "executors and administrators shall be allowed their reasonable expenses incurred in the execution of their respective trusts, and shall have such compensation for their services as the court in which their accounts are settled considers just and reasonable" (Gen. Stat. 1860, p. 495, § 10), but the principle was recognized in that commonwealth at an early day, and applied to all acting in a fiduciary capacity. It was said in *Barrell v. Joy*, 16 Mass. 229, "executors are allowed a reasonable compensation, and there is no reason why trustees should not be, and it will probably be for the advantage of all who are concerned in estates held in trust, that such compensation should be made. We know of no better rule to guide our discretion in this particular, than the usage which exists among merchants, factors, and others, who undertake to manage the interests and concerns of others," and five per cent. upon the gross amount of the

property which had come into the hands of the trustee was allowed to him in that case. In *Denny v. Allen*, 1 Pick. 147; *Longley v. Hall*, 11 Id. 124; *Ellis v. Ellis*, 12 Id. 183, and *Jenkins v. Eldridge*, 3 Story, 225, the general principle was recognized, and in *Gibson v. Crehore*, 5 Pick. 161, extended to a mortgagee in possession, to whom five per cent. was allowed for his trouble in collecting the rents, but in *Scudder v. Crocker*, 1 Cushing, 384, a commission of five per cent., amounting to nearly \$7000, on sales of property made by trustees under an assignment for the benefit of creditors, was reduced to \$5000.

In *Jennison v. Hapgood*, 10 Pick. 77, it was urged that the executor had, by unfaithful administration, forfeited all claim to compensation. Without directly deciding this question, the court held, that "this consideration ought not to be blended with the claim for compensation, so far as the services of the appellee have been beneficial to the heirs;" and the same view seems to have been taken by the Supreme Court of Vermont, in the same case; *Hapgood v. Jennison*, 2 Verm. 302; but in *Belknap v. Belknap*, 5 Allen, 468, the commissions of a trustee who had appropriated a portion of the fund, were applied in part to the payment of the costs, and the balance distributed as income, and the same doctrine was recognized and enforced in *Walker v. Walker*, 9 Wallace (U. S.) 744. So in the very recent case of *Blake v. Pegram*, 109 Mass. 557, a guar-

dian who refused to fully disclose his dealings with the estate, was deprived of all commission thereon.

As to the *manner* of allowing compensation, though the practice seems to have been to allow it in the shape of commissions, yet it was held in *Rathburn v. Colton*, 15 Pick. 471, that there was no objection in principle, or in the practice of the court, to allow commissions in connection with specific charges for services, provided the whole did not exceed a just compensation, in which case the commissions were to be considered in lieu of all remaining services not specifically charged; and in the very recent case of *May v. May*, 109 Mass. 252, the guardian of a lunatic possessing a large estate was allowed, in addition to his commission of five per cent. upon the gross amount collected, a further sum as a compensation for time occupied in visiting the ward, as he latter was proved to be materially benefited by such visits. In *Blake v. Pegram*, 101 Mass. 97, a trustee having claimed, in addition to his commissions, a further allowance for services rendered as counsel, it was said by the court that "the charges for particular services are not to be disallowed without some proof that they are excessive, or that the services are not such as justified any charge beyond the general charge of commission," and the case was thereupon recommitted to a master, who afterwards reported a certain amount as a reasonable compensation. It is apparent, however, that the above

remarks cannot be considered as having a general application, and upon a further hearing the court, while sustaining the report, yet said, "we are not prepared to hold that a lawyer acting as trustee, and having occasion to perform professional services on behalf of his trust, may not be allowed in any case to receive from the trust fund the usual professional compensation for such special services, but such charges, where the lawyer is his own client, are open to serious question because of the liability to abuse, or at least, to the suspicion of abuse. They require the most careful scrutiny, and should be left in no doubt either as to the reasonableness of the charge, or the propriety of the service," and hence a claim for professional services in excess of the amount allowed by the master was rejected, as no distinct proof appeared that the charge was either reasonable or necessary; *Blake v. Pegram*, 109 Mass. 55.

The distinction between the duties of an executor and a trustee, in reference to the subject of compensation, was thus pointed out by Shaw, C. J., in *Dixon v. Homer*, 2 Metcalf, 422; "There is not much analogy between the case of a trustee and that of an executor. The great duty of an executor or administrator, is to collect the assets of the estate, and make distribution of the same. In doing this, he receives the money once, and disburses it once; and his compensation is not fixed until he settles his account of such receipts and

disbursements, as far as they have been actually made. It is then, a compensation for services actually done. The case of a trustee is more analogous to that of a guardian. He takes the property to preserve, manage, invest, reinvest, and take the income of it, perhaps for a short period, perhaps for a long course of years, depending on various contingencies. It may happen that the trust will terminate in a few days by the death of the trustee, or his resignation or removal, before any beneficial service is performed. We think, therefore, that no allowance can justly be made, by way of commission, on assuming the trust. An allowance of a reasonable commission on net income from real and personal estate—income received and accounted for—appears to be a suitable and proper mode of compensating trustees for the execution of their trusts. Whether any allowance shall be made, in addition to a reasonable commission, for extra services, at the determination of the trust and settlement of the account, or whenever accounts are settled during the continuance of the trust, must depend on the circumstances of each case, as they may then exist." This, it will be seen, entirely coincides with the view taken in Pennsylvania; *supra*, page 559.

Double commissions will not as a general rule, be allowed. In *Miller v. Congdon*, 14 Gray, 114, they were refused to an executor, who was also trustee, when there had been no separation of the trust fund from the general estate, and

in the later case of *Blake v. Pegram*, 101 Mass. 600, it was said "The commission of five per cent. upon income received as guardian, in addition to a like sum charged upon the same money as received in the capacity of trustee, is manifestly excessive. . Such a commission upon income received and paid over is allowable only as a convenient measure of compensation for services supposed to have been actually rendered. It implies something more than mere nominal service and the responsibility of the trust. There is no rule of law and no principle of right by which such commissions are to be charged or allowed without regard to the rendition of actual services therefor. When the same person is both guardian and trustee, it would be a reproach to the law, and to the courts charged with the protection of such trusts, to allow him to charge full compensation in both capacities for the same service."

So, too, commissions are not allowed upon re-investments of capital; *May v. May*, 109 Mass. 252.

With respect to costs, it is enacted that "costs paid by executors or administrators and for which they are made personally liable, shall be allowed in their administration accounts unless the probate court decides that the suit was prosecuted or defended without reasonable cause," Gen. Stat. 1860, p. 651, § 9; and hence a fiduciary acting in good faith will be entitled to be reimbursed for reasonable expenses; *Denny v. Allen*, 1 Pick. 147; *Edwards v. Ela*, 5 Allen, 87; while they will be refused when

the litigation results from his misconduct; *Boyle v. Boyle*, 3 Allen, 158; *Blake v. Pegram*, 109 Mass. 542. In *Forward v. Forward*, 6 Allen, 494, it appeared by the report of the auditor that the executors had been grossly negligent in rendering their account, but as the subsequent litigation was not caused by such neglect, and as many of the distributees had previously agreed to indemnify the executors for their expenditures, their counsel fees and reasonable expenses of administration were charged upon the estate.

Nor is an administrator allowed the expenses of opposing the probate of a will; *Edwards v. Ela*, 5 Allen, 87; and so where an administrator applied for instructions concerning the disposal of a specific portion of the estate, the costs were charged upon that portion only as the ambiguity did not arise from the will; *Bydon v. Morong*, 103 Mass. 287.

In CONNECTICUT, there appears to be little authority and no statutory provision upon this subject. The Revised Statutes of 1849 provide that where commissioners are appointed to receive and decide upon the claims of creditors of an insolvent estate, "the court shall allow them a reasonable compensation for their services, out of the estate of the deceased;" (Revised Stat. ch. 3, § 56;) but are silent as to the compensation of the executor himself. The doctrine was, however, recognized in the early case of *Comstock v. Hadlyme*, 8 Conn.

263, where it was said that an executor acting *bona fide* "must be entitled to payment of his expenses and a compensation for his services;" adopted in *Canfield v. Bostwick*, 21 Conn. 552; and has been extended to trustees; *Clark v. Platt*, 30 Conn. 282. In *Kendall v. The New England Carpet Co.*, 13 Conn. 392, in which the previous case of *Comstock v. Hadlyme*, appears to have been overlooked, the English rule was referred to as a settled principle of equity, but likened to that which holds to be invalid purchases made by a trustee of the subject of the trust—a rule which admits of certain exceptions when the bargain is a perfectly open one. The plaintiff having accepted an assignment of a manufacturing company, and carried on the business on his personal responsibility, and made large advances in so doing, under an agreement with one of its members that he should be compensated for his services as though he had no interest in the business, it was held to be grossly inequitable and unjust, that the company should not only draw the plaintiff in to incur those hazards, and render those services, but that by their subsequent silence they should permit him to continue them a considerable time after it was known to them what claim he made for these services, without objection on their part.

No allowance will be made to an administrator for expenses incurred by his misconduct or violation of duty, but "as to disbursements which ultimately prove to

have been unnecessary, we do not mean to say that they are not to be allowed, if when they were made by him there was good reason for believing them to be necessary for the interest of those concerned in the estate, and they were made in good faith, but where there have been such expenditures it rests upon the administrator to show just excuse or explanation of them before he can legally claim their allowance ; " *Robbins v. Wolcott*, 27 Conn. 238. In *Cantfield v. Bostwick*, 21 Conn. 555, the court saw no error in an allowance, by the judge of probate, of a few dollars for services, then future, but certain to be rendered by the executor; a gross charge, however, for "expenses of settling the estate" will not be allowed; *Swan v. Wheeler*, 4 Day, 140; *Fairman's Appeal*, 30 Conn. 208.

In NEW JERSEY, the Revised Statutes of 1845 provided (in the words of prior acts passed in 1820 and 1834), that the allowance to executors, administrators, guardians, or trustees should be made with reference to the actual pains, trouble, and risk in settling the estate, rather than in respect to the quantum of estate; (R. S. of 1846, tit. vii. ch. 5, § 26), and although trustees, of whatever name, had always been allowed "an adequate compensation;" *Vorhees v. Stoothorf*, 6 Hals. 149; *Jackson v. Jackson*, 2 Green. Ch. R. 113; *Warbass v. Armstrong*, 2 Stockton Ch. R. 263; though in some cases reluctantly awarded; *State Bank v. Marsh*, Saxton, 296; yet

until the passage of the act of 1855, the amount of compensation seems to have been but little regulated, and it was complained that there was "no subject about which there was greater uncertainty—no accountant could guess what he would receive—no person interested imagine what he was to pay;" *Mathis v. Mathis*, 3 Harrison, 67. In that case the court refused on *certiorari*, to reverse the allowance by the court below to an executor of fifteen per cent., but the decision was based rather on the ground that this was a matter of discretion with that court, which in the absence of palpable error, would not be reviewed on *certiorari*; and the same view was taken in *Stevenson v. Phillips*, 1 Zabriskie, 71; *Anderson v. Berry*, 2 M'Carter, 233. The commissions of an executor would, it seems, have included not only an allowance for his personal services, but also, ordinarily, the expenses to which he had been subjected; *Lloyd v. Rowe*, Spencer, 685.

Subsequent legislation has, however, placed this subject upon a very exact basis. By the act of 1862 it is provided that on the settlement of accounts of executors, administrators, guardians and trustees under a will, their commissions, over and above their actual expenses, shall not exceed the following rates; on all sums that come into their hands not exceeding \$1,000, seven per cent., if over \$1,000, and not exceeding \$5,000, four per cent. on such excess; if over \$5,000, and not exceeding \$10,000, three per cent. on such

excess; and if over \$10,000, two per cent. on such excess; Act of February 18th, 1862; Nixon's Dig. p. 566 § 98. This statute is, in substance, a re-enactment of the prior Act of 1855, which was repealed by the Act of March 14th, 1861 (Nixon's Digest, p. 565, § 92), and a different rate established, but the latter statute was itself subsequently repealed by the Act of 1862, and the former rates re-established.

It is also provided by the Act of April 11th, 1867 (Nixon's Dig. p. 566, § 99), that the commissions of executors and administrators in any estate where the receipts exceed the sum of fifty thousand dollars, shall be determined by the Orphans' Court on the final settlement of their accounts according to the actual services rendered, not exceeding five per cent. on all sums which come into their hands. And by the Act of 1855 (Nixon's Dig. p. 562, pl. 58), where provision shall be made by will for a specific compensation to an executor, trustee or guardian, the same shall be deemed a full satisfaction for his services in lieu of the said allowance, or his share thereof, unless he shall, by writing filed with the surrogate, renounce all claim to such specific compensation.

Commissions are not allowed to a fiduciary guilty of negligence in the management of his trust, or in the presentation of proper accounts; *Blauvelt v. Ackerman*, 8 C. E. Green, 496; *Marcy's Accounts*, 9 Id. 452; *Elmer v. Loper*, 10 Id. 483; nor will they be

allowed where the executor or trustee misappropriates the funds of the estate, or neglects to invest them within a reasonable time; *Warbass v. Armstrong*, 2 Stock. Ch. 263; *Frey v. Demorest*, 2 C. E. Green, 71; *Lathrop v. Smalley*, 8 Id. 192 (and six months has been held to be such reasonable time; *Frey v. Demorest, supra*); and in the very recent case of *McKnight v. Walsh*, 9 C. E. Green, 468, where a trustee being directed by the will of the testator to invest portions of the estate, neglected to do so and used the money in his business, the court not only disallowed all compensation thereon, but charged the trustee with compound interest upon the commissions retained by him; *S. C.*, 8 C. E. Green, 137. In *Moore v. Zabriskie*, 3 C. E. Green, 52, a trustee who was deprived of his commission was allowed a counsel fee for "important services rendered to the *cestui que trust*."

So, while a fiduciary will be entitled to full indemnity for costs incurred when seeking for instruction where a reasonable doubt exists, or where his action is for the advantage of all concerned; *Liddall v. M'Vickar*, 6 Halst. 44; *Vanness v. Jacobus*, 2 C. E. Green, 154; *Attorney-General v. Moore*, 4 Id. 504; *Munn v. Munn*, 5 Id. 472; *Slack v. Bird*, 8 Id. 239; yet it is otherwise when there has been negligence, misconduct, delay in final settlement, failure to keep the funds of the estate properly invested, or a misappropriation thereof by the trustee; *Pursel v.*

Pursel, 1 M'Carter, 515; *Post v. Stevens*, 2 Beasley, 294; *Egerton v. Egerton*, 2 C. E. Green, 420; *Lathrop v. Smalley*; *M'Knight v. Walsh*, *supra*; and a guardian has been 'held to be individually responsible for the fees of counsel unnecessarily employed; *Holcombe v. Holcombe*, 2 Beasley, 415. Where interest is given against a trustee, costs follow as of course; *Warbass v. Armstrong*, 2 Stock. Ch. 263; *Frey v. Demorest*, 2 C. E. Green, 72.

The compensation provided by the Act of 1855 has been given to receivers; *Holcombe v. Holcombe*, 2 Beasley, 417; but an executor who, being unable to make partition of the property as directed by the will of his testator, files a bill in equity under which a sale and distribution takes place, receives the same allowance, and no more, that a master in chancery is entitled to; *Dickerson v. Canfield*, 3 Stock. Ch. 259.

In cases of specific bequests, or bequests of specified sums, the residuary estate, if no provisions to the contrary are contained in the will, bears the expenses of their administration; *Fowler v. Colt*, 7 C. E. Green, 44; see *supra*, p. 561.

In DELAWARE, although commissions are allowed to executors (*Davis v. Rogers*, 1 Houston, 64; *Bush v. McComb*, 2 Id. 546), yet the English rule prevails with respect to voluntary trustees. In *Egbert v. Brooks*, 3 Harr. 112, it was considered to be well settled, that a voluntary trustee was not entitled to any compensation for

time and trouble; he was entitled to have all his charges paid, to be indemnified against expense and loss, but not be remunerated; and although in the subsequent case of *The State v. Platt*, 4 Id. 154, it was asserted by counsel, that in that State all trustees were entitled to compensation, yet the chancellor in delivering the opinion of the court, said, "The existence of any such policy, general practice, or usage has not been made to appear by anything presented in this case, or that has occurred within the range of our observation;" and in an action brought by the Delaware College to recover an allowance of \$200 a year, retained as a compensation by two trustees of a lottery for the benefit of the College, it was held that they were entitled to no compensation, but a small sum was allowed them for their expenses.

An administrator or trustee making sale of lands under order of court receives, in addition to "his reasonable expenses," such sum as shall be allowed by the court not exceeding six per cent. upon the first three hundred dollars proceeds of sale, four per cent. on the next four hundred dollars, three per cent. on the next three hundred dollars, two per cent. on the next one thousand dollars, one and a half per cent. on the next fifteen hundred dollars, nor one per cent. on sums over three thousand five hundred dollars; Revised Code, 1852, p. 329, § 24; and it is also provided that "where part of the effects of the deceased passes from one executor or administrator commissions shall not be twice

allowed, but may be apportioned, or the whole may be allowed to him who, according to the circumstances, ought to have the same," Rev. Code (1852), p. 298, § 12. Apart from this, however, an action of debt can be brought by one administrator against the other for his proportion of the commissions allowed upon the settlement of the accounts; *Bush v. McComb*, 2 Houston, 546.

Costs awarded against executors or administrators are not allowed in their accounts, "unless the court shall certify the propriety of such allowance, or there is other good evidence that they were properly incurred;" Rev. Code, 1852, p. 308, § 45; but, as it seems to be thought contrary to the weight of authority elsewhere, that an executor must maintain the validity of his testator's will, the costs of such actions, whether successful or not, are held to be properly chargeable to the estate; *Hearn v. Ross*, 4 Harr. 101; *Browne v. Rogers*, 1 Houston, 458.

IN MARYLAND, the act of 1798, provided that the commissions of an executor "shall be, at the discretion of the court, not less than five per cent., nor exceeding ten per cent. on the amount of the inventory, including what is lost or perished," together with an additional allowance for such costs and extraordinary expenses, not personal, as the court might think proper, and by a late statute it is also enacted that "The Orphans' Court shall fix the commissions of executors within twelve months

from the grant of administration, and in all subsequent accounts, wherein executors shall charge themselves with further assets;" Laws 1860, p. 163; Rev. Code, Art. 81, § 107. And the discretion of the Orphans' Court as to such allowance is not subject to review; *Scott v. Dorsey*, 1 Harris & Johns. 232; *Wilson v. Wilson*, 3 Gill. & Johns. 20; *Brady v. Dilley*, 27 Ind. 583. By the act of 1841, (Rev. Code, 1860, Art. 81, § 106), these commissions, as well as those allowed to trustees (Rev. Code, 1860, Art. 81, § 120) are subject to a tax of ten per cent. in favor of the State; *William v. Mosher*, 6 Gill. 454; *Currijs v. The State*, 22 Md. 117; but by the act of 1860, (Laws p. 163; Rev. Code, Art. 81, § 107); when an executor "elects to take less than five per cent. commissions, the tax shall be charged only on the commissions" received by him.

The statute has been construed to give executors a right to their commissions even although the testator's will should expressly declare otherwise; *M'Kim v. Duncan*, 4 Gill, 72; and it has been generally extended to trustees; *Ringgold v. Ringgold*, 1 Harris & Gill, 27; *Nicholls v. Hodges*, 1 Peters, S. C. Rep. 565; *West v. Smith*, 8 How. U. S. R. 411; *Northern R. R. v. Keighler*, 29 Md. 580; receivers of insolvent corporations; *Abbott v. Steam Packet Co.*, 4 Maryland Ch. Dec. 315; and the like. Special rules of court have regulated the commissions to trustees for the sale of real estate, a class of fiduciaries

somewhat analogous to receivers ; these are on the first \$100 seven per cent. ; on the second, six per cent. ; on the third, five ; on the fourth, four ; on the fifth, three and a half ; on the sixth, the same ; on the seventh and eighth, three ; and on the ninth and tenth, two and a half ; and three per cent. on all above \$3000, besides an allowance for expenses not personal. This allowance to be increased in cases of postponement at the request of defendants, or extraordinary difficulty and trouble, and to be lessened in case of negligence, &c., at the discretion of the chancellor. This commission "is given to him as a compensation for his trouble and risk in making the sale, in bringing the money into court and paying it away in the manner directed, or in other words, for the performance of all the duties specified in the decree, and the subsequent orders, in relation to the sale and its proceeds ;" *Gibson's case*, 1 Bland, 147 ; but such commission is forfeited by misconduct ; *Gordon v. Matthews*, 30 Md. 235.

With respect to trustees ordinarily, though the courts lean strongly against *per diem* allowances ; *Ringgold v. Ringgold*, 1 Harris & Gill, 27 ; yet the commissions seem rather liberal, and as a general rule, chancery, in that state, treats executors and trustees with indulgence, both as to commissions and other expenses, except where the fiduciary has been guilty of negligence, or other misconduct in which case his compensation will be reduced to the minimum rate ; *Eversfield v.*

Eversfield, 4 Har. & Johns. 12 ; *Diffenderffer v. Winter*, 3 Gill & Johns. 347 ; *Waring v. Darnell*, 10 Id. 120. Nor will commissions be allowed upon a surcharge ; *Thomas v. County School*, 9 Gill & Johns. 115, and in *Ridgely v. Gittings*, 2 Har. & Gill, 61, and *Northern Railroad v. Keighler*, 29 Md. 580, compensation was refused to trustees who promised to undertake the trust upon payment of their expenses only.

In regard to costs it is provided by the code that "executors and administrators shall be entitled to and answerable for costs in the same manner as the deceased would have been, and shall be allowed for the same in their accounts, if the court awarding costs against them shall certify that there were grounds for instituting, prosecuting, or defending the action on which the judgment or decree shall have been given against them ; Rev. Code, Art. 93, § 105 ; and, if the fiduciary acts in good faith, necessary expenses and charges, including counsel fees incurred in the execution of the trust, are allowed with great liberality, even where the proceedings were unsuccessful, or were incurred in endeavoring to sustain the validity of the will ; *Green v. Putney*, 1 Md. Chan. Dec. 267 ; *Jones v. Stockett*, 2 Bland, 417 ; *Chase v. Lockerman*, 11 Gill & Johns. 185 ; *Compton v. Barnes*, 4 Gill, 57 ; *Ex parte Young*, 8 Id. 287 ; *Dorsey v. Dorsey*, 10 Md. 471 ; *Edelen v. Edelen*, 11 Id. 415 ; *Leiman's Estate*, 32 Id. 225 ; and in the recent case of *Brady v. Miller*, 27 Md.

582, certain costs arising from the unsuccessful attempt "made honestly and in good faith," by a trustee to establish a claim of his own against the trust fund were allowed as a charge upon the estate. And although in *Williams v. Mosher*, 6 Gill, 454, the court affirmed a decree which disallowed trustees a fee paid their counsel for preparing their answer, yet it is usual to allow an attorney five per cent. upon the amount collected; *Bank v. Martin*, 3 Md. Chan. Dec. 225. Counsel fees are not, however, allowed in an appeal where the judgment of the court below was sufficient to protect the executor, and it was not his duty to appeal; *Dorsey v. Dorsey*, 10 Md. 471; and an administrator who employed an agent to collect money for the estate was not allowed credit for what he had paid him, the agent being neither a public officer nor an attorney, and no legal process being in any way necessary; *Gwynn v. Dorsey*, 4 Gill & Johns. 453. So where executors were negligent in presenting their defence to a claim against the estate, although such defence was finally successful; *Donaldson v. Raborg*, 28 Md. 34; so too, where an executor unsuccessfully attempted to charge the estate with unjust claims; *Billingslea v. Henry*, 20 Md. 282; and in the very recent case of *Browne v. Preston*, 38 Md. 373, it was held that an agreement by an administrator, for the payment of contingent counsel fees could not, through the medium of the Orphans' Court, be enforced against the estate of the decedent,

and although the agreement was made by the administrator before his appointment, yet in the view taken by the court, this was immaterial.

Nor are the courts of Maryland averse to allowing a fiduciary who has performed services for the benefit of the estate, a remuneration in excess of his commissions. Thus in *Lee v. Lee*, 6 Gill & Johns. 320, it was said, "an executor may employ and pay out of the assets in his hands as many as are necessary for the completion and preservation of the crops. If, with more advantage to the estate, he acts in the capacity of an overseer himself, it is competent for the Orphans' Court to allow him a reasonable compensation for his services," and in *Edelen v. Edelen*, 11 Md. 415, a similar decision was made. So double commissions have been allowed to an executor who was also trustee; *Mitchell v. Holmes*, 1 Md. Chan. Dec. 287, and so of a trustee acting as counsel for the estate; *Post v. Mackall*, 3 Bland, 529; *Bank v. Martin*, 3 Md. Chan. Dec. 225.

In case of a *partial* administration by an executor, the court, (under the Act of 1820, "in which the minimum rate of allowance is purposely omitted,") "have unquestioned power to allow such compensation as the services actually merit, . . . they may give one per cent. and even less, if necessary. But when there has been a full administration, the court cannot descend below five per cent.;" *M'Pherson v. Israel*, 5 Gill & Johns. 60; *Parker v. Gwynn*, 4

Md. 423; and the time of allowing the compensation seems within the discretion of the court. "Of course they would aim to make the commission allowed correspond with the duties performed, and in passing every account, would look to the advance made by the administrator;" *Gwynn v. Dorsey*, 4 Gill & Johns. 453; but the allowance of a maximum commission to the first administrator, does not defeat the right of one subsequently appointed to a commission on the balance received from the former; *Lemon v. Hall*, 20 Md. 168.

In VIRGINIA the code of 1873 (tit. 39, ch. 128, § 25) directs that the commissioner, in stating and settling the accounts of any "fiduciary," (which includes, "every personal representative, guardian, executor, or committee,") shall allow any reasonable expenses incurred by him as such, and also, except in cases in which it is otherwise provided, a reasonable compensation in the form of a commission on receipts or otherwise. This provision has been taken substantially from the prior acts of 1820 and 1825, and there were other earlier statutes. As a general rule, except where a legacy is given to executors, or a specific sum provided in the creation of the trust (in which case commissions are not allowed in addition; *Jones v. Williams*, 2 Call, 105), it is held that no more than five per cent. on the amount of the receipts can be allowed; *Granberry v. Granberry*, 1 Washington, 246;

Taliaferro v. Miner, 2 Call, 197; *Miller v. Beverleys*, 4 Hen. & Munf. 420; *Triplett v. Jameson*, 2 Munf. 242; *Hipkins v. Bernard*, 4 Id. 83; *Kee v. Kee*, 2 Grattan, 132 (even though a testator has directed that his executors shall be "handsomely paid," *Waddy v. Hawkins*, 4 Leigh, 458); and this also applies to commissioners who sell real estate under decree of court; *Lyons v. Byrd*, 2 Hen. & Munf. 22, and to a consignee; *Deanes v. Scriba*, 2 Call, 416. But, said Tucker, J., in *Fitzgerald v. Jones*, 1 Munf. 156, "I very much incline to think that where the management of an estate is thrown upon an executor, and the care and education of a family of children with it, that he ought to have a more liberal allowance than a bare commission of five per cent. upon his receipts or expenditures. . . He ought to be compensated accordingly, whenever it appears that he has faithfully discharged the extraordinary duty imposed upon him by his testator," and in that case the executor was allowed two and a half per cent. in addition to the usual commission of five per cent. So, in the very recent case of *Boyd v. Oglesby*, 23 Gratt. 674, an administrator, who also acted as agent for the purpose of winding up the business of the firm of which the intestate had been a member, was allowed in the settlement of his accounts in 1842, five per cent. not only upon the receipts, but upon many of the disbursements, for which, amongst other grounds, the complainant, in

1858, filed a bill to re-open the settlement, but the Court, in dismissing the bill, said "It is usual, and we think most proper, to allow commissions only on the receipts, but in this case commissions are not allowed on all the receipts and disbursements, and we find from an examination of the accounts, that five per cent. commission upon all the receipts alone, with which the said Boyd is charged, both as administrator and as agent of the surviving partner, would be inconsiderably less than the commission which he has been allowed. This includes a commission on the money borrowed, which was a most advantageous operation for the estate and firm, and involved personal responsibility and labor on the part of the administrator and agent, which ought to have entitled him to a commission, though none was claimed by him. It also includes a commission on all moneys which passed through the hands of the administrator as such, or as agent, all of which involved trouble and responsibility, though upon a considerable part thereof he did not claim commissions, for the reason, doubtless, that upon a part of the funds which passed through his hands, he had been allowed commissions both on the receipts and disbursements. But there is no law which prescribes what commission shall be allowed an executor or administrator. The amount that should be allowed him is not fixed by law, but rests in the discretion of the court; and what court is so competent to

make the allowance as the court of probate? In some cases, perhaps, less than five per cent. and in others as high as ten per cent., has been allowed, and approved by this court. We are disinclined to disturb the settlement upon this ground, especially after it had been so long acquiesced in by the widow and the guardian of the infant distributees. Indeed it seems to us that the administrator's compensation is not greater than his services were worth to the estate."

So where estates have been large and very troublesome, ten per cent. has been allowed in full for commissions and the expense of employing clerks and agents; *M'Call v. Peachy*, 3 Munf. 306, and sometimes five per cent. in addition to those expenses; *Hipkins v. Bernard*, 4 Id. 93; *Farneyhough v. Dickerson*, 2 Robinson, 589. So, too, ten per cent. has been allowed where the debts were small and numerous, and the debtors presumed to be much dispersed; *Cavendish v. Flemming*, 3 Munf. 201. But where debtors resided near the executor, he was not allowed commissions to attorneys for collection, in the absence of evidence that it was attended with difficulty; *Carter v. Cutting*, 5 Munf. 241; and in *Sheppard v. Stark*, 3 Munf. 29, five per cent. was given in lieu of all expenses; but in general, these, and "all reasonable charges and disbursements" are allowed; *Lindsay v. Howerton*, 2 Hen. & Munf. 9; *Nimmo v. The Commonwealth*, 4 Id. 51; *Hogan v. Duke*, 20 Gratt. 259. Although in *Hipkins v. Bernard*,

2 Hen. & Munf. 21, an executor was held not entitled to charge commissions for turning certain bonds into mortgages, yet in the same case, (4 Munf. 83), this was overruled and the commissions allowed. So where bonds, instead of being collected, were transferred to the legatees and received by them; *Farneyhough v. Dickerson*, 2 Robinson, 582; or where grain, which otherwise it would have been the executor's duty to sell as perishable, was divided in kind among the legatees; *Claycomb v. Claycomb*, 10 Grattan, 589; but not so, upon the appraised value of slaves so divided, where the condition of the estate did not require their sale. Ib. Nor can commissions can be charged on a debt due by the executor to the estate; *Farneyhough v. Dickerson*, *supra*; and notwithstanding that compensation is in a manner secured by statute it seems to be held that its allowance, nevertheless, depends upon the *bona fides* of the fiduciary; *Wood v. Garnett*, 6 Leigh, 277; *Boyd v. Boyd*, 3 Gratt. 125. Under the express provisions of the Act of 1825 (Code, 1873, tit. 39 ch. 128, § 10), it has been held that an executor who failed to file his accounts in conformity with its requisitions was deprived of all compensation, no matter how meritorious his conduct might have been; *Wood v. Garnett*, *supra*; *Turner v. Turner*, 1 Gratt. 11; *Strother v. Hill*, 23 Id. 671; and partial payments made by the executor to legatees, from time to time, though the amount paid may exceed that

to which they were ultimately found to be entitled, do not constitute such a *settlement* of the account as to take the case out of the statute; *Nelson v. Page*, 7 Grattan, 166.

Fiduciaries will be personally liable for costs "when the court enters of record that, if he had prudently discharged his duty the suit or motion would not have been brought or made," Code, 1873, tit. 51, ch. 173, § 20.

The rule of the common law originally prevailed in NORTH CAROLINA; *Schaw v. Schaw*, 1 Taylor, 125; but, in 1799, it was altered by an act whose provisions were substantially followed in the subsequent Revised Statutes of 1836-7, (Ch. 46, § 29,) which directed that courts should take into consideration the trouble and time expended by executors in the management of the estate, and make an allowance not exceeding five per cent. for the amount of the receipts and expenditures which should appear to have been fairly made; which amount they might retain as well against creditors as legatees and distributees, together with the necessary charges and disbursements theretofore allowed. The Revised Code of 1854 (ch. 46, sec. 38, Rev. Code, p. 288), has substantially re-enacted these provisions, and added that in sales of land by license of court, for payment of debts, commissions shall not be allowed on any larger amount of the proceeds, than the sum actually applied in payment of debts; and the provisions of

these acts are applied also to guardians; *Hodge v. Hawkins*, 1 Dev. & Bat. Eq. 567. "The court has the power," it was said in *Bond v. Turner*, 2 Taylor, 125, in speaking of the act of 1799, "of allowing five per cent. commission on the receipts, and the same on the disbursements. It has a discretionary power to allow less, but not more than five per cent.;" and this amount was, in *Blount v. Hawkins*, 4 Jones Eq. 162, allowed upon receipts, and in *Covington v. Leak*, 65 N. C. 594, upon both receipts and disbursements. But upon the proceeds of a master's sale received by an executor, one per cent. is held to be sufficient; *Graves v. Graves*, 5 Jones, Eq. 280, and where the estate is received and disbursed in large amounts without litigation, three per cent. is considered to be an adequate compensation; *Graves v. Graves*, *supra*; so where the settlement of the estate has been chiefly conducted by counsel, two and a half per cent. on each side of the account was allowed; *State v. Foy*, 65 N. C. 277; so, too, where executors, under arrangement with a guardian, transferred to him bonds instead of collecting their proceeds, the commissions were reduced to two and a half per cent.; *Walton v. Avery*, 2 Dev. & Bat. Eq. 405; and in *Turnage v. Green*, 2 Jones Eq. 66, it was said, "it is proper that this court should declare that it will not sanction a charge by a trustee of five per cent. commission for simply receiving and paying over dividends of bank stock."

The right to commissions has, however, been recognized even where the executor has been charged with compound interest; *Peyton v. Smith*, 2 Dev. & Bat. Eq. 325; so, where a legacy is left to him, unless it appear that it was given in satisfaction, or in lieu of commissions; *Oden v. Windley*, 2 Jones, Eq. 445. But in *Arnold v. Byars*, 2 Dev. Eq. 4, it seems to have been thought that a claim to commissions would be forfeited by dishonest conduct, and in *Finch v. Rayland*, *Ib.* 141, it was held to be a general, though not a universal rule, that commissions are not to be allowed where no regular accounts have been kept. It is obvious, however, that the commissions of a deceased executor are not forfeited by reason of the misconduct of his administrator in settling the estate of the first testator; *Thompson v. McDonald*, 2 Dev. & Bat. Eq. 481.

Besides their commissions, executors are also allowed their actual and reasonable expenses necessary for the faithful discharge of their duty, such as those of attending necessary sales, or sending an agent out of the State; *Whitted v. Webb*, 2 Dev. & Bat. Eq. 442; counsel fees; *Hester v. Hester*, 3 Iredell, Eq. 9; *Poindexter v. Gibson*, 1 Jones, Eq. 44; *Morris v. Morris*, *Id.* 326; costs incurred in actions honestly litigated; *Leigh v. Lockwood*, 4 Dev. Eq. 577; *Collins v. Roberts*, 6 Ired. Eq. 201; *Arrington v. Coleman*, 1 Murph. 102; but these allowances are not made when they are unreasonable in amount, or unnecessary for the

estate; *Fairbairn v. Fisher*, 5 Jones, Eq. 385; *Colsom v. Maztin*, Phillips, Eq. 125; *State v. Foy*, 65 N. C. 275; *Johnston v. Haynes*, 68 Id. 509; *Moore v. Shields*, 69 Id. 50; nor will compensation be given for personal services in addition to travelling expenses and commissions, "as the latter are allowed for the very purpose of remunerating an executor or administrator for the personal attention which he devotes to the estate, and he is not to be allowed to make an extra charge for it;" *Morris v. Morris*, 1 Jones, Eq. 326. The allowance of commissions by a referee is usually adopted by the court unless shown to be erroneous; *Johnston v. Haynes*, 68 N. C. 514; *State v. Foy*, 71 Id. 527, and as to the correction in a court of equity, of commissions allowed by masters or county courts, see *Thompson v. McDonald*; *Graham v. Davidson*, 2 Dev. & Bat. 155; *Spurhill v. Cannon*, Ib. 400; *Walton v. Avery*, Ib. 405; *Whitted v. Webb*, Ib. 433. In *Potter v. Stone*, 2 Hawks, 31 (overruled on another point by *Ex parte Houghton*, 3 Dev. Eq. 441), it was said, "for the sake of future cases, we think it right to add, that payments made to distributees on account of their portions, whether before the administration is settled or at the close of it, cannot be considered as expenditures, and therefore no allowance of commissions can be made on them," and this rule was subsequently approved in *Clark v. Blount*, 2 Dev. Eq. 55, and *Peyton v. Smith*, 2 Dev. & Bat. Eq. 345. So commissions will not

be allowed upon payments made to the fiduciary himself; *Williamson v. Williams*, 6 Jones Eq. 62, nor upon specific bequests, whether consisting of money or slaves; *Walton v. Avery*, 2 Dev. & Bat. Eq. 411; but where an administrator purchased slaves for the benefit of the estate under an execution upon a debt due to it, and handed them over specifically, a commission of two and a half per cent. was given; *Sellers v. Ashford*, 2 Iredell Eq. 107; *Washington v. Emery*, 4 Jones, Eq. 32; so where executors have, *virtute officii*, the management of a fund for an infant under a trust for its accumulation, the regular compensation will be allowed them; *Perry v. Maxwell*, 2 Dev. Eq. 507; and commissions are allowed guardians upon the amount of bonds and judgments delivered to the ward; *Shepard v. Parker*, 13 Ired. Eq. 103; *State v. Foy*, 65 N. C. 277.

The apportionment of commissions among two or more, is always regulated by the circumstances of the case. "The fact of a joint agency does not give the right to one-half the value of the entire services;" *Hodge v. Hawkins*, 1 Dev. & Bat. Eq. 567; *Grant v. Pride*, 1 Dev. Eq. 259; *Perry v. Maxwell*, 2 Id. 507; and where an executor has suffered the personal estate to go out of his hands, he is not allowed to subject the real estate in the hands of the heir, to a charge for his services; *Newsom v. Newsom*, 3 Iredell Eq. 411.

Up to the year 1833, it would seem by the case of *Boyd v. Hawkins*, 2 Dev. Eq. 211, that the ex-

tension of these rules to *trustees* had not been formally recognized from the bench; on the contrary, it was there said, "the farthest we can go, is to permit a stipulation for compensation at the contracting of the relation" But on a rehearing of that case (2 Dev. Eq. 334), it was said by Ruffin, J., who delivered the opinion of the court, "We are informed that it has been usual in some parts of this State, for trustees to charge for services, and that the profession have no decided opinion against it. The amount will of course be according to the circumstances, and not beyond that which would, under the statutes, be made to executors; and if fixed by the parties, it will be subject to the revision of the court, and be reduced to what is fair, or altogether denied, if the stipulation for it had been coerced by the creditor as the price of indulgence, or as a cover to illegal interest, or the conduct of the trustee has been *mala fide* and injurious to the *cestui que trust*. Whether it shall be given as a commission or not, is hardly worth disputing about; that may be a convenient mode of computing in most cases, but the true object is a *just allowance* for time, labor, services and expenses, under all the circumstances that may be shown before a master." And this was approved in *Sherill v. Shuford*, 6 Iredell Eq. 228, and *Raiford v. Raiford*, Ib. 495; and in *Ingram v. Kirkpatrick*, 8 Id. 62, it was held, that two and a half per cent. charged by a trustee for the benefit of creditors, on the pro-

ceeds of sale of real estate, was a proper commission. But no additional compensation will be given when the trust is attached to the office of executor, and the custody of the trust fund voluntarily assumed by the latter; *Haglar v. McCombs*, 66 N. Car. 351.

Under the statutes of SOUTH CAROLINA, the courts in that state seem to have felt themselves little authorized to exercise a discretion of their own. The Act of 1789 allowed to executors, administrators, trustees and guardians, a sum not exceeding fifty shillings for every hundred pounds they should receive, and a similar sum upon all amounts they should pay away in credits, debts, legacies, or otherwise, during the continuance of their administration, which commissions were to be divided between them in proportion to the services by them respectively performed; and they were also allowed twenty shillings for every ten pounds, "for all sums arising by moneys let out at interest;" Act of 13th March, 1789 (5 Statutes, 112; Rev. Stat. 1873, p. 461, § 4); and by the Act of 1859 (Rev. Stat. 1873, p. 462, § 4), it is provided that the estate of a deceased executor or administrator who has settled his testator's estate, excepting the payment of the legacies or distributive shares, shall be allowed commissions for making such distribution as well as receiving the amount thereof; and a similar provision exists in favor of guardians, when the money is paid to the ward; Rev. Stat. 1873,

p. 485, § 11; *Adams v. Lathan*, 14 Rich. Eq. 304. The provisions of the Act of 1789 were taken from the seventh section of a prior statute passed in 1745, which further declared that any executor, guardian, or trustee, who should have had extraordinary trouble in the management of the estate, and should not be satisfied with the sums thus allowed, should be at liberty to bring an action for services, in which, however, the verdict was to be limited to five per cent. over and above the sums before mentioned. This section was not repealed or supplied by the Act of 1789; *Ex parte Wither-spoon*, 3 Rich. Eq. 14, note. For the Statutes of 1839 and 1846, as to the commissions of the ordinary in cases of derelict estates, see *Norton v. Gillison*, 4 Rich. Eq. 219. In the recent case of *The College v. Willingham*, 13 Rich. Eq. 195, it was doubted whether, under the then existing legislation, an allowance of commissions could be made to trustees, unless the *cestuis que trust* were minors, but this distinction is, apparently, not recognized in the Revised Statutes of 1873, p. 468, § 14.

The allowance given by these statutes to executors has uniformly been held to cover all those expenses which are sometimes termed *personal*; *Logan v. Logan*, 1 M'Cord, Ch. 5. Thus the courts have felt themselves bound to strike out any charge for traveling expenses, &c., and have referred the parties claiming them to the action at law prescribed by the statute; *Snow v. Collum*, 1 Des-

saus. 542; although in *Erwin v. Seigling*, Riley Ch. 202, the court held that the extraordinary trouble of an executor in going to and from Cuba to attend to complicated affairs of the estate was a sufficient consideration to support a gift of \$1000 from the legatees; and a gross sum in lieu of all commissions, has been allowed a guardian as a compensation for his expenses and commissions in collecting money in another State; *Huson v. Wallace*, 1 Rich. Eq. 18. In *Ruff v. Summers*, 4 Dessaus. 529. Dessaussure Ch., said, "it has always appeared to me, that the ground for compensation to executors being made by law to rest solely on the foundation of money received and paid away, is not a perfectly reasonable rule, inasmuch as there is often great service performed by executors, where only small sums of money are received and paid away;" it was, however, held in that case, that the action given to executors covered all cases and was their only remedy; and, so, while an executor will be allowed for amounts paid for adjusting complicated accounts of the estate, yet he is not entitled to charge for adjusting his own accounts; *Logan v. Logan*, 1 M'Cord Ch. 1. "There is a distinction," said Johnson, J., in *Teague v. Dendy*, 2 M'Cord Ch. 213, "between those services for which a compensation is allowed by the statute, and the expenses incurred in the course of the administration. The former referred to those duties which an administrator is supposed to undertake,

and the latter, to such as require the aid of professional skill, to which he is not supposed to be competent. The conduct and arrangement of a law-suit, is an illustration of the latter;" *Edwards v. Crenshaw*, Harper, 233; and an executor will therefore be allowed all expenses necessarily incurred in defending the probate of the will; *Butler v. Jennings*, 8 Rich. Eq. 87; *M'Knight v. Wright*, 12 Id. 229; but not the costs of an unsuccessful appeal from a decree reversing the judgment of the ordinary; *M'Knight v. Wright*, *supra*. "The principle to be deduced from all the cases," it was said in *M'Clellen v. Hetherington*, 10 Rich. Eq. 204, "is that the representative should be reimbursed from the estate for the expenses he has incurred in litigation fairly falling upon him in his character of trustee, especially when he has been successful, although he may have some interest in the suit. He should have credit for all expenditures for the preservation and benefit of the estate, as for fees to counsel for general advice in the administration of the estate, for resisting doubtful claims, for clearing incumbrances, for obtaining the instruction of the court in a proper case for the settlement of the estate, and like services," and hence an executor, who was also a devisee and legatee, was allowed for an amount paid counsel for their services in establishing the will. But counsel fees are not allowed when paid to sustain the position of the executor against those beneficially interested; *Vil-*

lard v. Robert, 1 Strobb. Equity, 393; *Garrett v. Garrett*, 2 Id. 272; *Wham v. Love*, Rice Eq. 51; even when he successfully defends himself from charges brought against him. "That entitled him to his costs. But though the court has authority to decree costs according to the merits of the case, it can go no further. It has no authority to decree counsel fees in any case, unless they are incurred as expenses of administration. An executor's case differs in no respect from any other case, and unless we take upon us to decree counsel fees in every case, according to the merits of the parties, we have no right to do it on the ground of merit alone, in the case of an executor;" *Atchison v. Robertson*, 4 Rich. Eq. 41. Charges for overseers' wages, as well as for clerk hire, auctioneers, &c., may properly be classed among those not personal, since their employment is, in general, directly for the benefit of the estate; *Garrett v. Garrett*, 2 Strobb. Eq. 271, and in many cases absolutely necessary, and a guardian will be reimbursed for the expenses of employing agents out of the state, although not obliged to do so; *Huson v. Wallace*, 1 Rich. Eq. 18; but an executor is not allowed to charge commissions and to credit himself besides with wages for having acted as overseer; *Jenkins v. Fickling*, 4 Dess. 370; *Edmonds v. Crenshaw*, Harper, 232; nor with a counsel fee for services performed by himself as an attorney. "In other words, he can make no contract with himself. He may em-

ploy another overseer, another physician, another lawyer, and pay them for their services, which payment will be allowed him. But he can make no bargain with himself;" *Mayer v. Galluchut*, 6 Rich. Eq. 2.

Where an executor pays money to himself, as guardian, he is allowed two and a half per cent. as executor, for transferring it, and the same commission as guardian, for receiving it; *Ex parte Wither-spoon*, 3 Rich. Eq. 13; and in *Deas v. Span*, Harper Eq. R. 276, and *Gist v. Gist*, 2 M'Cord, Ch. R. 474, the statutes received a liberal construction as to the allowance of commissions on the amount of bonds taken for the purchase-money of real estate; so where the executor purchased the estate himself; *Vance v. Gary*, Rich. Eq. 2. So where it was purchased by a creditor, and an equitable adjustment made of the debits and credits, though no money passed; *Kiddle v. Hammond*, Harper, 223; or where a part of the assets of the estate consisted in a debt due by himself, which was therefore considered as cash in his hands; *Griffin v. Bonham*, 9 Rich. Eq. 71; though in *Ball v. Brown*, Bailey Eq. 374, they were denied on the proceeds of land sold under decree in chancery for the foreclosure of a mortgage, on the ground that the money was neither "received" nor "paid away" by the executors. So full commissions were refused where the estate was, under a decree in equity, paid over to a commissioner; *Thompson v. Palmer*, 3 Rich. Eq.

141. In *Huson v. Wallace*, 1 Id. 2, where an administrator was compelled to account at an advanced price, for property of the estate which he had brought at an undervalue, he was denied commissions on the advance, and in *Edmonds v. Crenshaw*, Harper, 233, where a testator bequeathed to his executors ten per cent. "on the whole amount of moneys to be collected from the sale of the estate, and on outstanding debts due, or which *might thereafter* become due," it was held that the commission should be allowed on the sums actually collected by them, but not on those sums which they failed to collect. In the recent case of *The College v. Willingham*, 13 Rich. Eq. 203, the result of the decisions was thus stated, "Where the legacy is of a specific thing and to be satisfied only by the delivery of that thing in kind, commissions upon the value of such legacy are not chargeable upon the general estate, much less upon the legacy itself; *Ruff v. Summers*, 4 Des. 529; but whenever a demand against the estate, whether debt, legacy, or distributive share, is to be or may be satisfied by payment in money, there, if by consent or agreement between the parties, property, choses in action, stock, &c., are given and received as money, and at a money value, commissions are chargeable."

The Act of 1789 further provided that an executor should file annual accounts, and a neglect so to do forfeited all compensation. A substantial compliance with this

portion of the statute is always insisted on; *Benson v. Bruce*, 4 Dess. 464; *Edmonds v. Crenshaw*, Harper, 233; and it has been held that the failure to make the yearly returns not only forfeits all commissions, but also all claim for extra services; *Frazier v. Vaux*, 1 Hill Ch. 203; *Wright v. Wright*, 2 M'Cord Ch. 196. In certain cases, however, the lapse of a few months over the time of filing the last account has been sanctioned; *Jenkins v. Fickling*, 4 Dess. 370; *Black v. Blakely*, 2 M'Cord Ch. 8; and if the executor die before the time for submitting his accounts, his commissions are of course not forfeited, but his representative is allowed a year within which to do so. The provision has, moreover, been held not to be retrospective, so as to preclude an executor from commissions where for several years prior to its passage, he had filed no accounts; *Ramsey v. Ellis*, 3 Dess. 78. But even when the account is regularly filed, yet if it be unaccompanied by proper vouchers, the commission will be disallowed; *Black v. Blakely*, *supra*; and in *M'Dowell v. Caldwell*, 2 M'Cord Ch. 59, it was said by the court, that if a person who stands in a fiduciary position suffers his transactions to be involved in obscurity, when by a proper attention to his duty and the interest of his *cestui que trust*, he might have removed it, if he be entitled to any remuneration, it furnishes a good reason for reducing it to the lowest estimate.

The allowance of "ten per cent.

for all sums arising by moneys put out at interest," was held in *Tavaux v. Ball*, 1 M'Cord, Eq. 458, to be "evidently intended as compensation for the trouble of managing the fund while in the hands of the executor, and the two and a half per cent. for paying away, refers to the final disposition of it, or in other words, to that moment of time when the executor's power over it ceases, or when he has disposed of it in the manner directed by the will of the testator. It cannot, without great injustice, be referred to a former time, for if it was to be allowed for every application or appropriation, the executor might, by letting out and calling in at short periods, make his commissions exceed any profits which could be expected to arise by way of interest. The mode of determining what time he is to be credited with it is by inquiring whether he has made a final disposition of the fund." And it was held that an executor was entitled to two and a half per cent. for receiving money, ten per cent. on the interest made by him on it, and two and a half per cent. on the capital and interest finally paid over by him to the party interested. The same compensation was also allowed when, instead of investing the money in other hands, the executor, in good faith, suffered it to accumulate in his own, but when decreed to pay it over, at the end of his administration, no percentage was allowed him; *Wright v. Wright*, 2 M'Cord Ch. 192. In *Briggs v. Holcombe*, 3 Rich. Eq. 16, the ten per cent. com-

mission was declared to be limited to cases where the money was made an annually-accumulating fund by the executor, and not to apply to one where a simple balance was found to be due by him, in which case he was only entitled to two and a half per cent. for receiving, and the same for paying it away; nor will an executor be entitled to a commission of ten per cent. for paying annually to a legatee, as directed by the will, the interest of a certain portion of the estate, as such commissions were said to be allowed only on interest re-invested as principal; *Bobo v. Poole*, 12 Rich. Eq. 224.

The preceding rules have been applied to trustees and receivers; *Bona v. Davant*, Riley's Ch. Cas. 44; with the exception of the necessity of making annual returns, the neglect to do which, will not cause a forfeiture of compensation unless it appear that the estate has suffered from such omission; *Muck-enfoss v. Heath*, 1 Hill Ch. 184. They do not, however, apply to cases where the trustees have expressly agreed to act without compensation; *M'Caw v. Blunt*, 2 M'Cord, Eq. 90; *Vestry v. Barksdale*, 1 Strobb. Eq. 197; nor to commissioners in equity, whose compensation, regulated by a fee bill, the court has no power to enlarge or modify; *Bona v. Davant*, *supra*; and if the instrument creating the trust provides a specific compensation, the trustee will be bound by its terms; *College v. Willingham*, 13 Rich. Eq. 195.

In GEORGIA, the subject of com-

pensation to executors and trustees is regulated by a statute as old as 1764 (Prince Dig. 224; 2 Cobb Dig. 304), whose eleventh section declares that it may be lawful for every executor and administrator, guardian and trustee, for his care, trouble and attendance in the execution of their several trusts, to retain in his hands a sum not exceeding fifty shillings for every hundred pounds which he should thereafter receive, except on the appraised value of any estate that should come into his hands; and the like sum of fifty shillings for every hundred pounds which he should pay away in debts, legacies, or otherwise (excepting also, the delivering up any such estate to the persons entitled to the same, during the course and continuation of his management or administration; *Ex parte Burney*, 29 Ga. 33); and so in proportion for any sum less than one hundred pounds; provided that no executor, &c., should, where he had power so to do, for his trouble in letting out and lending any sum of money upon interest and again receiving the moneys so lent, be entitled to receive any sum exceeding twenty shillings for every ten pounds for all sums arising by moneys lent to interest so to be received, and in like proportion for a larger or lesser sum; and that no executor, &c., who was, or might be, a creditor of any testator or intestate, or to whom might be left or bequeathed, any sum of money, or other estate, should be entitled to any commissions for the payment to themselves, of any

such debts or legacies: but as it might be very difficult (the statute goes on to say) to ascertain the proper and adequate allowance to be made in all cases, and as the sums thereinbefore allowed might not be sufficient compensation for the care, trouble and pains which executors, &c., might take in some particular cases, it was provided that any executor or trustee who should have had extraordinary trouble in the management of the estate, and should not be satisfied with the sum thereinbefore mentioned, should be at liberty to bring an action for his services, and the verdict and judgment thereon should be conclusive; provided that no verdict should be given for more than fifty per cent. over and above the sums allowed by the statute.

A subsequent statute, passed in 1792, provided that if an executor should neglect to render annual accounts to the register of probates, he should not be entitled to any commissions for his trouble in the management of the said estate, and the fullest effect was given to this statute by holding (contrary to the construction put upon a similar statute in South Carolina; *Wright v. Wright*, 2 M'Cord Ch. 200;) that the executor forfeits not only his commissions on the returns for the neglected year, but all commissions for his trouble in the management of the estate; *Fall v. Simons*, 6 Georgia, 274; *Atkins v. Hill*, 7 Id. 575; *Kenan v. Paul*, 8 Id. 417. In consequence of these decisions, the Act of 22d February, 1850 (2 Cobb,

Dig. 340), provided that when, from providential cause, any trustee should fail to make returns by the time specified, the court might, by special order, save him from the penalty of forfeiture of commissions by reason thereof; and that if any executor, &c., should fail to make a return within the time required by law, he should not lose the commissions on any returns made in due time.

Commissions on legacies or investments prescribed by the will of the testator, are primarily payable from the residuum, but if there is no residue, then the legatees are liable for the same; *Williamson v. Wilkins*, 14 Ga. 416; and where an executor of an executor administers the estate of the first testator, he is entitled to commissions from the latter for the payment of pecuniary legacies therefrom; but, obviously, he should not receive commissions for such services from the estate of his immediate testator; *In re Jones*, 25 Ga. 414.

The statutory provision in reference to commissions upon reinvestments of interest, has been said to be "only a proviso that the commission shall not exceed ten per cent. on the interest," and hence it rests within the discretion of the court to allow any rate of compensation between two and a half and ten per cent.; *Royston v. Royston*. 29 Ga. 104; *Cartledge v. Cutliff*, Id. 769.

There appears to be no disposition to restrict the allowance to fiduciaries for the expenses of their administration; *Royston v. Roys-*

ton, *supra*; *Rust v. Billingslea*, 44 Ga. 306; although, of course, the estate is not to be charged with payments made to counsel retained to defend an executor from a charge of *devastavit*; *Moses v. Moses*, 50 Ga. 33. In *Lowe v. Morris*, 13 Georgia, 169, it was held that trustees had not only an inherent right to be reimbursed all expenses properly incurred in the execution of their trust, but were, moreover, entitled to compensation for time and services in its management, and that evidence in that behalf ought to have been received by the court below; and in *Burneg v. Spear*, 17 Id. 225, it was further held that although a court of chancery would not, in general, allow a trustee to encroach upon the capital of the trust estate, yet that in cases where the income was not sufficient, the commissions of the trustee might properly be paid out of the *corpus* of the estate.

In ALABAMA it is provided by the Revised Code, that "executors and administrators may be allowed such commissions on all receipts and disbursements by them as such, as may appear to the probate court a fair compensation for their trouble, risk and responsibility, not to exceed two and a half per cent. on the receipts, and the same per centage on the disbursements; and the court may also allow actual expenses, and for special or extraordinary services, such compensation as is just," and "upon the appraised value of all personal property, and on the amount of money and solvent notes

distributed by executors and administrators, they shall be allowed the same commissions as upon disbursements;" Revised Code, §§ 2161, 2162; but independently of all statutory enactments, the doctrine of compensation to those acting in a fiduciary capacity, has formed part of the common law of that State; *Spence v. Whittaker*, 3 Porter, 327; *Phillips v. Thompson*, 9 Id. 667; *Bothea v. McCall*, 5 Ala. 314; *Carroll v. Moore*, 7 Id. 617; *Benford v. Daniels*, 13 Id. 673; the allowance being proportioned to the trouble or responsibility incurred; *Gould v. Hays*, 25 Alab. 432. It was said by Goldthwaite, J., in *Harris v. Martin*, 9 Id. 899, "It is the usual and common practice to allow executors, administrators, and guardians a per centage upon the amount of the receipts and disbursements, as a compensation for the performance of the trust. This percentage has never been fixed by statute, and until some specific rule is declared upon the subject, it is evident each case must be governed by its peculiar circumstances. It is apparent, however, that the *quantum* of trouble and loss of time, is not the only matter to be considered; as the settlement of an estate of \$500 may involve as much difficulty as one of \$50,000. The compensation must also, to a great extent, be controlled by the amount of the estate," but, prior to the above statute, five per cent. upon the receipts, and two and a half per cent. upon the disbursements, seems to have been thought to be the usual

allowance in ordinary cases; *Magee v. Cowperthwaite*, 10 Alab. 968; *Pinckard v. Pinckard*, 24 Id. 250; *Bendall v. Bendall*, Id. 306; *Pearson v. Darrington*, 32 Id. 270; although in *Ashurst v. Ashurst*, 13 Alab. 782, it was said to require "clear and convincing proof" to justify such allowance. While, however, it is admitted that the English rule has never prevailed; *Bothea v. McCall*, 5 Alab. 308; yet these amounts are, it is said, "scrutinized with jealous watchfulness;" *Harris v. Martin*, *supra*; though where the fiduciary has shown *bona fides*, his commission and other expenses, such as counsel fees, &c., are willingly allowed; *Harris v. Martin*, *supra*; *Hearns v. Savage*, 16 Alab. 291; *Williamson v. Mason*, 23 Id. 489; *Pinckard v. Pinckard*, 24 Id. 250; *Pearson v. Darrington*, 32 Id. 250; *Henderson v. Simmons*, 35 Id. 292; *Pickens v. Pickens*, 35 Id. 452; *Harris v. Parker*, 41 Id. 624; *Ivey v. Coleman*, 42 Id. 418; and, if no negligence appear, the result of the action is immaterial; *Taylor v. Kilgore*, 33 Ala. 214; *Holman v. Sim*, 39 Id. 709; but it must be affirmatively proved that the expenses have been actually paid; *Modawell v. Holmes*, 40 Alab. 392; *Bates v. Vary*, Id. 422. Such expenses are, however, refused when either unnecessary; *Bendall v. Bendall*, 24 Alab. 306; *Pearson v. Darrington*, 32 Id. 229; or for the benefit of the fiduciary, or caused by his misconduct; Rev. Code, § 2149; *Jones v. Dyer*, 16 Alab. 221; *Pearson v. Darrington*, *supra*; *Anderson v.*

Anderson, 37 Alab. 683; *Morrow v. Allison*, 39 Id. 70; *Mims v. Mims*, Id. 716; and in *Smith v. Kennard*, 38 Alab. 695, where a protracted litigation resulted from the mutual errors of the distributees and the executor, the latter was allowed to charge the estate with one-half of the expense thereof.

Prior to the adoption of the Code, the power of the court to compensate by *per diem* allowance, or specific charge, was unquestioned; *Marshall v. Holloway*, 2 Stewart, 453; *O'Neil v. Donnell*, 9 Alab. 738 (though they leaned strongly against such a mode of compensation; *Magee v. Cowperthwait*, 10 Alab. 968); and by the act of 1841 (Clay, Dig. p. 228), when by will, an estate was directed not to be sold, but kept together for distribution at a future day, the court had power to allow in lieu of commissions, such annual compensation as should be reasonable, regard being had to the amount of labor performed, responsibility involved, and the value of the estate; and this act was held not to be retrospective in its operation; *Gould v. Hayes*, *supra*.

But since the code the ordinary services of a fiduciary can only be compensated by a sum not exceeding the amount therein mentioned, and evidence tending to prove the insufficiency of the allowance will not be received; *Newberry v. Newberry*, 28 Alab. 691; *Neilson v. Cook*, 40 Id. 498. Where, however, the services are, in the language of the statute, "special or

extraordinary," that is, such as do not form part of the customary or regular duties of the office, additional remuneration will be given with much liberality. Thus this compensation has, in addition to the statutory commission, been allowed to executors for superintending the estate and loaning the funds thereof; *Reese v. Graham*, 29 Alab. 91; *Ivey v. Coleman*, 42 Id. 410; and in the very recent case of *Waller v. Ray*, 48 Id. 468, a large additional allowance was made to the administratrix of an insolvent who managed the estate in pursuance of directions contained in the will, and the sum was directed to be paid in preference to the claims of the creditors. It has, however, been obviously held that the general services of an executor in reference to a pending litigation concerning the estate; *Holman v. Sims*, 39 Alab. 709; *Dockerry v. McDowell*, 40 Id. 476; or of a guardian merely compounding the income derived from the property of the ward; *Allen v. Martin*, 36 Alab. 330; are neither special nor extraordinary. As to compensation to a bank director, see *Alabama Bank v. Collins*, 7 Alab. 102.

Commissions can only be charged upon such portion of the inventory as consists of money, the "receipts" mentioned in the code, being construed to mean pecuniary assets; *Wright v. Wilkinson*, 41 Alb. 268; nor will commissions be allowed upon sums raised by accepting drafts and advancing money to meet the liabilities of the estate, as such acts

do not pertain to the office of an executor or administrator; *Pearson v. Darlington*, 32 Alab. 228. So, too, distribution by an executor or guardian (whose compensation is governed by the rules relating to executors; *Allen v. Martin*, 34 Alab. 442; S. C. 36, Id. 332) is not a disbursement within the meaning of §2161 of the Code; *Jenkins v. Jenkins*, 33 Alab. 731; *Allen v. Martin*, *supra*.

The compensation though rather matter of grace than of right, and depending entirely upon the *bona fides* of the trustee; *O'Neil v. Donnell*; is yet always allowed except in cases of gross negligence or wilful default resulting in injury to the estate; *Powell v. Powell*, 10 Alab. 914; *Gould v. Hayes*, 19 Id. 462; *Stewart v. Stewart*, 31 Id. 217; *Pearson v. Darlington*, 32 Id. 270; *Smith v. Kennard*, 38 Id. 700; *Harris v. Parker*, 41 Id. 604; *Ivey v. Coleman*, 42 Id. 418; or where the executor or trustee refuses to account; *Hall v. Wilson*, 14 Ala. 295; and is not withheld, for the omission to make annual returns, as required by the statute; *Craig v. M'Gehee*, 16 Alabama, 48; *Gould v. Hayes*, 19 Id. 462; *Neilson v. Cook*, 40 Id. 498. Double compensation has also been allowed to an executor acting in his capacity of counsel for the estate, and he was held to be entitled to receive "not the amount such services are usually rated at, but what an administrator would feel authorized to pay an attorney, taking into consideration the circumstances of the case;"

Harris v. Martin, 9 Alab. 900; *Morgan v. Nelson*, 43 Id. 586. In *Donelson v. Posey*, 13 Id. 752, an attempt was made to set aside a voluntary assignment, because, among other grounds, it allowed to the trustee a commission of twelve and a half per cent.; but the court said that while the commission was greater than that usually allowed, yet that the trustee had "to collect many, and perhaps small accounts, and his duties embraced a settlement of the affairs of a dissipated and reckless man, whose business was doubtless confused and difficult to arrange." If the opinion of the Court was based upon the estimated value of the services no exception can be taken to it, but if, as seems to be the case, the amount was allowed, owing to the absence of proof that it was unconscionable, the decision is open to the objections pointed out in *Guien's Estate*, 1 Ashmead (Pa.) 317; and *Barney v. Griffin*, 2 Comstock, 372, *supra*.

The MISSISSIPPI statute (Hutch. & How. Dig. p. 414, § 96), like that of Maryland, allows to executors such compensation as shall be reasonable and just, not less than five, nor exceeding ten per cent. of the amount of the appraised value; and this does not mean solely on the amount of the inventory, but on the whole estate; *Merrill v. Moore*, 7 Howard, 292; *Cherry v. Jarratt*, 3 Cushman, 221: including the real estate, when its proceeds pass through their hands; and the allowance is made only on the final settlement;

Shurtleff v. Witherspoon, 1 Sm. & Marsh. 622; but an administrator cannot charge the realty with the expenses of administering the personality, when the latter was adequate for that purpose, nor, it was intimated, is there any jurisdiction to decree the sale of land to pay an administrator's commission, as the same is not a debt of the intestate; *Hollman v. Bennett*, 44 Miss. 322. So, by Art. 109, p. 452, of the Code, the Court is directed to allow an administrator, as compensation for his trouble, either on partial or final settlement, not less than one nor more than seven per cent. on the amount of the estate administered; *Cherry v. Jarratt*, *supra*; *Sprott v. Baldwin*, 34 Miss. 329; *Powell v. Burrus*, 35 Id. 605.

The allowance of commissions does not, apparently, depend upon the degree of care bestowed by the executor; *Kelly v. Davis*, 37 Miss. 76; and, within the limits prescribed by the statute, is matter of discretion in the Probate Court, which will not be received on appeal, unless shown to have been manifestly abused; *Satterthwaite v. Littlefield*, 13 Sm. & March, 307; *Cherry v. Jarratt*, *supra*; *Sprott v. Baldwin*, 33 Miss. 581; *Powell v. Burrus*, 55 Id. 605; *Roach v. Jelks*, 40 Id. 757; but where the Probate Court refused to allow any commission whatever to a guardian, "whose conduct seemed to have been fair and just," the decree was reversed and liberal compensation awarded; *Adams v. Westbrook*, 41 Miss. 404. "This allowance, left discretionary with the Court of Probates, between the extremes

indicated, is intended to cover all compensation. Within this limit it may be made to vary according to circumstances. Out of it, they must pay their own expenses and fees of counsel for advice touching their duty in the conduct and management of the estate. But if there should be suits for or against the estate, which make it necessary to employ counsel, those fees must be paid by the estate. But when counsel are employed to give advice as to the correct course of duty of the executor or administrator (or are unnecessarily employed; *Crowder v. Shackelford*, 35 Miss. 322;) the fees must be paid by him individually out of his own compensation. If he have not the requisite knowledge to discharge the duties of the office he undertakes, he must pay for its acquisition himself. His commissions are intended to cover all the charges he is authorized to make against the estate in the course of administration;” *Satterwhite v. Littlefield*, 13 Smedes & Marsh. 306. In the latter case, however, of *Shirley v. Shattuck*, 6 Cushman, 26, it seems to have been thought, that where a trustee was also an attorney, although it was his duty to protect the interests intrusted to him, “he was not compelled to go beyond the usual course required of any faithful and prudent man, and bestow his extraordinary labors, such as were appropriate to a particular professional class, to the business committed to him only as a private individual. . .

. . . We think, therefore, that the sound and just rule is, that al-

though compensation may be allowed to a trustee who performs such services for the estate in his hands, as an attorney or solicitor, yet that it should never be allowed, unless it be shown clearly and beyond doubt that the legal proceedings were undertaken and conducted in good faith, with an eye single to the best interests of the estate, and were necessary to protect its rights, and such as a discreet and judicious man would have instituted in a matter of his own individual interest. It would, of course, be a strong justification of such services, that they were rendered at the instance of the *cestui que trust*.”

Commissions are only allowed to fiduciaries upon the final settlements of their accounts, and hence upon the death of one of two joint administrators, his commissions will, upon the settlement of his accounts by his representative, be paid to the latter, without any allowance being, at that time, made to the surviving administrator; *Sprott v. Baldwin*, 34 Miss. 329; *Effinger v. Richards*, 35 Id. 541; and, it is needless to observe, a decree for distribution is such final settlement of the accounts of an executor as entitles him to receive his compensation; *Crowder v. Shackelford*, 35 Miss. 322.

A promise to pay a “fair compensation,” is, it has been held, merely a promise to pay what the court would allow; *Ratliff v. Davis*, 38 Miss. 111.

In LOUISIANA, an administrator is allowed “on the settlement of

his account, a commission of two and a half per cent. on the amount of the inventory of the effects of succession committed to his charge, deduction being made for bad debts, and if there are two administrators they divide this commission;" Civil Code (Fuqua), Art. 1062, 1187, 1188; and the same compensation is given to executors "who have had general seisin of the estate, whether charged to sell it or not," but "if the executor had not a general seisin, his commissions shall be only on the estimated value of the objects which he has in his possession and on sums received by him;" Id. Art. 1677, 1678 (see *Baillio v. Baillio*, 5 N. S. 229; *Prudhomme v. Vienne*, 6 La. 363); and a bequest to an executor will be deemed to be in lieu of commissions, unless a contrary intention is expressed; Civil Code, Art. 1679.

An executor becomes entitled to this statutory remuneration upon receiving possession of the assets, or being duly qualified to perform the duties of his office; *Anderson v. Anderson*, 10 La. 34; *Nicholson v. Ogden*, 6 La. An. 486; and when once his right to commissions attaches it cannot be forfeited for anything except his own misconduct; *Succession of Lee*, 4 La. An. 578; *Succession of Lile*, 24 Id. 490; *Hale v. Salter*, 25 Id. 321; but the limit prescribed by the statute cannot be exceeded to compensate for additional services, whether rendered as counsel or otherwise; *Young v. Chaney*, 3 La. 464; *Baldwin v. Carlton*, 15

La. 399; *New Orleans v. Baltimore*, 15 La. An. 626; *Succession of Sprowl*, 21 Id. 544; *Succession of Lile*, *supra*.

The inventory must include all debts, "except those prescribed against or those due by bankrupts who have not surrendered any property," and upon due diligence being shown, commissions will be granted upon the whole amount of the inventory, the sums realized, forming no criterion by which to estimate the compensation; *Succession of Armas*, 2 Rob. 445; *Succession of Blakely*, 12 Id. 158; *Succession of Foulke*, 12 La. An. 538; *Shaffer v. Cross*, 13 Id. 110; *Succession of Powell*, 14 Id. 425. Hence full commissions have been allowed upon uncollected debts; *Robouam v. Robouam*, 12 La. 77; upon unsold property and uncultivated land; *Robouam v. Robouam*, *supra*; *Succession of Girod*, 4 An. 387; upon unconverted real estate and notes received for property sold; *Smith v. Cheney*, 1 Rob. 98; and also to an executor for his trouble and responsibility concerning property to which it was subsequently ascertained the testator had no title, although in this case, the statutory rate was allowed rather as a compensation than a commission; *Succession of Girod*, 4 An. 387. In cases of partial administration, however, commissions are only allowed upon the actual receipts, and upon sums definitely ascertained to be uncollectable, but which diligent efforts have been made to collect; *Succession of Milne*, 1 Rob. 400; *Succession of Day*, 3 La. An. 625;

S. C., 22 Id. 366; *Succession of Girod*, 4 Id. 387.

The rules in regard to disbursements are the same as those prevailing elsewhere, and hence necessary and reasonable expenses, including the fees of counsel retained on behalf of the estate, will be willingly allowed; *Succession of Milne*, *supra*; *McWilliams v. McWilliams*, 15 La. An. 81; *Succession of Fink*, 19 Id. 258; *Succession of Wedenstandt*, Id. 494; *Succession of Day*, 22 Id. 366; and items not objected to in the court below cannot be disputed upon appeal; *Succession of Blakely*, 12 Rob. 157. In the *Succession of Milne*, 1 Rob. 400, it was held that the executors could not charge the estate for the rent of an office.

By the statutes in force in TEXAS, executors and administrators are entitled to receive five per cent. upon cash receipts, and the same amount upon cash payments, in the course of their administration. Also reasonable expenses, on proof that there was a necessity therefor, and whenever in the opinion of the chief justice, the above commission is inadequate, or if extraordinary services were required to be rendered, a reasonable compensation may be awarded; Paschall's Dig. p. 325, art. 1340; and "if a fiduciary seeks greater compensation than the above, or has to incur expenses in managing the property, he should present his account therefor, and have the same allowed by the chief justice as a liability against the estate;"

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Davenport v. Lawrence, 19 Texas, 319.

The statutory commission is only awarded upon actual receipts and disbursements; *James v. Corker*, 30 Texas, 630; *Watt v. Downs*, 36 Id. 116; and will not, of course, be allowed upon a payment to the administrator himself; *Brown v. Walker*, 38 Id. 109.

What are reasonable expenses within the statute, is, to some extent, determined by the amount of the estate and social position of the distributees, and there is no disposition to restrict their payment; *Trammel v. Philleo*, 33 Texas, 411; *Johnson v. Hogan*, 37 Id. 77; *Porter v. Cole*, 11 Id. 157; but a different rule obviously applies to executors resisting the payment of palpably just demands; *Watt v. Downs*, 36 Texas, 116; *S. C.*, 33 Id. 421; or where the estate is not interested in the result of the litigation; *Renn v. Samos*, 37 Id. 241; *S. C.*, 33 Id. 760.

IN ARKANSAS, executors and administrators receive any sum not exceeding ten per cent. on amounts less than one thousand dollars, five per cent. on sums between one and five thousand, and three per cent. on sums over five thousand dollars; Rev. Stat. Ch. 4, § 106; and an allowance by the Probate Court of any amount less than the maximum sum is, in the absence of fraud, conclusive; *Ringgold v. Stow*, 20 Ark. 537.

While the right to commissions is not forfeited by a mistaken application of payments; *Tiner v. Christian*, 27 Id. 312; yet it is

otherwise in cases of negligence or fraud; *Reed v. Ryburn*, 23 Id. 47; and the compensation provided in an instrument creating a trust will not be increased unless the trust has been faithfully and efficiently performed, and the provision is plainly inadequate; *Biscoe v. The State*, 23 Id. 598. Counsel fees are also allowed to fiduciaries prosecuting or defending under order of court; *Tiner v. Christian*, *supra*.

In TENNESSEE, the Acts of 1715, and 1789, allowed an executor to retain no more than his necessary charges and disbursements, and the construction put upon these statutes is very strict, nothing being allowed, as against creditors, for any personal services, "but only those unavoidable payments without which the estate could not be collected and disposed of;" *Stephenson v. Stephenson*, 3 Hay 123; *Bryant v. Puckett*, Ib. 255; *Stephenson v. Yondel*, 5 Id. 261; *German v. German*, 7 Cold. 181. But the Act of 1838 (1 Thomp. & Steg. Stat. § 2356), taken in substance from one passed in 1822, allows to executors, administrators and guardians, "a reasonable compensation for their services," which depends upon their *bona fides*; *Coffee v. Ruffin*, 4 Cold. 524; *German v. German*, *supra*; *Fulton v. Davidson*, 3 Heisk. 643.

In the very recent case of *Fulton v. Davidson*, *supra*, an executor was held to be entitled to receive, in addition to his commissions, a separate compensation for having acted as counsel for the estate. "Every executor or admin-

istrator," said the court, "has a right to procure the necessary legal counsel in administering his trust, and to pay reasonable compensation therefor out of the assets of the estate. If the executor or administrator is himself an attorney-at-law, he may either employ other counsel, or he may give to the business his own professional services. In the latter case, he is entitled to the same compensation which he would have paid to another attorney in the former case. There is no incompatibility in the two offices of executor and solicitor. He is entitled to just remuneration for the value of his services in both capacities, to be ascertained by proof."

In KENTUCKY, some reluctance seems to have been felt in departing from the English rule. "The doctrine is incontrovertibly settled," it was said in *Breckenridge v. Brooks*, 2 A. K. Marshall, 339, "that where a mortgagee or other trustee, manages the estate himself, there is no allowance to be made for his trouble." So in *M' Millen v. Scott*, 1 Monroc, 151, it was held that a stipulation by a trustee for the payment of his expenses (though he would have been entitled to these without any such stipulation), excluded any claim for personal services. With respect to executors, this strictness was altered by statute (1 Morehead & Brown's Dig. 668), which gave to them their reasonable charges and disbursements expended in the funeral of the deceased, and other their administra-

tion; and in extraordinary cases, such recompense for their personal trouble as the court should deem reasonable. The amount of the allowance rests within the discretion of the court (which, ordinarily, will not be interfered with upon appeal; *Cabell v. Cabell*, 1 Met. 335; *Hutchings v. Hutchings*, MSS. June, 1859, cited 1 Stant. Rev. Stat. 506, n.), and while the usual commission is five per cent.; *Logan v. Troutman*, 3 A. K. Marsh. 67; *Ramsey v. Ramsey*, 4 Mon. 152; *Wood v. Lee*, 5 Id. 66; *M'Cracken v. M'Cracken*, 6 Id. 342; *Webb v. Webb*, Ib. 167; *Cabell v. Cabell*, *supra*; yet in exceptional cases, a larger rate has been allowed; *Wood v. Lee*, *supra*; *Fleming v. Wilson*, 6 Bush, 610; and these allowances obviously take precedence of the claims of creditors; *Fountleroy v. Leyle*, 5 Mon. 267. So, in other cases, "a gross sum has been allowed without regard to any per centum, and in others a daily allowance, or special charge has been passed;" *Wood v. Lee*, *supra*; but in *Bowling v. Cobb*, 6 B. Monroe, 358, a charge of seven per cent. upon receipts, and the same upon payments, was said to be excessive and unusual. A liberal spirit seems to be shown towards the allowances of expenses, such as hire of slaves; *Floyd v. Floyd*, 7 Id. 292; counsel fees, &c.; *Bowling v. Cobb*; *Fleming v. Wilson*, *supra*; *Wood v. Goff*, 7 Bush, 65; but an executor cannot charge commissions upon a debt paid to himself; *Franklin Academy v. Hall*, 16 B. Mon. 472.

These doctrines, however, were

not extended to trustees until a later period, the English rule being approved in *Jennings v. Davis*, 5 Dana, 134; *Hite v. Hite*, 1 B. Mon. 179; and *Miles v. Bacon*, 4 J. J. Marsh. 463; though it was admitted that there were exceptions in modern adjudications. But in *Phillips v. Bustard*, 1 B. Monroe, 350, the rule was said to be extensively qualified if not entirely exploded by the local law and usage of that state, where tutors, curators, executors, and administrators were all entitled to reasonable compensation, and there was no reason for applying so harsh and unreasonable a rule to the solitary class of cases denominated express technical trusts; and in *Lane v. Coleman*, 8 B. Monroe, 571, a party acting as agent, under an instrument which directed him to pay from the proceeds of certain law suits, all costs and expenses, including attorney's fees, and which was held to be in effect a deed of trust, was declared to be entitled to a "reasonable compensation for his services." So, in *Bank of the United States v. Hirst*, 4 B. Monroe, 439, the reservation in an assignment made to three trustees, of one per cent. commission on collections and disbursements, not to exceed \$2000 to each of them in any one year, was held not to be so extravagant as to indicate a fraudulent motive in the assignment; and in *Greening v. Fox*, 12 B. Monroe, 190, it was held that trustees under a deed for the support of the grantor and his wife, were entitled to five per cent. commission on the

amounts transferred to them; while in *Fleming v. Wilson*, 6 Bush, 610, an annual commission of one and a half per cent. was given to a trustee who, by judicious management for a period of seventeen years, had greatly increased the value of the estate.

In OHIO, the act of 1840 (1 Swan. & Critch. 299, § 170,) provides that executors and administrators might be allowed a commission upon the amount of the personal estate collected and accounted for by them, and of the proceeds of the real estate sold under an order of court for the payment of debts, which should be in full compensation for all their ordinary services; that is to say, for the first \$1000, at the rate of six per cent.; for all above that sum, and not exceeding \$5000, at the rate of four per cent.; and for all above \$5000, at the rate of two per cent.; and that in all cases such further allowances should be made as the court should consider just and reasonable for their actual and necessary expenses, and for all extraordinary services, not required by an executor in the common course of his duty; with a proviso that when provision should be made by will for compensation, the same should be deemed a full satisfaction for his services, in lieu of his commissions, or his share thereof, unless he should, in writing, renounce all claims to such compensation. In *Andrews v. Andrews*, 7 Ohio St. 151, the Supreme Court held, upon the authority of the Pennsylvania cases

cited *supra*, p. 553, that an executor was not bound to maintain the will of his testator, but should properly throw the expense of the same upon the legatees or devisees; and in *Gilbert v. Sutliff*, 3 Id. 149, it seems to have been thought that a trustee was not "entitled to compensation in the absence of an agreement to pay; he may claim for expenses, but he must render his account, and, if not admitted, must clearly establish it; if he mal-administer and refuse to account, both compensation and expenses may be refused." In *Williams v. Williams*, 8 Ohio St. 300, where a testator devised lands subject to the payment of legacies which though directed to be void by the executors, were discharged by the devisees, it was held that the executors were not entitled to commissions upon such legacies.

In INDIANA the compensation rests within the discretion of the court, no fixed rate being established; *Ray v. Dougherty*, 4 Black. 115; 2 Rev. Stat. (G. & H.) 526; but a provision made by the will, is, unless renounced, conclusive: 2 Rev. Stat. 527.

The revised statutes of ILLINOIS provide that "executors and administrators shall be allowed as a compensation for their trouble, a sum not exceeding six per cent. on the whole amount of personal estate, and not exceeding three per cent. on the money arising from the sales or letting of land, with such additional allowances

for costs and charges in collecting and defending the claims of the estate, and disposing of the same, as shall be reasonable;" Rev. Stat. 1874, p. 127, § 132, and by the laws of 1861, p. 177, § 1, "Guardians upon settlement shall be allowed such fees and compensation for their services as shall seem reasonable to the Court," but commissions will not be given to fiduciaries who employ the funds of the estate for their individual benefit; *Bond v. Lockwood*, 33 Ill. 224; and increased compensation will not be awarded to an administrator acting as counsel for the estate; *Willard v. Bassett*, 27 Id. 38.

With regard to trustees, in *Constant v. Matteson*, 22 Ill. 547, the Court, while recognizing the right to repayment of necessary expenditures, said "As a general rule, a trustee is not entitled to compensation either for his labor or time bestowed in the care of the trust, unless it is by stipulation or agreement," and, at all events, such claim cannot, for the first time, be asserted upon appeal; *Hurd v. Goodrich*, 59 Ill. 458.

In MISSOURI, executors and administrators were formerly allowed a commission not exceeding six per cent.; *Shong v. Wilkinson*, 14 Mo. 116; but they now receive, in all settlements, in addition to proper disbursements, and charges for legal advice, "as full compensation for their services and trouble, a commission of five per cent. on personal estate and money arising from the sale of real estate" (1

Wagner's Stat, 1872, p. 108, § 9); but the compensation is sometimes awarded in a gross sum; *Fisher v. Smart*, 7 Missouri, 581; and there is a provision relative to guardians, similar to that in force in Illinois (Id. 682 and 851).

In IOWA, executors are allowed upon personalty distributed, and real estate sold for payment of debts, for the first one thousand dollars at the rate of five per cent., between one and five thousand, at the rate of two and a half per cent., and over five thousand, at the rate of one per cent., with additional allowances for expenses and extraordinary services; Rev. Stat. (1860), p. 417, §§ 2454, 2455; and although these amounts are declared to be "as full compensation for all ordinary services," yet when more than the statutory commissions have been allowed, it will, upon appeal, be presumed to have been given for extraordinary services; *Patterson v. Bell*, 25 Iowa, 149. The compensation of guardians (Rev. Stat. 1860, p. 434, § 2567), and foreign executors or administrators (Laws of 1866, p. 150), rests within the discretion of the Court, and while either a percentage or gross sum may be awarded, yet it is forfeited by negligence; *Foteaux v. Lepage*, 6 Iowa, 135.

In WISCONSIN and NEBRASKA, executors and administrators receive their expenses and costs rightfully incurred (2 Taylor's Stat. [1872] p. 1534, § 66) and for their services such fees as the law allows,

[being one dollar for every day employed in the execution of the trust, 2 Taylor's Stat. p. 1523, § 24; *Cameron v. Cameron*, 15 Wisc. 1], provided that when the decedent shall, by his will, provide a compensation, such provision unless renounced is exclusive. But when no compensation is provided by the will, or, if provided, is renounced, commissions are allowed upon the personalty, and real estate sold for the payment of debts, at the rate of five per cent. on the first five thousand dollars, two and a half per cent. on amounts between one and five thousand, and one per cent. on sums above the latter amount, with provision for additional remuneration for extraordinary services; 2 Taylor's Stat. p. 1240, §§ 10, 11; Neb. Stat. p. 331, § 283. The compensation of guardians is confided to the courts; Ib. p. 1285, § 41.

An administrator acting in good faith is not personally liable for costs in an action brought by him for a conversion of the estate; whether such conversion occurred before or after the death of the intestate; *Knox v. Begdon*, 15 Wisc. 415; *aliter*, if the action is conducted for the individual benefit of the fiduciary; *Cameron v. Cameron*, 15 Wisc. 1. Payment of claims may also be made prior to an order of court, subject to the risk of their being subsequently disallowed; *King v. Whiton*, 25 Wisc. 689; and in the latter case it was also held that an expressed intention to waive the right to commissions will not, of itself, be sufficient to deprive an executor thereof.

In CALIFORNIA, "When no compensation shall have been provided by the will, or the executor or administrator shall renounce all claim thereto, he shall be allowed commissions upon the amount of the whole estate accounted for by him, as follows: "For the first one thousand dollars, at the rate of seven per cent. for all above that sum and not exceeding ten thousand dollars, at the rate of five per cent, and for all above that amount at the rate of four per cent.," with additional allowance for extraordinary services; "provided that the total amount of such allowances shall not exceed the commissions allowed by this statute;" Wood's Digest, p. 413, Art. 2327, § 221.

Commissions are not allowed on the whole amount of the inventory, but only upon such portions thereof as are reduced to possession and accounted for; *Isaac's Estate*, 30 Cal. 105; *Simmon's Estate*, 43 Id. 543; but an administrator who received certain securities which were subsequently decreed to belong to others, and changed the form of their investment with the consent of the parties entitled thereto, was held to be entitled to commissions thereon; *Wells, Fargo & Co. v. Robinson*, 13 Cal. 135. The statutory allowance is only made upon final accounting; *Ord v. Little*, 3 Cal. 289; *Miner's Estate*, 46 Id. 572; and hence where the fiduciary resigns or is removed, his remuneration is discretionary; *Ord v. Little*, *supra*.

The rule with respect to joint

executors was thus stated in *Hope v. Jones*, 24 Cal. 92. "The partnership relation does not exist between co-executors and they have no joint interest in the commissions allowed by law for their services in administering upon the estate. They are not each entitled to an equal share merely upon the naked ground of their relation to each other. The share to which they are respectively entitled is to be determined on entirely different considerations. In other words their respective portions are not ascertained by any established rule of law, but upon the principles of equity. The ratio of compensation and of service must be the same or as nearly so as the circumstances of the case will permit. Each is chargeable with the full amount of the assets which may come into his hands and is entitled to be credited with all disbursements legally made on behalf of the estate. Each may keep a separate account and present the same for final settlement. They are only entitled to share and share alike where their liabilities and services have been equal. One who takes no care or charge upon himself touching the estate or any part thereof, collects no debts, makes no disbursements, and thus renders no service whatever, is not entitled to any share in the commissions."

The decision of the probate court in questions concerning the expenses of administration is, owing to its exclusive jurisdiction over the settlement of decedent's estates, generally regarded as con-

clusive, although in clear cases of abuse of discretion the appellate court will interfere; *Hope v. Jones*, 24 Cal. 93; *Gurnee v. Maloney*, 38 Id. 85; *Gasq's Estate*, 42 Id. 289; *Mullen's Estate*, 47 Id. 452; and a personal liability will not be imposed upon fiduciaries for expenses incurred for the apparent benefit of the estate, whether the means adopted were or were not the most advantageous for the trust; *Abila v. Burnett*, 33 Cal. 658; *Simmon's Estate*, 43 Id. 543; *Miner's Estate*, 46 Id. 570; *Mullin's Estate*, *supra*; but an executor is individually liable for fees paid to counsel for procuring letters testamentary; *Simmon's Estate*, *supra*; or for involving the estate in needless litigation; *Hicox v. Graham*, 6 Cal. 168; or for costs incurred in attempting to recover an unauthorized investment; *Holbert's Estate*, 48 Cal. 627.

Although it will have been seen that, in a few States, the principle of compensating those acting in a fiduciary capacity, does not, as yet, seem to have been applied further than in the case of executors and administrators, yet it will sufficiently appear from observing its rapid extension, that as to the principle itself, there will soon be little difference of determination; and some of the rules which appear to be of general application, in the absence of statutory provisions to a contrary effect, are that compensation is awarded by means of commissions, rather than in a gross sum or per diem allowance—that one who assumes a

trust with the understanding, express or implied, that its duties are to be performed without compensation, shall not afterwards be allowed to claim it—that, in the absence of insolvency or undue influence, the compensation provided in the instrument creating the trust will prevail—that compensation is to be given for labor and risk actually incurred, and, therefore, not to be claimed on assuming the trust—that double compensation is not usually given when the fiduciary occupies a double position with regard to the same subject-matter—that the compensation is not to be increased in

proportion to the number of trustees—that in cases where the fiduciary has been wanting in that probity and care which equity demands, it will be withheld altogether—and, consequently, that although the cost of professional services, will, in general, be readily allowed when the protection of the fiduciary is also the protection of those beneficially interested, yet it will not be sanctioned where the former avails himself of such services in a defence against the rights of the latter, or where the litigation was either plainly unnecessary, or conducted in bad faith.

[*267]

*ASHBURNER v. MACGUIRE.

1784. JULY 18, 1786.

REPORTED 2 BRO. C. C. 108.

SPECIFIC LEGACY—ADEMPTION.]—*Legacy of interest and principal of a bond is specific, and is partially adeemed by the testator having received part of the debt by dividends declared after the bankruptcy of the debtor. "Legacy of my 1000*l.* East India Stock," is specific, and is adeemed in toto by the testator's selling the stock.*

WILLIAM MACGUIRE, by his will, dated the 27th September, 1778, bequeathed (inter alia) as follows;—"Item, I bequeath to my sister Jane Ashburner, the interest arising from *her husband William Ashburner's bond to me for principal, 3500*l.* sterling* during her life, independent of her present or any future husband, amounting to *175*l.* sterling per annum.* Item, I bequeath the principal of the said bond, on the decease of my said sister Jane Ashburner, to her four daughters, *Elizabeth, Anne, Sarah, and Sophia,* to be equally divided among them or the survivors of them. Item, I bequeath to Mr. William Beawes, now at school with the Rev. Mr. Everett, at Felstead, in Essex, *my capital stock of 1000*l.* in the India Company's Stock,* with the dividend thereon arising, which dividend is to pay for his education and maintenance till he is qualified for holy orders, and then the capital to be laid out in the purchase of a living for him in the church. This stock is to be continued or disposed of, at the discretion of my executors."

William Ashburner, the debtor, became a bankrupt in February, 1780. In March the testator proved this debt *under the commission, and, 16th May, 1781, received a dividend [*268] thereon of 4s. 3d. in the pound.

The testator died 12th July, 1781. Since his death another dividend of 2s. 9d. has been made to the bankrupt's creditors.

The testator at the time of making his will, was possessed of 1000*l.* East India Stock, and no more, but sold out the whole of it before his death. Beawes, the legatee of this stock, was a natural child of the testator.

The bill was brought by Mrs. Ashburner, her four daughters, and Beawes, to have the whole sum of 3500*l.* secured for Mrs. Ashburner and her daughters, and to have such part of it as is due out of the estate of Ashburner the bankrupt paid by his assignee, and the residue paid by the personal estate of the testator out of his general effects; and that the personal representative of the testator might also purchase with the testator's personal estate 1000*l.* East India Stock, and transfer the same for the use of the plaintiff Beawes, as directed by the will. The defendants, the administratrix and residuary legatees, insisted that the plaintiffs, the Ashburners, were entitled only to what remained due to the testator at the time of his death out of the estate of the bankrupt; and that the legacy of East India Stock to Beawes was adeemed by the testator's disposing of it in his lifetime.

The cause was heard before the Lord Chancellor in 1784, and on the 18th of July, 1786, he gave judgment.

LORD CHANCELLOR THURLOW, after stating the case, said—The claim of Mrs. Ashburner and her daughters depended on two questions:

First, whether the bond was given as a specific legacy; which depends on this, whether the manner in which the sum is mentioned, turns it to a pecuniary legacy, or, as the civilians call it, a demonstrative legacy, that is, a legacy in its nature a general legacy, but where a particular fund is pointed out to satisfy it; or whether it be what they call a *legatum nominis*, or *legatum debiti*.

*The second question is, whether the legacy, supposing it to be specific, is adeemed, so far as the testator has received dividends in respect of the debt, or, as the bankrupt's estate may be insufficient to pay the residue. [*269]

I will take the second point first; for this is clearly a specific legacy, according to all the definitions. Wherever a debt, or a part of a debt, is the subject bequeathed, it is a *legatum nominis*, or *legatum debiti*. I shall not stand long upon that point.

With respect to the second point, as to the ademption, one maxim has gained so much ground as to have been a governing rule, and has been recognized by Lord Talbot and Lord Hardwicke. It is, that where a debt is bequeathed, and is afterwards extinguished by the act or concurrence of the testator, as by demand or suit, the legacy is adeemed, but if paid in without suit

or demand, there is no intention to adeem; and there are innumerable authorities that a legacy of a debt is not adeemed by a voluntary payment. Lord Camden, in the *Attorney-General v. Parkin*,¹ expressly exploded this distinction; so did Lord Macclesfield.² I am inclined to adopt their opinions, because I can find no ground for the distinction but a passage in Swinb. sect. 20, p. 7, (p. 548, 6th edit.). But I doubt if the authors cited by him support him. Godolphin (*Orphan's Leg.*, 4th edit. 434), referring to the same books, states the rule differently; and so have other writers.

By the civil law, it was competent for a man, after he had changed the subject-matter of a specific legacy, to declare, by his conduct, that such a change was no ademption. The case put is of a gold chain, which the testator, after having bequeathed it by his will, converts into a cup; the legacy is not adeemed, because the cup might be restored to its former shape.

This has not been adopted by our law. There is no ground to say, that, after a legacy is extinguished, a man by his conduct, may revive it. It is contrary to common sense, as appears by the instance put. The gold chain may have been given as a [*270] legacy, because it had been *long in the testator's family. If it be afterwards converted into a gold cup, the reason for giving it ceased.

There is an exception, or limitation to this rule, where the testator alters the form, so as to alter the specifications of the subject; as by making wool into cloth, or a piece of cloth into a garment; there the legacy is adeemed, because the subject-matter cannot be restored to its former state.

This distinction is intelligible, in an action where the thing sued for cannot be recovered in specie; but it is not intelligible, when applied to a legacy; and, what is more material never was adopted by our law.

As to legacies of debts, according to the civil law, where the testator had sued for, but had not recovered, or had got judgment, but not execution, or had actually recovered the debt, but had set the money apart for the legatee, or, by words, declared he did not intend to revoke the legacy; in none of these cases was the legacy adeemed. But there is no authority in the civil law for the distinction between a debt being paid without demand, and in consequence of a demand.

Besides, although it can be ascertained where a suit was commenced for a debt, it may be extremely difficult to ascertain whether any demand has been made; if the testator receive payment of the debt, the legacy is gone, unless it appear from the manner of his disposing of the money afterwards, that he means to preserve it for the legatee. Lord Camden, in the *Attorney-General v. Parkin*, held there was no distinction between voluntary payment, and payment on a demand, and that in both cases,

¹ Amb. 566.

² Lord Thomond v. Earl of Suffolk, 1 P. Wms. 461.

the legacy was extinguished; he added, that where the sum is specified in the bequest, it is a general legacy, as I shall mention on the other point. But the distinction between, I bequeath¹ *the* 500*l. due on a bond from A. B.*, and I bequeath *the bond from A. B.* is very slender; and so admitted to be by his Lordship.

In the civil law there is a distinction taken between a demonstrative legacy, where the testator gives a general legacy, but points out the fund to satisfy it, and a taxative legacy, where he bequeaths a particular thing.

*On the first point, I am clear this is a specific legacy. [*271] If the fortune of the testator had failed, so as not to satisfy all the pecuniary legacies, and the question had been, whether this legacy should have been contributive to the pecuniary legacies, I believe no man in the profession would have doubted.

When the testator made his will, 5300*l.* was due to him from William Ashburner, by bond; he meant to relinquish that bond for the benefit of the family; not by way of release to the husband, but by way of settlement; and that this debt, whether it turned out well or ill, should go to the family; the interest to his sister for her life, the principal among her daughters. In this case, the bequest must be considered as specific, although the sum be mentioned; *for I cannot agree to Lord Camden's distinction.*

As to the legacy of East India Stock to the plaintiff Beawes, there is no case to countenance his claim. The testator says, "I give *my* capital stock to." &c.; the pronoun *my* has been relied on, in many cases, in deciding the legacy to be specific.

The testator, after making his will, sold his stock, which made it as if it had never existed; *the legacy is adeemed* according to all the cases.

In questions upon legacies of debts, the cases have crept beyond the original principle, which was the distinction between demonstrative and taxative legacies, and recourse has been had to the animus adimendi, which has nothing in common with the other principle.

In *Pettiward v. Pettiward*, Rep. t. Finch, 152, the Court was of opinion, from all the circumstances, that the testator intended to give a legacy of 2000*l.*, although the debts pointed out for the payment of it amounted only to 1700*l.*; and, therefore, decreed the deficiency to be made good out of the general assets. In *Pawlet's case*, Raym. 335, the legacy was held to be a pure legacy, or a legacy in numeratis, and not legatum nominis; and although the debt was paid to the testator, the legacy was decreed. In *Lord Castleton v. Lord Fanshaw*, 1 Eq. Ca. Abr. 298, *a [*272] legacy of a debt was held to be specific, although the sum was named.

In *Orme v. Smith*, 1 Eq. Ca. Abr. 302; Gilb. Rep. 82; and 1

¹ This distinction is recognised by Lord Hardwicke in *Ellis v. Walker*, Amb. 310, and by Lord Camden in *Attorney-General v. Parkin*, Id. 506, but is now overthrown.

Vern. 681, the payment was voluntary; and, from thence was inferred an argument, that there was no animus adimendi.¹

In *Lord Thomond v. Earl of Suffolk*, 1 P. Wms. 461, Lord Macclesfield disapproved of the distinction between a debt recovered by suit, or paid voluntarily. A definition of a specific legacy is given by Lord Macclesfield, in *Hinton v. Pinke*, 1 P. Wms. 539, and the advantages and disadvantages, as between a specific and pecuniary legacy, are mentioned; and, among other instances, that the legatee of a debt, which is lost by the insolvency of the debtor, shall have no contribution from the other legatees. In *Crockat v. Crockat*, 2 P. Wms. 164, this testator bequeathed the sum of 550*l.* which was then in Mr. Ellis's hands; the testator, before making his will, had placed the sum in the hands of Mr. Ellis, and had got his note for it. He had also, before making his will, drawn several bills on Ellis, which had reduced the sum to 430*l.* It was held, by the Master of the Rolls, that, as the drafts were all made before the will, and as the note for the full sum was still standing out, the testator should be considered as renouncing the payments, and that he meant to give the whole 550*l.* as a legacy.

I take it to be clear, if a testator gives a cup, which is in pawn, it is a full gift, and the executor must redeem.

In *Ford v. Fleming*, 2 P. Wms. 469, 1 Eq. Ca. Abr. 302, Lord King held, that calling in the debt was no ademption, supposing himself bound by the passage in Swinburne, and *Pawlet's case*.² How he could be bound by those cases I cannot conceive. This case³ at the Rolls, cited 1 Atk. 508, is nonsense, and has often been denied. The question upon the legacy of the stock has been determined uniformly: *Ashton v. Ashton*, Ca. t. Talb. 152, and 3 P. Wms. 384, *Partridge v. Partridge*, *Ca. t. Talb. 226, [*273] *Purse Snaplin*, 1 Atk. 414, does not tell at all to the purpose. *Avelyn v. Ward*, 1 Ves. 420, is contrary to many cases determined before, and to one by Lord Hardwicke himself, viz, *Purse v. Snaplin*.⁴

Lord Camden, in the *Attorney-General v. Parkin*,⁵ decided one point, and left the other open. Parkin, in his will, recites that he had certain mortgages, to the amount of £——, and bonds to the amount of £——. He gives all these, by such enumeration, to Pembroke College, Cambridge. To his sisters, who were next of kin, he gave annuities, and declared they should have nothing more under his will. Several sums were afterwards called in, or paid before the testator's death. Lord Camden determined, that the sisters were not disappointed by the declaration, that they should have nothing but the annuities; he held the legacy to the

¹ See as to the intention of the testator, Domat. tom. 2, p. 186. Vide *Coleman v. Coleman*, 2 Ves. jun. 640.

² Raym. 335.

³ *Phillips v. Cary*; and see *Heath v. Perry*, 3 Atk. 103.

⁴ *S. C. nom. Pierce v. Snaveling*, 1 Ves. 425.

⁵ Amb. 566.

College was not adeemed as to the sums paid in, upon the ground that the sum was named, which he at the same time admitted to be slight. The testator certainly meant to give everything to the College, except the annuities; but the bequest is in the strictest form of a specific legacy.

In¹ *Cartwright v. Cartwright*, 18th July, 1775, before Lord Bathurst, the bequest was "I give 1400*l.* for which I have sold *my* estate this day," &c. The testator afterwards received the whole money, paid it to his banker, and drew out of his hands 1100*l.* of that money. Lord Bathurst held this to be a legacy of quantity, and that the receiving was no ademption, on the authority of the *Attorney-General v. Parkin*; but it is questionable whether that case supports that determination.

In the case before me, the testator plainly intended that his sister, Sarah Ashburner, and her children, should have the debt, owing to him by her husband, secured as a provision for them.

My decree will be, that the bond be delivered up to the wife and children, that they may receive the dividend not received by the testator, and whatsoever may hereafter *be payable [*274] out of the bankrupt's estate in respect of that date.

The legacy to Beawes is gone, and the bill must be wholly dismissed as to that claim.

The case of *Ashburner v. Macguire*, determined by Lord Thurlow, after great consideration—for, according to Lord Alvanley (see 4 Ves. 566), he took two years before he gave judgment—is usually referred to as an authority wherever the question arises, whether a legacy is general or specific, and if specific, what amounts to an ademption of it. See *Stanley v. Potter*, 2 Cox, 182; *Chaworth v. Beech*, 4 Ves. 565, 566; *Innes v. Johnson*, 4 Ves. 574.

Legacies are usually said to be of two different kinds, *general* or *specific*; a third, however, may be added, in some degree partaking of the properties of the two former,—a *demonstrative* legacy.

A legacy is *general* where it does not amount to a bequest of any particular thing or money, distinguished from all others of the same kind. Thus, if a testator gives A. a diamond ring, or a horse, or 1000*l.* stock, or 1000*l.*, not referring to any particular diamond ring, horse, stock, or money, as distinguished from others, these legacies will be general.

It may be here mentioned that general pecuniary legacies are bequests of personal property "described in a general manner" within the meaning of the 27th section of the Wills Act (1 Vict. c. 26), where no particular fund is indicated for payment, and they will therefore be payable out of personal estate, which the testator has power to appoint in

¹ Stated in the Appendix to Mr. Wooddeson's 3d vol. of Views of the Laws of England.

any manner he may think proper, where there are no assets of which the testator was possessed as his own personal estate, sufficient to pay the legacies: *Hawthorn v. Sheddon*, 3 Sm. & G. 293; and see *Spooner's Trust*, 2 Sim. N. S. 129; *Wilday v. Barnett*, 6 L. R. Eq. 193; *In re Wilkinson*, 4 L. R. Ch. App. 587.

A legacy is specific, *legatum nominis vel debiti*, when it is a bequest of a particular thing, or sum of money, or debt, as distinguished from all others of the same kind. Thus, if a testator gives B. "my diamond ring," "my black horse," "my 1000*l.* stock," or "1000*l.* contained in a particular bag," "or owing to me by C.," in these and like instances the legacies are specific.

A legacy is *demonstrative*, when, as Lord Thurlow observes in the principal case, "it is in its nature a general legacy, but there is a particular fund pointed out to *satisfy it." Thus, if a testator be-
[*275] queaths 1000*l.* out of his Reduced Bank Three per Cents., the legacy will not be specific, but demonstrative. That this species of legacy was recognised by the civil law, is clear. "Si testator scripserit, aureos quadringentos Pamphilæ dari volo, ita ut infra scriptum est, ab Julio autore aureos tot, et in castris quos habeo tot, et in numerato quos habes tot, et post multos demum annos decesserit cum jam omnes summæ in alios usus translatae essent, responsum fuit, Pamphilæ quadringenta deberi; quia vero similis est *patremfamilias demonstrare* potius hæredibus voluisse, unde aureos quadringentos sine incommodo rei familiaris contrahere possent, quam conditionem fideicommisso injecisse, quod ab initio pure datum esset."—Voet ad Pand. 35, tit. 1, sect. 5.

Though often a matter of much difficulty, it is of much importance accurately to distinguish these legacies one from the other, because, as will be hereafter more fully shown, a specific legacy will not, upon a deficiency of general assets to pay debts, be obliged to abate, until after the general legacies have been exhausted; but, at the same time, a specific legatee is liable to this disadvantage, that if the thing specifically given be adeemed by the testator either aliening or changing it into a different species of property, he will not be entitled to claim anything by way of compensation out of the general personal estate. But with regard to a demonstrative legacy, it is so far of the nature of a specific legacy, that it will not abate with the general legacies until after the fund out of which it is payable is exhausted, and so far of the nature of a general legacy, that it will not be liable to ademption by the alienation or non-existence of the property pointed out as the primary means of paying it. See *Mullins v. Smith*, 1 Drew. & Sm. 210; *Vickers v. Pound*, 6 Ho. Lo. Ca. 885; *Disney v. Crosse*, 2 L. R. Eq. 593; *Hodges v. Grant*, 4 L. R. Eq. 140.

Before, however, entered upon these topics, it may be more useful to examine some of the cases in which the distinguishing marks of these

different kinds of legacies have been discussed, bearing in mind, that, because of the consequences, the Court is inclined not to construe a legacy as specific, unless clearly so intended: *Kirby v. Potter*, 4 Ves. 752; *Innes v. Johnson*, 4 Ves. 568; *Webster v. Hale*, 8 Ves. 413; *Dickin v. Edwards*, 4 Hare, 276; *Ellis v. Walker*, Amb. 310; *Sayer v. Sayer*, 7 Hare, 382; *Williams v. Hughes*, 24 Beav. 474, 478.

Legacies of money.—A bequest of a sum of money in such a bag (*Lawson v. Stitch*, 1 Atk. 508), or in the hands of a certain person (**Hinton v. Pinke*, 1 P. Wms. 540; *Crockat v. Crockat*, 2 P. Wms. 164; *Pulsford v. Hunter*, 3 Bro. C. C. 416), or even of [*276] “all my monies” (*Manning v. Purcell*, 2 Sm. & G. 284; 7 De G. Mac. & G. 55; *Larner v. Larner*, 26 L. J. N. S. (Ch.) 668), is specific. So where one partner bequeathed to the other 2000*l.*, which appeared to be due to him on the last settlement, upon certain trusts, if he did not draw it out of the trade before he died, Lord Hardwicke held that it was a specific legacy: *Ellis v. Walker*, Amb. 310. But a bequest of money for a ring (*Apreece v. Apreece*, 1 V. & B. 364), or to purchase government securities (*Lawson v. Stitch*, 1 Atk. 507; *Gibbons v. Hills*, 1 Dick. 324; *Edwards v. Hall*, 11 Hare, 23), or lands (*Hinton v. Pinke*, 1 P. Wms. 539), or of an annuity to be purchased out of or charged on the personal estate (*Alton v. Medlicott*, cited 2 Ves. 417; *S. C.*, 3 Atk. 694; *Hume v. Edwards*, 3 Atk. 693; *Creed v. Creed*, 11 C. & F. 508), or of so much money “to be paid in cash” (*Richards v. Richards*, 9 Price, 226), is a general legacy. So, “in *Kirkpatrick v. Kirkpatrick*, before Lord Kenyon when Master of the Rolls, legacies were given to persons in India, and legacies to persons in England, to be respectively out of the effects in the respective countries, that was held to be only a direction as to the payment, not to make them specific,” cited in *Roberts v. Pocock*, 4 Ves. 158. So, a gift of a legacy, with a direction that it shall be paid as soon as the testator’s property in India shall be realised in England, will not make it specific, nor would it fail although the assets had been remitted to England in the lifetime of the testator: *Sadler v. Turner*, 8 Ves. 617, 624; and see *Raymond v. Brodbelt*, 5 Ves. 199.

Legacies of debts.—A debt may be specifically bequeathed, either by a gift of the security, as “my East India bonds” (*Sleech v. Thorington*, 2 Ves. 562, 563); “my note of 500*l.*” (*Drinkwater v. Falconer*, 2 Ves. 623); “my navy bills” (*Pitt v. Camelford*, 3 Bro. C. C. 160); or by a gift of the sum owing upon the security, as a bequest of “the money due on an interest note given by A.” (*Fryer v. Morris*, 9 Ves. 360); or “due on A.’s bond” (*Davies v. Morgan*, 1 Beav. 405); “the money now owing to me from A.” (*Ellis v. Walker*, Amb. 309); “or the interest of 7000*l.*, secured on mortgage of an estate belonging to A.” (*Gardner v. Hatton*, 6 Sim. 93.)

A bequest of a debt is equally specific, where it is made to several

persons in certain shares and proportions, nor is it the less specific in consequence of a life interest being given in it. Thus, in the principal case, where the testator bequeathed to his sister **“the interest* [*277] *arising from her husband’s bond, due to me, for principal 3500l. sterling,”* for life, for her separate use, amounting to 175l. sterling per annum, and on the decease of his sister, the principal of the said bond to her four daughters, to be equally divided among them, Lord Thurlow held, that the bond was specifically given; and this decision has been approved of and followed in *Chaworth v. Beech*, 4 Ves. 555; *Innes v. Johnson*, 4 Ves. 568; *Stanley v. Potter*, 2 Cox, 180; sed vide *Coleman v. Coleman*, 2 Ves. jun. 639; *Duncan v. Duncan*, 27 Beav. 386. So a gift of a part or residue of a debt is specific (*Ford v. Fleming*, 1 Eq. C. Ab. 302, pl. 3; 2 P. Wms. 469; *Nelson v. Carter*, 5 Sim. 530; and see *Basan v. Brandon*, 8 Sim. 171).

If a testator gives a sum out of a debt to one person and the residue to another, the legacies are specific, but if he says “I give a legacy of a particular sum to A. and desire it to be paid out of a debt due to me,” the legacy is demonstrative, as the testator merely points to a fund out of which it is to be paid; *Duncan v. Duncan*, 27 Beav. 390, and see *Campbell v. Graham*, 1 Russ. & My. 453.

Legacies of stock, government securities, &c.—Stock, or government securities, may be specifically bequeathed where the specific thing or corpus is, as in the principle case, described as “my” stock (*Barton v. Cooke*, 5 Ves. 461; *Choat v. Yeats*, 1 J. & W. 102; *Norris v. Harrison*, 2 Madd. 279, 280). So, a legacy “of my stock,” or “in my stock,” or “part of my stock,” is a specific gift of an aliquot part of stock: *Kirby v. Potter*, 4 Ves. 750, per Lord Alvanley; and see *Mullins v. Smith*, 1 Drew. & Sm. 210; *Oliver v. Oliver*, 11 L. R. Eq. 506. So, a bequest of “all the stock which I have in the Three per Cents., being, or about 5000l.,” is specific; *Humphreys v. Humphreys*, 2 Cox, 184; *Cochran v. Cochran*, 14 Sim. 343; *Gordon v. Duff*, 28 Beav. 519; and a bequest “of the interest of the whole of my property in the public funds,” was held a specific legacy of 700l. Three per Cent. Reduced Annuities, the only property in the public funds which the testator had: *Hayes v. Hayes*, 1 Kee. 97. And see *Vincent v. Newcombe*, 1 You. 599; *Kampf v. Jones*, 2 Keen, 756; *Schuttleworth v. Greaves*, 4 My. & Cr. 35.

Previous to the late Wills Act, a bequest of “my stock,” “my shares,” or any other similar property, described in those words, was held to indicate an intention to pass the specific property only which the testator might have belonging to him of the description in question, at the time of making his will, such a bequest therefore was specific and not general.

But now since the Wills Act *has expressly enacted (1 Vict. [*278] c. 26, s. 24) (and testators must be taken to know the Wills Act), that a will shall be construed, with reference to property, to speak

and take effect as if it had been executed immediately before the testator's death, *unless a contrary intention appears by the will*, it requires some more specific indication of such "contrary intention" than the mere circumstance that the testator has described stock by such words as "my stock," or "my shares," words which although a meaning could be given to them by reference to what was the state of things at the date of the will, have also a distinct meaning in reference to the state of things at the date of the testator's death, and might have been left in the will for the very purpose of passing property as it existed at the latter date, and because the testator knew, that, by the operation of the Wills Act, they would pass that property. Thus, in *Goodlad v. Burnett*, 1 K. & J. 341, where a testatrix by her will, dated in 1850, made a bequest as follows: "I give my New Three and a Quarter per Cent. Annuities," it was held by Sir W. Page Wood, V. C., that the bequest comprised all the New Three and a Quarter per Cents. which she had at her death, and consequently was not specific. "When," said his Honor, "I refer to a particular thing, such as a ring or a horse, and bequeath it as 'my ring,' or 'my horse,' it seems to me there might be considerable difficulty in saying that the 'contrary intention' to which the Act in its 24th section refers, does not appear on the face of the will; but when a bequest is of that which is generic,—of that which may be increased or diminished, then I apprehend, the Wills Act requires something more on the face of the will for the purpose of indicating such 'contrary intention' than the mere circumstance that the subject of the bequest is designated by the pronoun 'my.'" See also *Douglas v. Douglas*, Kay, 400; *Trinder v. Trinder*, 1 Law Rep. Eq. 695; *Moore v. Madden*, 2 I. R. Eq. 511; *Beahan v. Beahan*, 3 I. R. Eq. 427; *Ferguson v. Ferguson*, 6 I. R. Eq. 199; *Castle v. Fox*, 11 L. R. Eq. 542.

A bequest by a testator of personal property, which he states "I now possess," will not of itself simply indicate "a contrary intention" within the meaning of the Wills Act, so as to exclude subsequently acquired personal property from passing thereunder. See *Wagstaff v. Wagstaff*, 8 L. R. Eq. 229; there a testator made a bequest of "all my ready money, bank and other shares, freehold property . . . and any other property that I may now possess." It was held by Lord Romilly, M. R., that the personal estate acquired subsequently to the date of the will passed by the bequest. *"I am certainly," said his Lordship, "not disposed to construe any will so as to make [*279] real estate go one way, and personal estate another, under the same words; but in this case I am of opinion that *Cole v. Scott* (1 Mac. & G. 518) does not apply. There the testator made a will, by which, in effect, he said, 'I do not wish my after acquired real estate, whether freehold or copyhold, to pass,' for as to the freehold and copyhold estates, he devises those 'which are now vested in me,' and then, when he comes to the leasehold estates, he adds, 'or shall be vested in me at the

time of my death,' showing that he had clearly in his mind the distinction between the property he was then possessed of and that which he should afterwards acquire. There is no doubt a testator may make his will in this way. The only question is, whether this testator has done so?

"Now, I may compare the expressions which the testator has made use of with two other forms of expression. If the testator had said 'I give all my real and personal estate,' there can be no doubt that after-acquired property would have passed. So, again, if he had said, 'I give all the real and personal estate I possess.' Does it make any difference when he puts in the word 'now'? The words 'I possess' mean the same thing as 'I now possess.' In all these cases the law says that you must read the will as if it had been written on the day of the testator's death, and you must have distinct words, as there were in *Cole v. Scott*, in order to show that the property acquired subsequently to the date of the will is not intended to pass."

But a thing will not pass as a specific legacy, unless it actually belongs to a testator at the time of his death. Thus, if a testator who has made a specific bequest of all the money in the public funds of which he may die possessed, gives instructions to his broker to purchase stock, but no stock is purchased until after the death of the testator, it will not pass by his will even though the broker may in his books have given him credit for the stock (*Thomas v. Thomas*, 27 Beav. 537), but if the broker had entered into a contract for the purchase of the stock before the testator's death, the vendor would be held a trustee of the stock for the testator, and it would consequently pass by his will: *Ib.* 541.

The result would be the same where the broker was the owner of the stock and gave the testator credit for the amount in his books; *Ellis v. Eden*, 25 Beav. 482.

Even before the Wills Act, the mere possession, by the testator, at the date of his will, of stock or annuities of an amount equal to or greater [*280] than the bequest, where it was made merely in general terms, as of stocks or annuities (*Partridge v. Partridge*, Ca. t. Talb. 226; *Simmon v. Vallance*, 4 Bro. C. C. 345; *Webster v. Hale*, 8 Ves. 410; *Wilson v. Brownsmith*, 9 Ves. 180; *Hayes v. Hayes*, 1 Kee, 97; *Johnson v. Johnson*, 14 Sim. 313); or of stocks or annuities in particular funds (*Purse v. Snaplin*, 1 Atk. 415; *Bronsdon v. Winter*, Amb. 57; *Bishop of Peterborough v. Mortlock*, 1 Bro. C. C. 565; *Sibley v. Perry*, 7 Ves. 523, 529, 530; *Webster v. Hale*, 8 Ves. 410; or of India bonds (*Sleech v. Thorington*, 2 Ves. 562, 563); or canal shares *Robinson v. Addison*, 2 Beav. 414); would not, unless it appeared clearly to be the testator's intention to refer to the identical stock, annuities, bonds, or shares, of which he was possessed, be considered as specific;

for it might be his intention that his executor should purchase them out of his general personal estate.

Although stock be given in general terms, if the testator directs a sale for the benefit of the legatee, the legacy will be specific; for that direction would not have been given if the testator intended the stock to be purchased out of his general personal estate; *Ashton v. Ashton*, Ca. t. Talb. 152; 3 P. Wms. 384; *Sleech v. Thorington*, 2 Ves. 564; *Simmons v. Vallance*, 4 Bro. C. C. 348.

Where there is a bequest not of *part* of certain stock, that is to say, of *stock* out of stock (in which case the legacy as before shown, is specific as being part of a specific fund), but of *money* out of stock "as of 1000*l.* out of my Reduced Stock," then the legacy will not be specific, but demonstrative: *Kirby v. Potter*, 4 Ves. 748; *Deane v. Teste*, 9 Ves. 146, 152; *Rogers v. Clarke*, 1 C. P. Coop. 376; *Attwater v. Attwater*, 18 Beav. 330. And see *Jones v. Southall*, 32 Beav. 31. As to this distinction, see *Hosking v. Nicholls*, 1 Y. & C. C. C. 478; *Mullins v. Smith*, 1 Dr. & Sm. 204. So, where a certain sum is given, and the fund in which it is invested is described or pointed out merely, the legacy will be demonstrative; *Raymond v. Broadbent*, 5 Ves. 199; *Gillaume v. Adderley*, 15 Ves. 384; *Le Grice v. Finch*, 3 Mer. 50; *Sparrow v. Josselyn*, 16 Beav. 135; *Thomas v. Thomas*, 3 Ir. Ch. Rep. 399. So in *Lambert v. Lambert*, 11 Ves. 607, where the bequest is "to A., the sum of 12,000*l.* of my funded property, to be transferred in his name, or employed as it shall appear most beneficial to his interest," it was held to be a demonstrative legacy.

~ But the intention, which always governs in these cases, may show that so much of the identical stock was intended, in which case the legacy will be specific. Thus, in *Morley v. Bird*, 3 Ves. 629, the testator directed A. to pay to certain persons "four hundred pounds out of seven now lying in *the Three per Cent. Consolidated;" Lord [*281] Alvanley held, that the legacy was specific.

It seems (contrary to the opinion expressed by Sir T. Plumer, in *Parrot v. Worsfield*, 1 J. & W. 601) that there may be a specific legacy of stock which the testator became possessed of after the time of making his will: *Fontaine v. Tylor*, 9 Price, 94; *Stephenson v. Dowson*, 3 Beav. 342; *Queen's College v. Sutton*, 12 Sim. 521. And see *Bethune v. Kennedy*, 1 My. & Cr. 114, where Sir C. Pepys remarks, "that a bequest of all that a testator *may* possess in the funds would be a specific bequest of all his funded property, the rule being, that a legacy is not the less specific for being general." And see *Hosking v. Nicholl*, 1 Y. & C. C. C. 478; *Jacques v. Chambers*, 2 Coll. 435; *Townsend v. Martin*, 7 Hare, 471; *Oakes v. Oakes*, 9 Hare, 666; *Thomas v. Thomas*, 27 Beav. 537; *Measure v. Carleton*, 30 Beav. 538.

Where a testator makes a specific bequest, for instance, of stock which he accurately describes, that stock only, and not stock of a dif-

ferent denomination, will pass, though the amount be less than what he states it to be: *Gilliat v. Gilliat*, 28 Beav. 481; and see cases cited in the note at page 484; but if he had no such stock as that which he mentions in his will, other stock might pass: *Wring v. Wright*, 14 Sim. 400; *Penticost v. Ley*, 2 J. & W. 207; *Gallini v. Noble*, 3 Mer. 691; *Drake v. Martin*, 23 Beav. 89.

Things ordered by and made for the testator will pass under his will, although not delivered or paid for until after his death: *Field v. Peckett*, 29 Beav. 575.

Parol evidence of the state and value of a testator's funded property is admissible, in order to determine whether a legacy is specific or general. See *Attorney-General v. Grote*, 2 Russ. & My. 690, where Lord Eldon overruled the decision of Sir W. Grant, M. R. reported 3 Mer. 316. And see *Boys v. Williams*, 2 Russ. & My. 689. In that case a testatrix gave to A. and M. "50*l.* each of Bank Long Annuities now standing in my name." At the date of the codicil, and at her death, she possessed Long Annuities sufficient to answer this bequest specifically, but not also to satisfy certain legacies charged by the other testamentary papers upon the same stock. It was held by Lord Brougham, reversing the decision of Sir L. Shadwell, V. C. (reported 3 Sim. 563), that evidence as to the state and value of the testatrix's property in the funds at those respective times was admissible; and, on the effect of that evidence, and the language of the testamentary papers taken together, the bequests to A. and M. were held not to be specific, but pecuniary. "To the proposition," said his lordship, "that, because the [*282] words of the will *were clear upon the face of them, extrinsic evidence was inadmissible, it was wholly impossible to accede: that being the case of a latent ambiguity, the very case which, according to all the text writers, formed the exception to the general rule against admitting parol evidence to explain or construe the words of the instrument. It was because the ambiguity was not patent, but latent; that is to say, discoverable only upon reference to the subject matter, upon which the will purported to operate, that the Court was justified in resorting to extrinsic evidence at all. It was perfectly true that the Court was not at liberty, in the case of any written instrument, whether a will of real or personal estate, or a deed, to introduce into the consideration of the question of construction any matter furnished by extrinsic evidence for the purpose of giving a different meaning to the words from that which their plain import conveyed. The Court was not at liberty by matter of fact to overrule the construction, which was matter of law arising on the face of the instrument itself. But that proposition was perfectly consistent with the admission of evidence to explain, though not to control, the language, to aid, though not to vary or alter the construction." And see *Warren v. Postlethwait*, 2 Coll.

116, 121; *Collison v. Curling*, 9 C. & F. 88; *Innes v. Sayer*, 3 Mac. & G. 606; *Horwood v. Griffith*, 4 De G. Mac. & G. 700.

Legacies connected with Realty.—Every bequest of a lease for years of land (*Long v. Short*, 1 P. Wms. 403), or of tithes (*Rudstone v. Anderson*, 2 Ves. 418; *Hone v. Medcraft*, 1 Bro. C. C. 261), or of a rent out of a term of years (*Long v. Short*, 1 P. Wms. 403), is a specific legacy.

But if, instead of a *rent or annuity*, a *gross sum* is given, payable out of a term or real estate, that will be a demonstrative legacy, and effect will be given to it although the particular security intended by the testator happens to fail: *Savile v. Blacket*, 1 P. Wms. 778; *Fowler v. Willoughby*, 2 S. & S. 354; *Livesay v. Redfern*, 2 Y. & C. Exch. Ca. 90; *Willox v. Rhodes*, 2 Russ. 452; *Creed v. Creed*, 11 C. & F. 510; *Severs v. Severs*, 1 Sm. & Giff. 400; *Paget v. Huish*, 1 Hem. & Mill. 663.

But where the only gift is in the direction to pay the legacy out of a particular fund, as land, the land alone is liable, and if it fails, the legacy fails also: *Spurway v. Glynn*, 9 Ves. 483. And see *Dickin v. Edwards*, 4 Hare, 273; *Welby v. Rockliffe*, 1 Russ. & My. 571.

The proceeds to arise from the sale of land may be so bequeathed as to render the legacy specific. Thus, in *Page v. Leapinwell*, 18 Ves. 463, the testator devised an estate in trust to sell, *but not less than [*283] 10,000*l.*, and pay several sums amounting to 7,800*l.*, and the overplus monies arising from the sale to A.: Sir W. Grant, M. R. held that it was a specific legacy of 10,000*l.*, and the sale producing less, the other legatees were obliged to abate with A.

A similar decision is to be found in the case of a bequest out of personal property. See *Walker v. Laxton*, 1 Y. & J. 557. There a testatrix had power to appoint a sum of 2,200*l.*, and by her will after reciting the power, she bequeathed the whole sum in several legacies to different persons. Alexander, L. C. B., held that, as the amount of these particular gifts, and of the fund subject to the power exactly tallied, the legacies were a charge on the fund only, and that the general personal estate was not liable. See also *In re Jeffery's Trusts*, 2 L. R. Eq. 68.

Annuities.—Generally speaking, Annuities are legacies: *Ward v. Grey*, 26 Beav. 491.

And in general, in the construction of a will, annuities will be comprised within the word "legacies" (*Duke of Bolton v. Williams*, 4 Bro. C. C. 361, 376, 385, cited; *Sibley v. Perry*, 7 Ves. 534; *Swift v. Nash*, 2 Keen. 20), unless there is something in the will to show that the testator himself distinguished between them: *Cornfield v. Wyndham*, 2 Coll. 184; *Bromley v. Wright*, 7 Hare, 334; *Gaskin v. Rogers*, 2 L. R. Eq. 284. It is sometimes important to consider this when the question arises whether under the word "legacies," annuities are charged upon land, or are exempted from the payment of legacy duty.

Again, where legacies are directed to be paid out of real estate, an

annuity, being a legacy, will also be charged on the same fund: *Mul-lins v. Smith*, 1 Drew. & Sm. 204, 211.

An annuity when given with words of inheritance is descendable, and goes to the heir to the exclusion of executors (*Turner v. Turner*, Amb. 782; *Stafford v. Buckley*, 2 Ves. 179), *secus* if, although the annuity be perpetual, words of inheritance are not used: *Taylor v. Martindale*, 12 Sim. 158; *Parsons v. Parsons*, 8 L. R. Eq. 260.

The question often arises whether an annuity is perpetual, or whether it is for life only. The answer to it depends upon the intention of the testator.

If an annuity is given simpliciter, that is, to one generally, a life interest only passes: per Lord St. Leonards in *Kerr v. The Middlesex Hospital*, 2 De G. Mac. & G. 583; *Yates v. Maddan*, 3 De G. Mac. & G. 532; *Potter v. Baker*, 13 Beav. 273.

A bequest of 30l. a year to A. together with her children B., C. and D., and *for their joint maintenance*, was held to be a bequest of [*284] *an annuity to the mother and her children as joint-tenants for the life of the longest liver of them: *Wilson v. Maddison*, 2 Y. & C. C. C. 372.

If an annuity be given to one for *life*, and after his death to another simply (*Potter v. Baker*, 15 Beav. 492), or to one for life with power to him to give it after his death to another, or to one, and after his death to several others or the survivors (*Blewitt v. Roberts*, Cr. & Ph. 274; *Yates v. Maddan*, 3 Mac. & G. 532, reversing the decision of Sir L. Shadwell, V. C., reported 16 Sim. 613; *Sullivan v. Galbraith*, 4 I. R. Eq. 582), unless there are some other circumstances to vary the construction, the subsequent takers, as well as the first annuitant, will take for life only. And see *Barden v. Meagher*, 1 I. R. Eq. 250, per Walsh (M. R.).

But the will may show that it was the intention of the testator that the annuity should be perpetual: *Mansergh v. Campbell*, 25 Beav. 544; 3 De G. & Jo. 232. And see *Robinson v. Hunt*, 4 Beav. 450; *Hedges v. Harpur*, 3 De G. & Jo. 129; *Warren v. Wright*, 12 Ir. Ch. Rep. 401; *Barden v. Meagher*, 1 I. R. Eq. 246.

Thus, where a testator speaks of an annuity which he gives to a person for life, as if it were in existence after the death of such person, irrespective of any words added for the purpose of continuing its existence for the benefit of any other person, there the annuity given indefinitely to such other person is a perpetual annuity: per Lord Truro, C., 3 Mac. & G. 540.

A gift by will, even since the Wills Act (1 Vict. c. 26), of an annuity without words of limitation, but which by the same will is charged on real estate, is not a devise of a perpetual annuity or rent-charge, but is a gift of an annuity for life as it would have been before the Wills Act: *Nichols v. Hawkes*, 10 Hare, 342.

Where, however, an annuity is directed to be provided out of the proceeds of property, or out of property generally, or where an annuity is to be brought into existence by the application of property, and that annuity is given to a party generally, he will take the property appropriated to purchase the annuity, and therefore the annuity in perpetuity if purchased: per Lord St. Leonards, C., in *Kerr v. The Middlesex Hospital*, 2 De G. Mac. & G. 583; *Potter v. Baker*, 13 Beav. 273; 15 Beav. 489; *Pawson v. Pawson*, 19 Beav. 146; *Hill v. Rattey*, 2 J. & H. 634; *Ross Borer*, Ib. 469; *Bent v. Collins*, 6 L. R. Ch. App. 237; *Hicks v. Ross*, 26 L. T. R. (N. S.) 470; 14 L. R. Eq. 141. But the testator may show by the words of his will an intention only to give an annuity for life: *Banks v. Braithwaite*, 32 L. J. N. S. (Ch.) 198.

The gift of the produce of a fund, whether particular or reversionary *without limit as to time, is a gift of the fund itself: 3 Mac. & [*285] G. 540; 12 C. & F. 161.

A direction to purchase an annuity for A. in the British funds (*Kerr v. The Middlesex Hospital*, 2 De G. Mac. & G. 576), or in Government securities (*Ross v. Borer*, 2 J. & H. 469), will give him a perpetual annuity. But see *Re Groves' Trusts*, 1 Giff. 74.

A mere charge, however, of an annuity on property devised in fee simple, will not sufficiently show the intention of the testator that the duration of the annuity should correspond with the limits of the estate so charged: *Mansurgh v. Campbell*, 3 De G. & Jo. 237; *Sullivan v. Galbraith*, 4 I. R. Eq. 582.

And mere direction that an annuity is to be paid out of the testator's "general effects" (*Innes v. Mitchell*, 6 Ves. 464), or out of a particular fund (*Wilson v. Madison*, 2 Y. & C. C. C. 372), will not render the annuity perpetual, for it cannot be construed as an absolute gift of so much of the effects or fund necessary to purchase the annuity.

But other words in the will may show an intention that the annuity should be perpetual: *Pawson v. Pawson*, 19 Beav. 146.

If the Court once infers from the will, that the testator intended to give a sum certain per annum in perpetuity, the absence of any direction as to the particular part of the testator's property to be segregated or appropriated to meet it, is immaterial, as the Court will take care that a sufficient part of the testator's property is set apart for that purpose: *Stokes v. Heren*, 12 C. & F. 161; *Hill v. Rattey*, 2 J. & H. 634, 644; but see the remarks of Lord Campbell, C., in *Lett v. Randall*, 2 De G. F. & Jo. 392, 393.

The question often arises as to whether an annuity is a charge upon the corpus of a fund, or is payable only out of the income; this is a question of intention. Where a testator directs a sufficient sum to be set apart in order to produce an annuity, and does not leave sufficient assets (*Wright v. Callender*, 2 De G. Mac. & G. 652; *Miner v. Baldwin*, 1 Sim. & G. 522), or the sum set apart is originally insufficient

(*Bright v. Larcher*, 3 De G. & Jo. 148; and see *Perkins v. Cooke*, 2 J. & H. 393), or becomes so in consequence of a reduction of interest, the annuitant will be entitled to be paid out of the corpus. Thus in *May v. Bennett*, 1 Russ. 370, a testator directed his executors to lay out in what Government securities they pleased, as much money as would produce the annual interest of 54*l.* 12*s.* per year to his wife during her life, in case she did not marry again. The executors invested in the 5*l.* per cents. a sum which yielded dividends exactly equal to the specified income. Those dividends being afterwards diminished by the conversion [*286] of *the 5*l.* per cents. into 4*l.* per cents., it was held by Lord Gifford, M. R., that the widow was entitled to have the deficiency made good, either by the sale from time to time of portions of the appropriated stock, or out of any other part of the residue which could be made available. See also *Mills v. Drewitt*, 20 Beav. 632; *Percy v. Percy*, 35 Beav. 295.

Where the dividends of a fund in Court are insufficient for the payment of an annuity charged upon it, a *prospective* order will be made for the sale from time to time of so much of the corpus as will, together with the dividends, be necessary for raising the amount of the annuity: *Hodge v. Lewin*, 1 Beav. 431; *Swallow v. Swallow*, Ib. 432, n.

Where the testator shows an intention that the fund out of which the annuity is payable should be preserved whole during the life of the annuitant, and at his death go over to another person, then the corpus is not liable to make up the deficiency of the income of the fund to pay the annuity. Thus in *Foster v. Smith*, 1 Ph. 629, a testator devised certain real estates to trustees in trust to receive the rents and profits, and thereout to pay to his wife the clear annuity of 200*l.* during her life, and *from and immediately after the decease of his wife*, upon trust to convey the estates to his three sisters. It was held by Lord Cottingham, C. (reversing the decision of Knight Bruce, V. C., 2 Y. & C. C. C. 193), that the annuity was a charge only on the rents which accrued during the life of the widow, and not on the corpus. "There can be no doubt," said his Lordship, "that if the trust had simply been to receive the rents, issues, and profits of the estates when and as the same should become due and payable, and thereout to pay to his wife, if she should survive the testator, an annuity of 200*l.* for her life, that this would have been a charge upon the rents, until the whole amount of the annuity with the arrears had been paid. And the trustees, after the death of the widow would have been bound to apply the rents accordingly. But in this case a new trust arises on her death; for the trustees are directed, 'from and immediately after that event,' to convey the estate to the sisters; and if they perform their trust, which I think they are bound to do, they would be disabled from applying the subsequent rents to the discharge of the arrears. To obviate this, it is proposed to construe the direction to convey to the sisters on

the death of the widow, as if it had been a direction to convey *subject* to the annuity. But this would essentially alter the testator's will; in fact, to make a new will. And I think there is nothing in the will to justify it." See also *Earle v. Bellingham*, 24 Beav. 445; *Baker v. Baker*, 6 Ho. Lo. *Ca. 616; *Tarbottom v. Earle*, 11 W. R. [*287] (V. C. S.) 680; *Sheppard v. Sheppard*, 32 Beav. 194.

But where an annuitant acquiesced during her whole life without asserting her right to be paid the full annuity by resorting to the corpus, and stood by allowing dealings to take place on the faith that the corpus was not liable to diminution, it was held that her representatives could not enforce a claim to any arrears of the annuity: *Upton v. Vanner*, 1 Drew. & Sm. 594.

Where an annuity is charged upon real (*Picard v. Mitchell*, 14 Beav. 103; *Hobson v. Neale*, 17 Beav. 182; *Byam v. Sutton*, 19 Beav. 556; *Howarth v. Rothwell*, 30 Beav. 516; and see cases cited, *Ib.*, p. 519, note) or personal (*Gordon v. Bowden*, 6 Madd. 342; *Swallow v. Swallow*, 1 Beav. 432, n.) property, the corpus is liable for the arrears.

Secus, where there is a trust to pay the annuities out of the growing profits: *Phillips v. Phillips*, 8 Beav. 193; *Miller v. Huddleston*, 3 Mac. & G. 513, 530; *Hindle v. Taylor*, 20 Beav. 109; *Addcott v. Addcott*, 29 Beav. 460; *Salvin v. Weston*, 14 W. R. (V. C. W.) 757.

Where there is a general and indefinite trust to receive rents and profits for the payment of an annuity, it amounts to an indefinite charge of the annuity on the corpus, which will consequently be payable out of it. Thus in *Phillips v. Gutteridge*, 11 W. R. (L. C.) 12; 32 L. J. (Ch.) 1, a testator bequeathed leasehold land and ground rents to a trustee upon trust to receive the rents, issues, and profits, and pay the annual sum of 60*l.* to H. for her life, and after her decease, to raise by sale or mortgage 400*l.*, to be divided as therein mentioned. And upon further trust, "after the performance of *all the before mentioned trusts*, upon trust to assign the said land, ground rents, and premises or such part thereof as should remain undisposed of to his son absolutely." It was held by Lord Westbury, C., affirming the decision of Sir J. Stuart, V. C., that the annuity was a charge upon the corpus. So, in *Birch v. Sherratt*, 2 L. R. Ch. App. 644, a testator directed his trustees to convert and invest his property, and "with and out of the interest, dividends, and annual proceeds thereof, levy and raise the annual sum of 100*l.*," and pay it to his mother for life, "*and from and after the payment of the said annual sum of 100*l.*, and subject thereto*," he declared that the trustees should stand possessed of his said trust monies, stocks, and securities, upon the trusts thereafter mentioned. The income of the estate being insufficient to pay the annuity, it was held by the Lords Justices, reversing the decision of Sir John Stuart, V. C. (4 L. R. Eq. 58), that the deficiency must be paid out of the corpus. "If," said Rolt, L. J., "an annuity is given out of the rents and profits, or

[*288] dividends *and interest, and the capital or corpus is given intact, from and after the annuitant's death, to another, the case is equivalent to the case of a life interest with remainder over. But if the capital is given over, not 'from and after the annuitant's death,' but, 'from and after satisfaction of the annuity and subject to the annuity,' then I think the case is equivalent to the case of a legacy and a residuary bequest, especially if the gift of the annuity itself admits of a construction charging it on the capital of the estate or of the trust fund." See also, *Bell v. Bell*, 6 Ir. Eq. 239.

An annuity may, according to the construction of a will, be held to be after the death of the annuitant a continuing charge upon rents and profits, until the arrears of the annuity are paid, but not a charge upon the corpus. Thus, in *Booth v. Coulton*, 5 L. R. Ch. App. 684, a testator gave his real and personal estate to trustees, in trust to pay his debts and legacies, and then out of the annual profits of the residue, to pay three life-annuities, and "subject as aforesaid," to stand possessed of the residue, upon trust to apply the income for the benefit of G. Booth for life, and after his death he gave the residue to P. Booth. The income of the residue proved insufficient to pay the three annuities in full, and the trustees paid them rateably till November, 1868, when one of the annuitants died, with an arrear owing to him; the tenant for life being still living. It was held by Lord Justice Giffard, varying the decision of Sir John Stuart, V. C., that the annuities were a continuous charge on the rents and profits, and that the rents and profits since November, 1868, must be applied, first in payment of the arrears of the three annuities *pari-passu*, and then in payment of the two subsisting annuities. And see *Stelfox v. Sugden*, Johns. 234.

Where a testator directs an annuity to be *purchased*, the annuitant is entitled to receive the money necessary to purchase the annuity (*Ford v. Batley*, 17 Beav. 303; *Yates v. Yates*, 28 Beav. 641; and see *Palmer v. Crauford*, 3 Swanst. 482, 488; *Dawson v. Hearn*, 1 Russ. & My. 606; *Woodmeston v. Walker*, 2 Russ. & My. 197; *Day v. Day*, 1 Drew. 569), even although there be a declaration in the will that he shall not be allowed to receive the value of the annuity in lieu thereof (*Stokes v. Cheek*, 28 Beav. 620): for it is obvious that if an annuity were purchased he might sell it immediately. *Ib.* 261.

And it is immaterial in case the annuitant is a man (*Day v. Day*, 1 Drew. 560) or an unmarried woman (*Woodmeston v. Walker*, 2 Russ. & My. 197; *Re Browne's Will*, 27 Beav. 324), that the annuity is directed to be paid into their hands without power of anticipation, or that there is a gift over upon bankruptcy or alienation; [*289] *Day v. Day*, 1 Drew. 569, *sed vide contra*, *Power v. Hayne*, 8 L. R. Eq. 262. And if the annuitant dies before the purchase is effected, his personal representative will be entitled to the money so directed to be

laid out: *Ib.*, and see *Barnes v. Rowley*, 3 Ves. 305; *Palmer v. Crawford*, 4 Swanst. 482, 488.

And the result is the same where the money to be invested is to arise from residuary estate (*Day v. Day*, 1 Drew. 569), or from the sale of land, and the annuitant dies during the life of a person taking a prior interest. Thus, in *Bayley v. Bishop*, 9 Ves. 6, the testator devised an estate to his wife for life, and after her decease to trustees upon trust to sell, and with the money arising from the sale (after paying certain legacies) to lay out 500*l.* in the purchase of an annuity for his son. The son died during the life of the wife. It was held by Sir William Grant, M. R., that the administratrix of the son was entitled to the 500*l.* "It is clear," said his Honor, "that the testator meant an annuity to be purchased with the 500*l.*; which is the same in effect as giving a legacy of 500*l.* to his son; for upon a bill filed he might have received the money; and the Court would not have compelled the trustees to lay it out in an annuity. . . . Taking this then as a pecuniary legacy of 500*l.*, the question is whether it fails by the death of the son in the life of the widow? I am of opinion that it does not. The remainder to the trustees was a vested interest at the testator's death. If the wife had then been dead, the trust must have been immediately executed, the estate sold, and the money distributed. It was therefore merely on account of the estate for life in the widow, and not with reference to the circumstances of the legatees, that the sale and payment were postponed. It is impossible to reconcile all the cases of legacies payable out of land. But upon the authority of *Dawson v. Killet* (1 Bro. C. C. 119), I must hold this vested upon the testator's death." See also *Day v. Day*, 1 Drew. 569.

Where, however, a testator does not direct an annuity to be *bought*, but has entered into a covenant to pay, or directs the payment of, one out of his estate, the annuitant is not entitled to have the estate, or a portion of it, sold for the purpose of obtaining payment of the value of the annuity in a gross sum: *Yates v. Yates*, 28 Beav. 637, 641.

Whether Bequests contained in a Residuary Clause are Specific or General.—The question, whether a bequest contained in a residuary clause is specific or general, is of much importance where the attempt is made to shift the primary liability of the personalty upon realty (see *Ancaster v. *Mayer*, *ante*, vol. i. p. 630); and where the personal estate comprised in such clause consists of property of a [*290] wasting nature, as long annuities and leaseholds, is given to persons in succession. See *Howe v. Earl of Dartmouth*, *post*, 320.

Legatee's right of selection.—If a testator bequeaths to a legatee a given number of articles, forming part of a stock of articles of the same description; as, for instances, if he has twenty horses in his stable, and bequeaths six of them, the legatee has the right of selection: *Jacques*

v. Chambers, 2 Coll. 435; *Richards v. Richards*, 9 Price, 226; *Kennedy v. Kennedy*, 10 Hare, 438.

Upon the same principle where the main object of a gift is to benefit the person who is to take, and no other person is interested in the bequest—in such case if the gift cannot be applied to the purpose specified, or if the legatee prefers to have it otherwise applied, he has the option of saying, that although the testator has expressed his desire that the benefit shall be conferred in a particular form, he does not like to take it in that manner, and may ask the Court to give him the property absolutely.

Thus in *Re Skinner's Trusts*, 1 J. & H. 102, a testator bequeathed manuscripts to trustees "for my grandson that they may provide for the said books being published to the best advantage for the interests of the said child, so as to contribute towards raising a fund to assist him when he goes to College," and bequeathed 1000*l.* towards the printing: it was held by Sir W. Page Wood, V. C., that the grandson was entitled to elect to take the 1000*l.*, it appearing to be impossible to publish the book at a profit. And see *Sidney v. Vaughan*, 2 Bro. P. C. 254.

Where, however, there is another purpose distinctly and clearly expressed, independent of the object of benefiting the legatee, and beyond the mere intimation of a wish as to the mode by which the benefit should be conferred, the principle will not apply, and the legatee cannot elect: per Sir W. P. Wood, V. C., in *Re Skinner's Trusts*, 1 J. & H. 105; and see *Lassence v. Tierney*, 1 Mac. & G. 551; *Trimmer v. Danby*, 2 Jur. N. S. 267; *Lonsdale v. Berchtoldt*, 3 K. & J. 185; *Cowper v. Mantel*, 22 Beav. 231.

Ademption of Legacies.—A general legacy, as it is payable out of the personal assets generally, will not, if they are sufficient for that purpose, be liable to ademption, except in the case of a legacy to a child where a subsequent portion is given by the parent or person in loco parentis. As to which see note to *Ex parte Pye*, post.

The claims of a specific legatee will be defeated, if the thing specifically bequeathed to him be not *in existence at the time of the [*291] testator's decease;—the legacy, to use the common expression, being adeemed. It must not, however, be supposed that the ademption of a specific legacy is in principle in any way similar to the ademption of a general legacy by a portion; for, in the latter case, all depends upon the intention, either express or presumed, of a parent or one in loco parentis to substitute a portion for a legacy; in the former, the intention of the testator is immaterial. According to the rule, as laid down by Lord Thurlow in the principal case, the question in these cases will be, whether the legacy be specific, and, if so, whether it is in existence at the testator's death. In a subsequent case, Lord Thurlow again repeats the rule laid down in the principal case, in language strongly

condemnatory of those authorities which proceeded upon the notion, that the animus adimendi should be considered. "When," said his Lordship, "the case of *Ashburner v. Macguire* was before me, I took all the pains I could to sift the several cases upon the subject, and I could find no certain rule to be drawn from them except this—to inquire whether the legacy was a specific legacy (which is generally the difficult question in these cases), and, if specific, whether the thing remained at the testator's death; and one must consider it in the same manner as if a testator had given a particular horse to A. B.; if that horse died in the testator's lifetime, or was disposed of by him, then there is nothing on which the bequests can operate. The idea of proceeding upon the animus adimendi has introduced a degree of confusion in the cases, which is inexplicable, and I can make out no precise rule from them upon that ground. . . . It will be a safer and clearer way to adhere to the plain rule which I before mentioned, which is to inquire whether the specific thing given remains or not." *Stanley v. Potter*, 2 Cox, 182.

A specific legacy of goods at a particular place, will, in general, be adeemed by their removal. Thus in *Green v. Symonds*, 1 Bro. C. C. 129, n., the testator bequeathed to C. all his books at his chambers in the Temple; he afterwards removed the books into the country, and it was held that the removal affected an ademption of the legacy. So, in *Heseltine v. Heseltine*, 3 Madd. 276, the testator gave to his wife all his household goods, &c., goods and chattels whatsoever, that should be in and about his dwelling-houses, in Doctors' Commons and at Walthamstow at the time of his decease; and after the making of his will, the testator took a house in Bedford-square, and removed to it the greater part of the furniture from his house in Doctors' Commons, and it was held by Sir J. Leach not to pass by the will. * "Probably," said his Honor, "if the testator had been asked whether he meant to give his wife the furniture in Bedford-square, he would have answered in the affirmative; but a gift of such furniture as should be in his house at Doctors' Commons, and at Walthamstow, at the time of his decease, cannot pass furniture which at the time of his decease was in his house in Bedford-square." And see *Colleton v. Grath*, 6 Sim. 19; *Spencer v. Spencer*, 21 Beav. 548; but see *Blagrove v. Coore*, 27 Beav. 138. [*292]

The like result will follow if the goods are removed by an agent, with the testator's approbation: *Shaftsbury v. Shaftsbury*, 2 Vern. 747.

A legacy of specific chattels will be adeemed upon their total loss or destruction during the life of, or at the same time as the death of, the testator, even although they may have been insured, and their value recovered from the insurers. See *Durrant v. Friend*, 5 De G. & Sm. 343. There a testator gave specific chattels to a legatee, and the residue of his estate and effects to his executors; and having insured the

chattels, he took them with him on an Indian voyage. The ship was lost at sea, the goods perished, and the testator was drowned. The executors received the monies in which the goods had been insured from the insurers. In a suit for the administration of the testator's estate, it was held by Sir James Parker, V. C., that the testator and the chattels having perished together, the legatee had no interest in the chattels, and consequently not in the insurance money; but that it vested in the executors as part of the residuary estate.

A mere temporary or accidental removal may not amount to an ademtion. Thus, in *Land v. Devaynes*, 4 Bro. C. C. 537, a testator gave all his plate and linen in his house in S. (with the lease) to his wife. He had but one set of plate and linen, which was usually removed, with the family, from house to house. The plate happened to be at B., the country house, at his death, yet it passed to the wife. So, likewise, under a bequest of household furniture, pictures, and books, which might be at the testator's decease in, upon, or about his mansion, it has been held, that pictures removed from the mansion, and in the hands of a picture-cleaner to be cleaned, and books sent to be repaired, passed, but not articles purchased for the mansion, and not sent home at the testator's decease: *Lord Brooke v. Earl of Warwick*, 2 De G. & Sm. 425; see also *Spencer v. Spencer*, 21 Beav. 548. So ademtion has been held not to take place by the removal for safe custody of [*293] plate to a banker's (*Domvile v. Baker*, 32 Beav. 604), or of furniture *and other articles to a warehouse (*Ib.*).

So it seems that ademtion will not take place if the goods are removed on account of a fire. "They should be considered," says Lord Hardwicke, "as being in the testator's house at his death, and the legacy is not defeated by that accident" (*Chapman v. Hart*, 1 Ves. 271); nor if they are removed fraudulently, to disappoint the legacy, or by a tortious act unknown to the testator: *Shaftsbury v. Shaftsbury*, 2 Vern. 747, 748, n. 2; *Domvile v. Taylor*, 32 Beav. 604.

A distinction has been taken by Lord Hardwicke between a legacy of goods on board a ship and in a house, although he knew of no case of the kind; he thought that the bequest of goods on board a ship must be supposed to be made in consideration of the several contingencies and accidents they were liable to; and if it should be determined, that if by any accident they should not be on board at the testator's death, they should not pass, it would defeat several marine wills. If the goods were removed to preserve them, the ship being leaky, or likely to founder; or if the testator was removed to another ship (a contingency he was subject to daily), and he was forced to obey, this would not defeat the legacy: *Chapman v. Hart*, 1 Ves. 273.

Where the words of a bequest have not necessarily a reference to a particular locality, the removal of the articles comprised in the bequest to a different place from that which they were in at the date of the will,

is immaterial. Thus in *Norris v. Norris*, 2 Coll. 719, where a testator bequeathed to his wife as follows: "All my interest in my house at Lavender Hill, the furniture, books, pictures, wines," &c. &c. After the date of his will, the testator removed from Lavender Hill to Spencer Lodge, taking with him furniture, books, pictures, wines, &c. He afterwards purchased more of these articles, and died at Spencer Lodge. It was held by Sir. J. L. Knight-Bruce, V. C., that his wife was entitled to the furniture, books, pictures, and wines which he had at the time of his death. "There may," said his Honor, "be room to suspect or conjecture that in using the expressions the furniture, books, pictures, wines, &c. &c., the testator had in his mind only such effects within the description, as were then, or as at his death might be, in the dwelling-house then occupied by him; especially when their place in the will is observed. But the expressions themselves have not necessarily so restricted a meaning—have not, necessarily, any local reference. It would, I think, be giving too much weight to the use of the definite article, and the particular position of the phrase, so as to *con- [294] fine the construction. The language must, I conceive, be taken to have been used generally, not with regard to any particular place, nor with regard only to such 'furniture, books, pictures, wines,' &c., as he had when he made his will."

If a debt, specifically bequeathed, be received by the testator, it will be adeemed, for there exists nothing for the will to operate upon: *Rider v. Wager*, 2 P. Wms. 329, 330, 331; *Birch v. Baker*, Mos. 373; *Badrich v. Stevens*, 3 Bro. C. C. 431; *Stanley v. Potter*, 2 Cox. 180; *Fry v. Morris*, 9 Ves. 360. See also *Barker v. Rayner*, 5 Madd. 208. There a testator bequeathed two policies effected upon the life of his wife, to his executors, upon trust to pay the premiums during the life of his wife, and after her death, after making certain payments, to put out the residue of the money to be received by virtue of the policies upon real or Government securities, upon trust for certain persons. The testator's wife having died during his life, he received the amount of the two policies, and, after paying thereout a sum to secure which they had been assigned, invested the residue in securities, upon which it remained at the time of his death. Sir John Leach, V. C., held that the legacy was adeemed. "In the case of *Ashburner v. Macguire*," said his Honor, "Lord Thurlow entered very fully into the consideration of all the cases which are to be found upon this subject. And in that case, and still more unequivocally in the case of *Stanley v. Potter*, in Mr. Cox's Reports, he altogether repudiated the principle of the animus adimendi, as tending to inexplicable confusion; and held, that when it was once determined that the legacy of the debt was specific, and not demonstrative, that the only safe and clear way was to adhere to the plain rule—that there is an end of a specific gift, if the specific thing do not exist at the testator's death. It may be questionable, from the cases of *Coleman v.*

Coleman (2 Ves. jun. 639), and *Roberts v. Pocock* (4 Ves. 150), whether Lord Rosslyn fully adopted the principle of Lord Thurlow; but the cases of *Fryer v. Morris* (9 Ves. 360), and *Le Grice v. Finch* (3 Mer. 51), before Sir W. Grant, appear to me to manifest, by necessary inference, that the learned judge considered the law to be so settled. Taking it, therefore, as an established principle, that, in the case of a specific gift, the Court is only to inquire whether the specific thing remains at the death of the testator, and cannot enter into the consideration, whether it has or not ceased to exist by an intention to adeem on the part of the testator, it necessarily follows, that, in the present case, I am bound to declare that the legacies of the policies of insurance, being [*295] *a specific gift, has altogether failed, by the non-existence of the policies at the death of the testator." This decision, on appeal was affirmed by Lord Eldon, 2 Russ. 122.

In *Gardner v. Hatton*, 6 Sim. 93, the testator bequeathed 7000*l.*, secured on mortgage of an estate at W., belonging to R. T. The 7000*l.* and interest were received after the date of the will by the testator's agent, on his account, and immediately afterwards 6000*l.*, part of it, was invested on another mortgage, and the remainder was paid into a bank in which the testator had no other monies, but was afterwards drawn out by a person to whom the testator had given a cheque for the amount. It was held by Sir L. Shadwell, V. C., that the legacy was specific, and notwithstanding the 6000*l.* remained due on the second mortgage at the testator's death, that the legacy was wholly adeemed. "My opinion," said his Honor, "is that when the testator received the whole of the debt, there was an end of the subject, and, consequently, that this is a clear case of ademption." See, also, *Phillips v. Turner*, 17 Beav. 194; *Sidebotham v. Watson*, 11 Hare, 170; *Gale v. Gale*, 21 Beav. 349; *Jones v. Southall*, 32 Beav. 31.

The principles, therefore, laid down by Lord Thurlow being clearly established, we may consider that the distinction taken in some of the older decisions (see *Orme v. Smith*, 1 Eq. Ca. Ab. 230, pl. 2; 2 Vern. 681; *Partridge v. Partridge*, Ca. t. Talb. 228; *Crockat v. Crockat*, 2 P. Wms. 165; *Rider v. Wager*, 2 P. Wms. 330; *Earl of Thomond v. Earl of Suffolk*, 1 P. Wms. 464; *Drinkwater v. Falconer*, 2 Ves. 624; *Ford v. Fleming*, 2 P. Wms. 469; *Ashton v. Ashton*, 3 P. Wms. 385; *Hambling v. Lister*, Amb. 402), viz. between a voluntary and compulsory payment of a debt to the testator, and the argument which prevailed, that in the former case it might be presumed there was no animus adimendi, is no longer of any weight.

A partial receipt of a debt will, as was held by Lord Thurlow, in the principal case, only be an ademption pro tanto: *Jones v. Southall*, 32 Beav. 31.

Under particular circumstances the receipt of a debt has not been held to amount to an ademption. Thus, in *Crockat v. Crockat*, 2 P.

Wms. 164, the testator, who had placed in a goldsmith's hands 550*l.* for which he had taken a note payable to him or order, by his will gave to his sister the sum of 550*l.* which was then in the hands of the goldsmith. The testator had, *before* making his will, drawn some bills on the goldsmith, for several sums of money, which, in all, had reduced the 550*l.* to 430*l.* Sir Joseph Jekyll, M. R., held that the legacy was not partially adeemed. **"These payments out of the 550*l.* in the hands of Mr. Ellis having been all ordered by the testator before the* [*296] *making of his will, this cannot be said to be an ademption of the legacy, but is an express indication of the testator's intention, that as the note for the full sum of 550*l.* was still standing out, notwithstanding he had ordered the payment in of part of the note, yet he renounced all those payments, and willed that the whole 550*l.* should be the legacy which he gave to his sister."* In *Graves v. Hughes*, 4 Madd. 381, the testatrix, by a codicil to her will, bequeathed to W. H. and M. H. an arrear of interest due on a mortgage, amounting to 600*l.*, as she computed the same. After making the codicil, she lived eleven years, and received interest from the mortgagor, to the amount of 648*l.* On a reference to the Master, he found that 646*l.* 8*s.* 3*d.* was due to the testatrix for interest when she made her codicil, and that a sum to that amount was due to her for interest when she died; and, upon an affidavit he found that the interest received by the testatrix after the making of the codicil *was so received in respect of interest after the making of the codicil*, leaving outstanding the arrear of interest due when she made the codicil. Sir J. Leach, V. C., held, that the legacy was not adeemed by the receipt of interest subsequent to the making of the codicil. "*Prima facie,*" said his Honor, "*the money received subsequent to the codicil was applicable in payment of the interest which first became due; but the testatrix might, if she chose, apply the money in discharge of the interest which accrued due subsequent to the making of the codicil, and leave the interest due when she made her codicil, as an outstanding debt; and the affidavit mentioned in the Master's report proves that fact, and is admissible as proof of the testatrix's intention:*" *Earl of Thomond v. Earl of Suffolk*, 1 P. Wms. 462, 464; *Pulsford v. Hunter*, 3 Bro. C. C. 416.

A bequest of a debt may be in its terms so comprehensive as to extend to the fund in its altered state after it has been received by the testator: *Clark v. Browne*, 2 Sm. & G. 524.

Where stock is standing in the name of a trustee at the time a testator makes a specific bequest of it, but is afterwards transferred to and sold out by him, and cannot be traced, being spent or mixed with his other monies, the legacy will be adeemed (*Lee v. Lee*, 27 L. J. (Ch.) 824); but where a testator makes a specific bequest of the stock it will not be adeemed by a transfer, after the date of the will, into his own

name. *Lee v. Lee*, 27 L. J. (Ch.) 824. See also *Moore v. Moore*, 29 Beav. 496; *Jones v. Southall*, 32 Beav. 31.

The question has arisen, whether a testator, who, having made [*297] *a specific bequest of stock, sells it, and afterwards purchases the same or less amount of the same stock, will thereby either wholly or partially revive the specific bequest. Lord Talbot, in *Partridge v. Partridge*, Ca. t. Talb. 226, 227, seems to have thought that he would. "All cases of ademption of legacies," observed his Lordship, "arise from a supposed alteration of the intention of the testator; and if the selling out of the stock is an evidence to presume an alteration of such intention, surely his buying in again is as strong an evidence of his intention that the legatee should have it again." And see *Aveling v. Ward*, 1 Ves. 426; *Drinkwater v. Falconer*, 2 Ves. 625. According, however, to the rule laid down by Lord Thurlow, in the principal case, the intention of the testator will not be taken into consideration. The question will be, Is the identical stock bequeathed by the testator in existence? And if that question is answered, as in such case it must be, in the negative, the legacy is adeemed. Thus, in *In re Gibson*, 2 L. R. Eq. 669, a testator, being at the time possessed of 1000l. "guaranteed stock" in the North British Railway, bequeathed to his son "my one thousand North British Railway Preference Shares." After making his will, he sold his North British guaranteed stock, and died possessed of shares and stock in the North British Railway, acquired by several successive purchases, exceeding the amount bequeathed to his son. It was held by Sir W. P. Wood, V. C., that the bequest, being of a specific thing, which had been adeemed, and was not in the testator's possession at the time of his death, a contrary intention, so as to exclude the operation of 1 Vict. c. 26, s. 24, sufficiently appeared upon the will, and that the son was not entitled to have his legacy satisfied out of the North British Railway shares and stocks in the testator's possession at the time of his death. "Suppose," said his Honor, "a man to have at the date of his will, a picture of the Holy Family, by some inferior artist, and to give by his will 'my Holy Family.' He afterwards disposes of this picture, and subsequently acquires by purchase or gift a very much better one, on the same subject, painted by an eminent artist. Would it not be a monstrous construction to hold, that the picture existing in the testator's possession at the time of his death would pass? When there is a clearly indicated intention upon the face of the will, to give the single specific thing and nothing else, it would be a very narrow construction of the words of section 24 of the Wills Act, to hold that you must sweep in everything to which the words might be held to apply, without the slightest reference to the state of things existing at the *date of the will. It is true that the testator had not at the [*298] date of his will 1000 shares, but 1000 guaranteed stock. But he had nothing else to which the words of the will could be applied, and

no one could doubt that this stock was the thing pointed out by the will. After the date of his will he sold this 1000*l.* stock, and purchased not uno ictu, but bit by bit, a number of other shares or stock. This bit-by-bit purchase would not come within the reasoning of Lord Hardwicke in *Avelyn v. Ward*, (1 Ves. 423), as being a substitution of one entire fund for another. On the contrary, it was rather like the purchase of some totally different article. . . . I adhere to my view, that where there is a distinct reference to a distinct and specific thing, and not to a genus, there is sufficient indication of 'a contrary intention, to exclude the operation of the rule established by the 24th section of the Wills Act, and limit the operation of the will to the state of things existing at the date of the will. In this case, the testator, at the time of his death, had not this specific stock in any shape. He had parted with it, and acquired by subsequent purchase a much larger number of shares. These subsequent purchases were not in any shape a replacing of the original fund, and there is nothing to lead the Court to suppose that, having once adeemed the specific bequest, the testator had replaced the identical thing. He has distinctly referred to one thing in his will, which was no longer in existence at the time of his death: that thing, and that only, can be considered as the subject of the bequest. I must, therefore, hold that the claim of the son to have his legacy satisfied out of the New Guaranteed North British Stock existing at the testator's death, fails." See also *Pattison v. Pattison*, 1 My. & K. 12.

Where, however, the thing specifically given has been changed in name and form only, and is in existence substantially the same, though in a different shape, at the time of the testator's death, it will not be considered as adeemed by such a nominal change. Thus, if stock is converted into a different species by Act of Parliament (*Partridge v. Partridge*, Ca. t. Talb. 226, 228; *Bronsdon v. Winter*, Amb. 57, 59), or is merely transferred from the names of trustees into the name of the testator (*Dingwell v. Askeu*, 1 Cox, 427; and see Amb. 260; 3 Bro. C. C. 416; Moore, 273, 376), it will not be adeemed. So likewise, in the recent case of *Oakes v. Oakes*, 9 Hare, 666, where a testator had bequeathed all his Great Western Railway shares and all other the railway shares which he might be possessed of at the time of his decease: it was held by Sir George Turner, V. C., that the bequest was not adeemed, *in consequence of the Great Western shares which the testator had at the date of his will having been converted, [*299] by a resolution of the company under the authority of an Act of Parliament, into consolidated stock, but that consolidated stock in the same company, purchased by the testator after the date of his will, did not pass under the bequest of the Great Western Railway shares to the legatee.

Moreover, where stock specifically bequeathed has been transferred

by fraud or practice, on purpose to disappoint the legacy; or by tortious act, unknown to the testator (*Shaftsbury v. Shaftsbury*, 2 Vern. 747, 748, n 2); or without his authority (*Basan v. Brandon*, 8 Sim. 171); or if he die before the authority given to his agent to transfer be carried into effect (*Basun v. Brandon*, 8 Sim. 171; *Harrison v. Asher*, 2 De G. & Sm. 436): in all these cases there will be no ademtion.

Where a person after making by his will specific bequests, becomes insane, and other persons without authority dispose of the things so bequeathed, the question arises whether they will be thereby adeemed. In the case of *Browne v. Groombridge*, 4 Madd. 495, a testator gave to his wife all his ready money and bank notes which he should have about his person, or in or about his usual residence, at the time of his decease. He gave specifically to others all his exchequer bills and stock standing in his name at the time of his decease. The testator became insane, and during his incapacity several large sumes of money which were paid to him was invested in his behalf and in his name in the purchase of stock and exchequer bills. His wife died during the testator's lifetime, whereby her legacy lapsed. It was held by Sir John Leach, V. C., that the specific legatees of the stock and exchequer bills were entitled to the stock and exchequer bills so purchased, and that the next of kin of the husband did not take them as being "ready money," to which they were entitled by reason of the lapse of the legacy to his wife. His Honor observed, "that in the bequest to his wife of the ready money and bank notes which testator should have about his person, or in or about his usual residence, at the time of his decease, he could contemplate only the floating cash, which he ordinarily kept about him. That it was the duty of those who managed the testator's affairs, during his incapacity, to act as a provident owner would do, and not to have large sums of money unemployed. That there was no equity between the legatees; and as between them property *duly converted* must be taken in the state and character in which it is found at the death of the testator."

As a general rule, however, notwithstanding the decision in [*300] *Browne v. Groombridge*, the unauthorized acts of parties will not effect a conversion so as to disappoint the specific legatees of a person who has become insane after he made his will. See *Taylor v. Taylor*, 10 Hare, 475: there a testator, who was a shop-keeper, had made a will, bequeathing his leasehold house and shop, and stock in trade therein, to his wife (subject to certain trusts, which failed), and giving his residuary estate in another manner. He became insane. No commission in lunacy was taken out, but his wife not being disposed or competent to carry on the trade, joined with the persons whom he had named executors, and also with the residuary legatees in an agreement for the sale of the leasehold premises and stock in trade therein, for a gross sum to be paid by instalments.

After this agreement was made, and possession of the property delivered to the purchaser, the testator died. The Court, in an administration suit, approved of the agreement as beneficial to the estate, and directed it to be carried into effect. It was held by Sir W. Page Wood, V. C., that notwithstanding the agreement for sale, and the transfer of the possession of the property specifically bequeathed, none of the parties having any lawful authority to effect such a sale, both the leasehold estate and the stock in trade must be taken as unconverted at the death of the testator, and passed to the specific legatee: see also *Jenkins v. Jones*, 2 L. R. Eq. 323.

Where *personal* property specifically bequeathed by a person who afterwards becomes lunatic, is sold under an order of the Court of Chancery in Lunacy, which does not preserve the rights of the legatees, the bequest will be adeemed. See *Jones v. Green*, 5 L. R. Eq. 555. There a testator, by will, bequeathed the income of shares in "the Assam Company" specifically, and bequeathed the shares to his residuary legatee. After the date of the will he was found lunatic; and by an order in lunacy the shares were directed to be sold, and the proceeds were invested in Consols. It was held by Sir G. M. Giffard, V. C., that as the provisions of the Lunacy Regulation Act (16 & 17 Vict. c. 70, s. 2, 119), whereby the rights of owners of property sold by the order of the Lord Chancellor in Lunacy are preserved, *extend only to land*, the gift of income was adeemed by the sale, and fell into the residue, "There might, no doubt," said his Honor, "have been a direction accompanying the order, that the proceeds of the shares were to belong to the same persons as were the owners of the original shares. But the order contains no such provision. What then is the result? All the authorities show that the conversion must be treated *as a lawful conversion, exactly as if the testator had himself converted the shares into Consols." [*301]

If a partner, under articles providing for the renewal of the partnership, specifically bequeath his share of the profits (naming the amount), and, upon the expiration of the old, new articles are entered into, by which his share in the profits is altered, the legacy will not be adeemed. See *Backwell v. Child*, Amb. 260, where Lord Hardwicke observed, "that, where a person *in trade* makes a provision out of his share for his family, and afterwards renews the partnership, by which, perhaps, his interest is varied, yet it is not a revocation; if it were, it would occasion great confusion." And see *Ellis v. Walker*, Amb. 309.

Generally, where leaseholds are specifically bequeathed, and the testator takes a new lease, the bequest will be adeemed, because the renewed lease is a different thing: the thing given no longer exists (*Abney v. Miller*, 2 Atk. 593; *Rudstone v. Anderson*, 2 Ves. 418; *Hone v. Medcraft*, 1 Bro. C. C. 261; *Slatter v. Noton*, 16 Ves. 197); unless, perhaps, where the legal estate is in a trustee (*Carle v. Carle*, 3 Atk.

174; *S. C.*, Amb. 28; *Ridgw. Ca. t. Hard.* 210; *Slatter v. Noton*, 16 Ves. 201). So, where a testator, after bequeathing leaseholds by his will, makes an assignment of them upon other trusts, it will amount to an ademption: *Cowper v. Mantell*, 22 Beav. 223.

But as a testator may undoubtedly dispose of the *future*, as well as his present interest in the chattel real, it is a question of intention what the subject of disposition is—whether only the interest which he had at the time of executing the will, or all the interest, though subsequently acquired, which he might have at his death in the leasehold premises; that intention is to be collected from the words used by the testator to express it. Per Lord Eldon, in *Slatter v. Noton*, 16 Ves. 109. And see *Colegrave v. Manby*, 6 Madd. 84.

Where an under lessee after his will takes an assignment of the original lease, it will amount to an ademption of the bequest of the under lease (*Porter v. Smith*, 16 Sim. 251), but he may by a codicil show his intention of passing his interest as it existed at his death. *Id.*

And now, by stat. 1 Vict. c. 26, s. 23, it is enacted, “that no conveyance or other act, made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by [*302] will at the time of his death.” *And by sect. 24, “that every will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.”

Where a testator, having given a general legacy, by a subsequent instrument makes it specific, the ademption of the specific legacy without more, will not set up the general legacy: *Hertford v. Lowther*, 7 Beav. 107.

A specific legacy, as is laid down in the principal case, will not be adeemed by the testator pledging or pawning it, and the legatee will be entitled to have it redeemed by the executor; or if he fail to perform that duty, the legatee is entitled to compensation out of the general assets, upon the same principle as the devisee of real estate was entitled to the redemption of the subject of a gift out of the general assets of the testator; *Knight v. Davis*, 3 My. & K. 361; *Ellis v. Eden*, 25 Beav. 482.

Where, however, by a deed of even date with a lease, the lessor covenanted that the lessee should retain part of each year's rent until satisfaction of a debt due from the lessor to the lessee; it was held by Sir W. Page Wood, V. C., that as between the executors and the specific legatees, the specific legatees took subject to the whole rent, and

that the benefit of the covenant for reduction of rent went to the executors: *Ledger v. Stanton*, 2 J. & H. 687.

The question by no means unfrequently arises how far a specific legatee of shares is entitled to have calls paid out of the testator's general estate. The cases upon this subject have been carefully reviewed by Sir John Romilly, M. R., in his elaborate judgment in *Armstrong v. Burnet*, 20 Beav. 424, 437, where it is laid down as the result of the cases, "that where the interest of the testator in the subject-matter which he professes to bequeath, is complete, or where it is so treated and considered by him and by all persons unconnected with it, as in the case of a share in an insurance company, then the future calls fall on the legatee and not on the general personal estate; but where further payments are required to make perfect the interest which the testator professes specifically to bequeath, then the general personal estate is applicable for that purpose:" *Marshall v. Holloway*, 5 Sim. 196; *Wright v. Warren*, 4 De G. & Sm. 367; *Barry v. Harding*, 1 J. & L. 475; *Fitzwilliams v. Kelly*, 10 Hare, 266; and see *Moffet v. Bates*, 3 Sm. & Giff. 468; *Addams v. Ferick*, 26 Beav. 384; *Day v. Day*, 1 Drew & Sm. 261. But see *Blount v. Hipkins*, 7 Sm. 43; *Jacques v. Chambers*, 2 Coll. 435; 4 Railw. Cas. 499; *Clive v. Clive*, Kay, 600; *Jones v. Ogle*, 41 L. J. Ch. (N. S.) 633.

*Where shares fully paid up are specifically bequeathed, the question whether the specific legatee or the residuary estate is liable to the future calls, depends on whether the calls are actually made before the testator's death. [*303]

In *Adams v. Ferick*, 26 Beav. 384, a testatrix bequeathed shares in a company. Before her death, three calls were authorized at stated intervals, but she died before two of these periods. It was held, by Sir J. Romilly, M. R., under the circumstances, and from the practice of the company, that the calls were not to be considered as really made, until a call-letter had been sent to the shareholders, and that as to those sent after the testatrix's death, the specific legatee and not the residuary estate must bear the calls.

The rule that a specific legatee of shares liable to calls must take them cum onere, does not apply to calls made in the lifetime of a person who is tenant for life of the whole residuary estate (including the shares) as an entire fund: *In re Box*, 1 Hem. & Mill. 552.

The true test is whether the shares have or not been separated from the general residue at the date of the call: *In re Box*, 1 Hem. & Mill. 552.

A gift of a specific legacy carries with it everything incident to the subject-matter of the gift. Therefore, as a general rule, bonuses which accrue due after the death of a testator upon shares specifically bequeathed by him, belong to the specific legatee (*Maclaren v. Stainton*, 3 De G. F. & Jo. 202, reversing S. C., 27 Beav. 460), even although

they may arise in consequence of the fraudulent retention of moneys which would have increased the dividends of any former owner, whether he be the testator or any person taking from him. *Ib.* And see *Edmondson v. Crosthwaite*, 34 Beav. 30; *The Carron Company v. Hunter*, 1 Ho. Lo. Sco. App. 362.

But where a bonus on shares has been declared during the life of the testator, it will not pass to the specific legatee, although payable after the death of the testator: *Lock v. Venables*, 27 Beav. 598.

So, in *De Gendre v. Kent*, 4 L. R. Eq. 283, in June, 1865, a dividend of 7 per cent. per annum upon certain shares held by the testatrix was declared payable on the 15th of July, 1865, and the 15th of January, 1866. The dividend was declared out of profits earned previous to the declaration thereof. The testatrix died on the 31st of December, 1865. It was held by Sir W. Page Wood, V. C., that the January dividend formed part of the corpus of her residuary estate, and did not pass under a bequest of the annual income of such residuary personal estate. *"[304] This dividend," said his Honor, "which was earned in the lifetime of the testatrix, though declared payable at a future time, was a debt due to her at the time of her death, and formed part of the corpus of her estate. She has given the tree to the plaintiff; but as to this particular fruit, it seems to have fallen during her (testatrix's) lifetime."

A bequest of 2,000*l.*, "insured on my life," with the H. Company, was held by Sir R. T. Kindersley, V. C., to pass a bonus due at the testator's death: *Roberts v. Edwards*, 33 Beav. 259; but see *Norris v. Harrison*, 2 Madd. 268.

Upon the same principle, the profits of a partnership made during a conventional period, which was wholly included in the testator's lifetime, will be considered to be capital belonging to the testator's estate, although these profits were not ascertained till some time after his death: *Browne v. Collins*, 12 L. R. Eq. 586, 593. And see *Ibbotson v. Elam*, 1 L. R. Eq. 188; 35 Beav. 594.

But where the dividends, although earned during the testator's life, are not declared until after his death, they will be considered as income: *Bates v. Mackinley*, 31 Beav. 280.

So, likewise, the profits of a partnership, though principally earned during the testator's life, will be considered as income, if the conventional period at which such profits are to be ascertained terminates after the testator's death: *Ibbotson v. Elam*, 1 L. R. Eq. 188; *Browne v. Collins*, 12 L. R. Eq. 586.

Where a testatrix gave shares in a bank to trustees, to pay the annual proceeds to her daughter for life, and the capital she gave in trust for her grandchildren, it was held by Sir R. T. Kindersley, V. C., that the bonuses declared upon the bank shares *out of the half-yearly profits*, were to be considered as income, and to belong to the tenant

for life; it would have been otherwise if the bonuses had been paid out of an accumulation of profits, running over several year: *Plumb v. Neild*, 29 L. J. (N. S.) Ch. 618. As to capitalizing profits, see *In re Ezekiel Barton's Trust*, 5 L. R. Eq. 238.

Where a dividend is declared upon shares during the life of a tenant for life, his representatives will be entitled to it, although it is not paid until after his death (*Wright v. Tuckett*, 1 J. & H. 266), unless the deed of settlement provides that in such case it shall be paid to some one else: *Clive v. Clive, Kay*, 600.

Where a testator had bequeathed some railway shares, "and all his right, title, and interest therein," it was held by Lord Langdale, M. R., that moneys which he had paid in advance beyond the calls, passed to the legatee: *Tanner v. Tanner*, 11 Beav. 69.

Where there is a specific bequest, *parol evidence is admissi- [*305] ble to show what property there is answering to the description of it; but if, on that evidence, it appears that there is property correctly answering the description, no evidence can be adduced to show that it was intended to apply to other property: *Horwood v. Griffith*, 4 De G. Mac. & G. 700.

A demonstrative legacy is not liable to ademption, although the fund out of which it is payable be not in existence at the death of the testator; the primary object is the gift of the legacy: the fund out of which it is payable is merely of secondary consideration. "Thus," as observed by Lord Macclesfield, "if a legacy was given to J. S., to be paid out of such a particular debt, and there should not appear to be any such debt, or the fund fail, still the legacy ought to be paid, and the failing of the modus appointed for payment should not defeat the legacy itself:" *Savile v. Blacket*, 1 P. Wms. 777—779; and see *Ellis v. Walker*, Amb. 310; *Chaworth v. Beech*, 4 Ves. 565; *Gillaume v. Adderley*, 15 Ves. 384; *Smith v. Fitzgerald*, 3 V. & B. 5; *Mann v. Copeland*, 2 Madd. 223; *Fowler v. Willoughby*, 2 S. & S. 354; *Willow v. Rhodes*, 2 Russ. 452; *Campbell v. Graham*, 1 Russ. & My. 453; *Creed v. Creed*, 11 C. & F. 509; *Williams v. Hughes*, 24 Beav. 474.

Where, however, a testator shows it to be his intention that a legatee is to be paid out of a particular fund *only*, upon its failure he will have no claim upon the general assets: *Coard v. Holderness*, 22 Beav. 391; and see *Bristow v. Bristow*, 5 Beav. 289.

The confirmation of a will by a codicil will not revive a legacy adeemed in the interval between the will and the codicil; *Cowper v. Mantell*, 22 Beav. 223; and see *Montague v. Montague*, 15 Beav. 565.

Where the gift of a pecuniary legacy which has been charged upon land is revoked by a subsequent will or codicil, giving all the personality to another, it will still remain a charge on the real estate, although that would not be so in the case of a specific legacy, which cannot from its nature be charged upon another fund. Thus, in *Kermode v.*

Macdonald, 3 L. R. Ch. App. 584, a testatrix by her will gave to M. G. "the interest, profits, or produce of 300*l.* British, or thereabouts, invested by her in the General Steam Navigation Company, and also the interest of 200*l.* British, for her life, and upon her decease, she gave "the said principal sum of 500*l.*" to the children of M. G. And she directed that in case of her personal estate proving insufficient for the payment of the legacies thereinbefore mentioned, then such deficiency should be made up out of her real estate by sale or mortgage. And she bequeathed the *residue of her personal estate to S. G. and [306] A. T.

By a codicil, the testatrix gave "all her personal estate" to A. C. M. It was held by Lord Justice Cairns, affirming the decision of Lord Romilly, M. R., 1 L. R. Eq. 457, that the whole personal estate passed by the codicil, and that the legacy of 300*l.* was specific, and was absolutely revoked by the codicil, and that the legacy of 200*l.* was revoked, so far as the personalty was concerned, but not with regard to the realty upon which it remained a charge. "The true principles," said his Lordship, "are stated very clearly by Lord Eldon in *Sheddon v. Goodrich* (8 Ves. 501). If you have a legacy given and charged upon two funds—and it makes no difference whether it is charged primarily or secondarily upon either—then if you find in a codicil a revocation of the legacy, of course the legacy is gone; but if you have such a charge, and then by a codicil or a subsequent part of a will a revocation of the gift of one of these funds, that does not operate as a revocation of the legacy, which remains unrevoked, and charged upon the other fund. It has been said that a legacy is a gift *pro tanto* of personal estate, and that if you find in a codicil a gift of the whole personal estate, that revokes the gift of the legacy. But that argument seems to assume the whole question in this case. If the will contained nothing but a gift of a pecuniary legacy, then the codicil would have revoked the gift of the legacy; but the will contains not merely a gift of a pecuniary legacy—it also contains a charge on the real estate; and the codicil operates merely on the personal estate."

Abatement of Legacies.—As has been before shown, in the administration of assets, general legacies are not applicable in payment of debts, until after the general personal estate, real estates devised for payment of debts, real estates descended, and real estates charged with payment of debts, have been exhausted; after which general legacies, in priority of specific legacies are applicable; or, if the whole amount of them is not wanted for that purpose, they must abate among themselves *pro rata*, *ante*, p. 137, 138.

A legacy at first sight appearing to be residuary may be shown by the testator's intention to be specific, in which case it will only abate with other specific legacies. An instance of this is to be found in the case of *Page v. Leapingwell*, 18 Ves. 463; there a testator devised land

upon trust to sell, but not for less than 10,000*l.*, and gave legacies there-out amounting to 7800*l.*, and "the overplus monies," to A. & B. The estate sold for less than 7000*l.*; Sir W. Grant, M. R., held that the *other legatees ought to abate equally with A. and B., his Honor being of opinion, that the inference to be drawn from the ex- [*307] pressions in the will was, that the testator did not mean by the word "overplus" what it usually imports, viz., whatever shall turn out to be the overplus; but that he was contemplating a *certain overplus*, and was making his disposition accordingly. "I conceive," he added, "the true intention to have been that these persons should take as specific legatees; and therefore they must abate among themselves." See also *Hewitt v. George*, 18 Beav. 522; *Hunt v. Berkely*, Mose. 47; *Laurie v. Clutton*, 15 Beav. 65; *Wright v. Weston*, 26 Beav. 429; *Duncan v. Duncan*, 27 Beav. 386; *Haslewood v. Green*, 28 Beav. 1; *Elwes v. Causton*, 30 Beav. 554; *In re Jeffery's Trust*, 2 L. R. Eq. 68; *Walpole v. Apthorp*, 4 L. R. Eq. 37; *Miller v. Huddleston*, 6 L. R. Eq. 65.

Where, however, a testator neither knows, nor assumes to know, the amount of a fund, and after bequeathing certain portions thereof, he makes a bequest of the residue, the latter must be applied first in payment of debts. See *Read v. Strangeways*, 14 Beav. 139; *Williams v. Armstrong*, 12 Ir. Eq. Rep. 356; *Vivian v. Mortlock*, 21 Beav. 252. And see *Carter v. Taggart*, 16 Sim. 423; *Loscombe v. Wintringham*, 12 Beav. 46; *Booth v. Alington*, 6 De G. Mac. & G. 613; *Greenwood v. Jemmett*, 26 Beav. 479; *Harley v. Moon*, 1 Drew. & Sm. 623; *Baker v. Farmer*, 3 L. R. Ch. App. 537, reversing *S. C.*, 4 L. R. Eq. 382.

In *Petre v. Petre*, 14 Beav. 197, where a testator having a power of appointment by will over 7100*l.* $3\frac{1}{4}$ per cents., appointed 5000*l.*, part of the trust funds to A. and 500*l.* to B., and the residue to his son. The stock having upon the appointment become liable in equity to the payment of debts, it was held by Sir John Romilly, M. R., that the residue was first applicable towards their payment. "The authority," said his Honor, "of *Page v. Leapingwell* applies where the testator disposes of an estate which he assumes will produce a given sum, or with an ascertained fund, in which case it is indifferent, whether after he has given certain portions, he specifies the remainder by stating its amount or by comprising it under the term 'residue.' But in this case, so far from knowing the amount of the fund, the testator could have no conception of it; for it was impossible to ascertain the amount until the fund had been realised by a sale, and the charges on it known. If in this case it appeared that the testator thought he was dealing with a sum of 7100*l.* sterling, and he had divided it into different proportions, the loss would then fall on all the persons interested in proportion *to their shares, although the last portions were called 'the residue' but that is not the case here." [*308]

The decision, however, of *Petre v. Petre* seems to be scarcely consis-

tent with *In re Jeffry's Trust*, 2 L. R. Eq. 68: there a testator bequeathed as follows: "The pink coupons in the pigeon-hole are for 3666*l.*, send those to Irving and Slade, 1 Copthall Court, and he is to pay to Ellen Tomkins 2500*l.*, and the rest for Archdeacon Giles for Bess and Eddie." It was held by Sir W. Page Wood, V. C., that the case fell within the decision in *Page v. Leapingwell*, and that it was plain that it was a specific gift of the coupons of 2500*l.* to A. and the rest to B.

A question sometimes arises between pecuniary and residuary legatees, where there has been a devastavit by the executor, whether the pecuniary legatees ought not to share the loss proportionably with the residuary legatees. The better opinion, in opposition to that of Lord Cowper, in *Dyose v. Dyose*, 1 P. Wms. 305, is, that they ought not. See *Fonnereau v. Poyntz*, 1 Bro. C. C. 478; *Humphreys v. Humphreys*, 2 Cox, 184; *Page v. Leapingwell*, 18 Ves. 466; and *Wilmott v. Jenkins*, 1 Beav. 501; *In re Lyne's Estate*; 8 L. R. Eq. 482.

But the case may be varied by the dealings of the pecuniary legatees with the executor as by suffering their legacies to remain in his hands, and receiving interest thereon, thus making him their debtor; for then they may be considered to have waived their priority under the will, and will only be entitled to have what is left divided between them and the residuary legatees, in the proportion of the amount of their legacies, and of the residue, as it was computed at the death of the testator, with interest on each: *Ex parte Chadwin*, 3 Swanst. 380. See and consider *Mallory v. French*, 11 Ir. Eq. Rep. 376. In other words, "If all the legatees have consented that they will have the fund out of which their legacies are payable appropriated as a specific sum, it is the same as if the testator had appropriated it; and if any part of the fund is lost they must all suffer rateably. But unless there is this common consent, we must look to the intention of the testator and to nothing afterwards." Per Lord Justice Wood, in *Baker v. Farmer*, 3 L. R. Ch. App. 541. Where one of several residuary legatees, or next of kin, has received his share of the estate of a testator or an intestate, the others cannot call upon him to refund if the estate is subsequently wasted (*Peterson v. Peterson*, 3 L. R. Eq. 111, 114); but if part of the estate had been previously wasted, the person so paid can be called upon to refund, the rule being that what is available when one is paid, should be equally divisible among all. *Ib.*

*309] *But where one residuary legatee calls upon another to refund, upon the ground of being overpaid, the burden of proof lies upon the person requiring the money to be refunded, to show that the payment was made in excess. *Ib.*

Where a legacy is charged on real estate should the personal estate be insufficient to pay it, if the personal estate was sufficient for that purpose at the time of the testator's death, and became inadequate in

consequence of a devastavit, the legacy will not be a charge on the real estate: *Richardson v. Morton*, 13 L. R. Eq. 123.

As a rule, general legacies and annuities stand upon an equal footing, and upon a deficiency of assets they must abate rateably, and the onus lies on any legatee or annuitant seeking priority to make out clearly and conclusively that such priority was intended: *Miller v. Huddleston*, 3 Mac. & G. 513; *Thwaites v. Foreman*, 1 Coll. 409; *Brown v. Brown*, 1 Keen. 275.

In *Coore v. Todd*, 7 De G. Mac. & G. 520, a testator by his will devised real estate to trustees in fee in trust out of the rents to pay an annuity to A. B. until he attained twenty-five, when he was to be entitled to the possession of the estate, and an annuity of 400*l.* a year to C. D. for life, and an annuity of 150*l.* for the maintenance during minority of an infant tenant in tail: and "without prejudice to the trusts aforesaid," and "to any jointure to be created under the power therein-after contained," to pay the surplus rent to the mother of A. B., until he should be entitled to the possession of the estate; and "subject to the trusts aforesaid," the trustees were to hold the estate in trust for A. B. for life, with remainder to his eldest son in tail, with power to A. B. to appoint a jointure to any wife, with the usual powers of distress and entry, to take effect immediately after his decease. A. B. having appointed the jointure died, leaving his widow, who gave birth to a posthumous son, the infant tenant in tail. The income of the estate proving deficient—it was held by Lord Cranworth, C., that the annuity of 400*l.*, the jointure and the annuity for the maintenance of the infant tenant in tail must abate *pari passu*, but that the apportionment was not to be retrospective, so as to affect the amount received by C. D. previously to the birth of the tenant in tail.

However, where a general legacy is given for any valuable consideration, as the relinquishment of dower by a widow (*Burridge v. Bradyl*, 1 P. Wms. 126; *Blower v. Morrett*, 2 Ves. 420; *Davenhill v. Fletcher*, Amb. 244; *Heath v. Dendy*, 1 Russ. 543; *Norcott v. Gordon*, 14 Sim. 258; *Stahlschmidt v. Lett*, 1 Sm. & G. 421; *Bell v. Bell*, 6 I. R. Eq. 239), or of a debt actually due (*Davies v. *Bush*, 1 Younge, [*310] 341), it will be entitled to priority over all other merely voluntary legacies. But in *Davies v. Bush*, 1 Younge, 341, where a testator has given a legacy to a person, on condition of his executing a general release of all claims which the legatee had on the testator, Lord Lyndhurst was of opinion, that, if there was not a debt actually due to the legatee, he could not be considered as a purchaser of the legacy, so as to avoid an abatement with the other legatees. If no debt were due, and the release were required merely for the sake of peace, then unquestionably the legatee could not be treated as a purchaser.

An annuity charged on the personal estate by a testator, being a gen-

eral legacy, on a deficiency of assets abates proportionably with the general legacies.

In such cases a value is put upon the annuity, and then a proportional abatement is made between the annuity and the legacies, and then the annuitant, although it is only a life annuity, or his representatives, if he be dead, is entitled at once to receive a sum equal in amount to the valuation so abated: *Carr v. Ingleby*, 1 De G. & Sm. 362; *Long v. Hughes*, Ib. 364; *Wroughton v. Colquhoun*, Ib. 357; and see "Forms of Decrees" in those cases.

But if annuities are given as gifts of specific interests in the real estate, they will not abate with legacies charged on the real estate: *Creed v. Creed*, 11 C. & F. 491, overruling the decision of Sugden, C., in 1 Dr. & War. 416.

As annuities on a deficiency of assets abate with legacies, so they abate among themselves: *Innes v. Mitchell*, 1 Ph. 716.

When the corpus of an estate charged with annuities is insufficient to pay the arrears, it will be divided between the annuitants in proportion to the value of their respective annuities: *Wroughton v. Colquhoun*, 1 De Gex. & Sm. 357; *Todd v. Beilby*, 27 Beav. 356.

If all the annuitants are *living* at the period of division, the value must be ascertained as at the death of the testator: *Todd v. Beilby*, 27 Beav. 353.

If *all* the annuitants are dead, the arrears of their annuities must be ascertained, and the fund divided in the proportion of those arrears: *Todd v. Beilby*, 27 Beav. 353, 356.

If *some* are dead, and the others living, the value as to the former will be taken at the amount of their arrears, and as to the latter, at the amount of their arrears, added to the calculated value of the future payments: *Todd v. Beilby*, 27 Beav. 353; *Heath v. Nugent*, 29 Beav. 226, and it is immaterial that an annuity is reversionary, and falls into possession after the testator's death: *Potts v. Smith*, 8 L. R. Eq. 683.

[*311] *In *Innes v. Mitchell*, 2 Ph. 346, a testator gave an annuity of 300*l.* to his three daughters, and the survivors and survivor, with a gift over to the last survivor, of the sum set apart to answer the annuity. After the death of one of the daughters, the fund set apart was lost by the misconduct of the trustee, and the annuity remained unpaid for the rest of the lives of the other two, but after their deaths a sum of money, forming a part of the residue, but of less amount than the original fund, became available. It was held by Lord Cottenham, C., reversing the decision of Lord Lindhurst, C. (1 Ph. 710), that, as the last survivor had no opportunity of receiving the capital during her life, the annuity was to be considered as continuing for her benefit, after her sister's death until her own, and therefore, that she was entitled to an apportionment, in respect of the arrears of such annuity during that interval, as well as in respect of the principal fund.

A bequest of an annuity to an executor for his trouble in the conduct and management of the testator's affairs will not be entitled to priority over other legacies: *Duncan v. Watts*, 16 Beav. 204.

It may be here remarked, that by the Dower Act (3 & 4 Will. 4, c. 105, s. 12), it is expressly enacted, "that nothing in the act contained shall interfere with any rule of equity, or of any ecclesiastical court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies."

Where the testator's intention is clearly to prefer one legatee to another, preference will of course be given (*Lewin v. Lewin*, 2 Ves. 415; *Marsh v. Evans*, 1 P. Wms. 668; *Attorney-General v. Robins*, 2 P. Wms. 23; *Beeston v. Booth*, 4 Madd. 161, 170; *Stammers v. Halliley*, 12 Sim. 42; *Brown v. Brown*, 1 Kee. 275; *Weir v. Chomley*, 1 Ir. Ch. Rep. 295; *Spong v. Spong*, 3 Bligh, N. S. 84; Sugd. Prop. 422; *Dyer v. Bessonett*, 4 Ir. Ch. Rep. 382; *Haynes v. Haynes*, 3 De G. Mac. & G. 590); but not where it is at all doubtful whether he intended to give such preference. See *Blower v. Morret*, 2 Ves. 421; *Beeston v. Booth*, 4 Madd. 161; *Eavestaffe v. Austin*, 19 Beav. 591; and see *Coare v. Tood*, 23 Beav. 92; *Campbell v. M'Conaghey*, 6 I. R. Eq. 20.

Specific legacies, as has been shown, are not applicable in the administration of assets in payment of debts, until after general legacies have been exhausted (*ante*, p. 138), nor are demonstrative legacies, that is to say, legacies payable out of a particular fund (*Roberts v. Pocock* 4 Ves. 150; *Lambert v. Lambert*, 11 Ves. 607; *Acton v. Acton*, 1 Mer. 178); except when they become general legacies by failure of the fund. *Mullins v. Smith*, 1 Drew. & Sm. *210; and persons to whom specific and demonstrative legacies are bequeathed, can compel [*312] devisees of land not charged with debt, to abate or contribute with them, pro rata, toward their payment. (See *ante*, p. 139; *Roberts v. Pocock*, 4 Ves. 160; *Long v. Short*, 1 P. Wms. 403; *Tombs v. Roch*, 2 Coll. 490;) and although a specific legacy be charged with debts and legacies, the general undisposed-of residue will be first applicable: *Hewett v. Snare*, 1 De G. & S. 333; *ante*, vol. 1, p. 655.

As to the lapse of legacies, see *Elliot v. Davenport*, Lead. Cas. Real Prop. 803, 2nd ed. and note.

Time of Payment of Legacies and Interest.—As a general rule interest is payable on legacies from the time when they become actually due.

With regard to specific legacies, they are considered as severed from the bulk of the testator's property by the operation of the will *from the death* of the testator, and are specifically appropriated, with their increase and emolument, for the benefit of the legatee from that period; so that interest is computed on them *from the death* of the testator; and it is immaterial whether the enjoyment of the principal is post-

poned by the testator or not: 2 Rop. Leg. 1250, 4th edit. Thus, where there is a specific legacy of stock, the legatee will be entitled to the dividends from the death of the testator (*Barrington v. Tristram*, 6 Ves. 345; see also *Clive v. Clive*, Kay, 600), although it may have been directed "to be paid within twelve calendar months" after the testator's decease: *Bristow v. Bristow*, 5 Beav. 289.

A demonstrative legacy does not carry interest from the testator's death: *Mullins v. Smith*, 1 Drew. & Sm. 210.

If the thing specifically bequeathed were reversionary, the legatee would only be entitled to it upon the reversion falling into possession.

A demonstrative legacy, where the property out of which it is payable is reversionary, is only payable where the reversion falls in: *Earle v. Bellingham*, 24 Beav. 448.

With regard to general legacies, where the testator has fixed no time for their payment (*Child v. Ellsworth*, 2 De G. Mac. & G. 679), they will not be payable until *a year after his decease*; they will therefore, as a general rule, carry interest only from that time, and it will be due even though the payment of the legacy be impracticable (*Wood v. Penoyre*, 13 Ves. 333, 334; *Gibson v. Bott*, 7 Ves. 96); and whether the assets are productive or not (*Pearson v. Pearson*, 1 S. & L. 10). So where there is a general legacy of long annuities, the legatee will not be entitled to the dividends accruing before the expiration of a year from the testator's decease: *Collyer v. Ashburner*, 2 De G. & Sm. 404.

[*313] *A case will, however, be taken out of the general rule, where a clear intention is shown that legacies are not to be paid until some time after the expiration of one year from the testator's decease. See *Lord v. Lord*, 2 L. R. Ch. App. 782. There a testatrix, having a general power of appointment over property which was the subject of pending litigation, appointed it by will to J. Lord upon trust, "so soon as proceedings in law and equity should be terminated, and the same should come into his possession," to pay certain legacies, and as to the residue upon other trusts. It was held, by the Lord Justices, affirming the decision of Lord Romilly, M. R., that the trust to pay the legacies did not arise, and, consequently, that the legacies did not carry interest, until the litigation ended, and the property came into the hands of J. Lord, which was not until more than eighteen years after the death of the testatrix.

A mere reference by the testator to the time when his personal estate shall be received, will not be a sufficiently clear indication of his intention, that the legacy is not to be paid at, and, consequently, that the interest is not to run from, such time. See *Wood v. Penoyre*, 13 Ves. 334: there the testator gave a legacy of 900*l.*, to be paid out of money due on an Irish mortgage, "when the same shall be recovered." Sir W. Grant, M. R., held that, the words "when recovered" did not suspend or postpone the right to interest.

Although the testator directs legacies to be invested for legatees at a period beyond the expiration of one year from his own death, nevertheless, if the direction for investment is for the convenience of the estate, interest will be paid to the legatees upon the legacies, from a year after the testator's death, if the estate is sufficient then to pay them. See *Varley v. Winn*, 2 K. & J. 700; there the testator after bequeathing legacies of 2000*l.* to each of his daughters to be paid to them four years after his decease, the interest to be computed from the end of one year after his decease, and after giving a further sum of 6000*l.* to each of his daughters, added, "which said sum of 6000*l.* to each of them shall be invested in real or government securities by my executors, within seven years, to be computed from the time of my decease in trust for them or their children; but if any of my said daughters should die leaving no issue, then the share or portion so invested shall be divided amongst those who have issue, share and share alike, as they arrive at the age of twenty-one years of age; and if only one, the whole to go to that one only." It was held by Sir W. Page Wood, V. C., that interest was payable on the legacies of 6000*l.* from a year after the *testator's death, the estate being sufficient to pay them at the testator's death; See 1 American Leading Cases, 629, 5 ed. [*314]

Where, however, the Court decrees a legacy to be a satisfaction for a debt (*Clark v. Sewell*, 3 Atk. 99); or where a person charges his real estate with the debts of another man (*Shirt v. Westby*, 16 Ves. 393); interest will be given from the death, not merely from a year after the death, of the testator.

Where a testator directs a legacy to be paid before the expiration of twelve months from his death, interest will be due from the time when payment was directed to be made: *Lord Londesborough v. Somerville*, 19 Beav. 295.

Another exception "is the case of a legacy by a father or mother to a legitimate child, whether by way of portion or not. If it is given generally, the Court will give interest from the death, to create a provision for its maintenance" (*Beckford v. Tobin*, 1 Ves. 310); or where a person puts himself in loco parentis (*Wilson v. Maddison*, 2 Y. & C. C. 372); but the exception is not extended to an adult child (*Raven v. Waite*, 1 Swanst. 553); nor where the parent has provided maintenance for his child though not adult out of another fund (*In re Rouse's Estate*, 9 Hare, 649; *Donovan v. Needham*, 9 Beav. 164); "nor has the Court extended it to a natural child, for two reasons: first, from the rule of law considering a natural child as no relation,—having, indeed, no civil blood: secondly, that it is not fit for a Court of Justice to give the same countenance to such children as in the case of legitimate children" (*Beckford v. Tobin*, 1 Ves. 310; *Lowndes v. Lowndes*, 15 Ves. 301); nor has the exception been extended to a wife (*Lowndes v. Lowndes*, 15 Ves. 301; *Freeman v. Simpson*, 6 Sim. 75; *Milltown v. Trench*, 4 C.

& F. 276; 11 Bligh, N. S. 1); but where there is a direction to apply a competent part of the interest on a legacy for the maintenance of a natural child (*Newman v. Bateson*, 3 Swanst. 689; *Dowling v. Tyrell*, 2 Russ. & My. 343), or of a stranger, even where the legacy is contingent (*In re Richards*, 8 L. R. Eq. 119), interest will be payable from the testator's death; 1 American Leading Cases, 630, 5 ed.

Where an annuity is given by will, it will commence immediately from the testator's death, and consequently the first payment is at the end of a year from his death (*Gibson v. Bott*, 7 Ves. 96). But Lord Eldon in that case takes a distinction between an annuity and a legacy for life, for he says, that "if a legacy is given for life, with remainder over, no interest is due till the end of two years. It is only interest of the legacy, and till the legacy is payable, there is no fund to produce interest;" and he considered it doubtful whether a sum of money

[*315] *directed to be placed out to produce an annuity, is to be considered as a legacy payable at the end of a year, or as an annuity payable from the death: see *Gibson v. Bott*, 7 Ves. 97; 1 American Leading Cases, 630, 5 ed; *Eyre v. Golding*, 5 Binney, 472.

But it seems that a person having a life interest in the residue of personalty, is entitled to the proceeds from the death of the testator; or, if it ought to be converted, to such income as it would have produced if converted (*Angerstein v. Martin*, T. & R. 232; *Hewitt v. Morris*, T. & R. 241; *La Terriere v. Bulmer*, 2 Sim. 18; *Dimes v. Scott*, 4 Russ. 195; *Douglas v. Congreve*, 1 Kee. 410; *Caldecott v. Caldecott*, 1 Y. & C. C. C. 322; *Taylor v. Clarke*, Hare, 161; but see *Taylor v. Hibbert*, 1 J. & W. 308; *Stott v. Hollingworth*, 3 Madd. 161; *Griffith v. Morrison*, 1 J. & W. 311, n.; *Amphlett v. Parke*, 1 Sim. 275; *Yates v. Yates*, 28 Beav. 637; *Webb v. Pollock*, 20 W. R. (V. C. M.) 796. See *Howe v. Earl of Dartmouth*, and note, post, p. 320). But the tenant for life will not be entitled to have the income arising from what is wanted for the payment of debts, because that never becomes residue in any way. See *Allhusen v. Whittell*, 4 L. R. Eq. 295, 302, where Sir W. Page Wood observes, "the authorities clearly show that supposing a testator has a large sum, say 50,000*l* or 60,000*l*., in the funds, and has only 10,000*l*. worth of debts, the executors will be justified, as between themselves and the whole body of persons interested in the estate, in dealing with it as they think best in the administration. But the executors, when they have dealt with the estate, will be taken by the Court as having applied in payment of debts such portion of the fund as, together with the income of that portion for one year, was necessary for the payment of the debts."

A gift for life, is specific, of things "quæ ipso usu consumuntur," is a gift of the property, and there cannot be a limitation over after a life interest in such articles (*Randall v. Russell*, 3 Mer. 195). Thus it was laid down by Sir J. L. Knight-Bruce, V. C., that a gift of "wine, spirits,

and hay," to a woman so long as she could be living unmarried, is a gift of the absolute interest. See also *Andrew v. Andrew*, 1 Coll. 690, 691, 692; *Twining v. Powell*, 2 Coll. 262. But this, it seems, will not be the case with regard to consumable articles constituting the testator's stock in trade. Thus in *Phillips v. Beal*, 32 Beav. 25, a wine merchant, possessed of a large stock of wine, by his will gave all his household goods, and everything he might die possessed of, to his wife *for life*, and from and after her decease he bequeathed the whole of his effects that might "*be then remaining*" to his daughter. Lord Romilly, M. R., held, that the widow was entitled to all the wine in the house, but not to that used *for the purpose of trade*. "Wine," said his Lordship, "is one of those things which *ipsu usu consumuntur*, and if the testator was keeping the wine for his own consumption, and not for the purpose of sale, it belongs to the widow. This must be ascertained." See *Howe v. Earl of Dartmouth*, notes post, 686; *Barnett v. Lester*, 53 Illinois, 325.

So, likewise, in *Cockayne v. Harrison*, 13 L. R. Eq. 432, a farmer, after giving to his wife furniture to furnish a comfortable room at his farm at S., bequeathed to her his farming stock at S. during her widowhood, and after her marrying again, or her decease, he gave the same to trustees for sale. The stock consisted, amongst other things, of cattle and stacks of hay. The widow having married again, it was held by Lord Romilly, M. R., that the widow was only entitled to a life interest in the farming stock. "I think," said his Lordship, "that the distinction which I took in *Phillips v. Beal* (32 Beav. 25), is sound, and that I ought to follow that decision. Here is a gift for life of farming stock, which is made in connection with a gift for life of the business, the stock being necessary to carry on the business; and I think that under these circumstances the legatee is bound to keep up the stock, and further, that if for any reason it is sold off and the business discontinued, she only takes a life interest in the proceeds. Where there is no trade, I am disposed to adopt the view taken in *Randall v. Russell*, 3 Mer. 190, and to hold that the legatee takes an absolute interest." Lord Hatherley, C., when Vice-Chancellor, arrived at the same conclusion in *Groves v. Wright*, 2 K. & J. 347, with respect to a gift of farming stock and implements of husbandry for life; but the ground his Lordship proceeded on was, that farming stock and implements of husbandry were not things *quæ ipso uso consumuntur*. Vice-Chancellor Stuart, however, in *Bryant v. Easterson*, 5 Jur. (N. S.) 166, held that a legatee for life of farming stock, consisting, among other things, of growing crops, oxen, sheep, pigs, and horses, took such stock absolutely, as things *quæ ipso uso consumuntur*, and that they did not therefore go to the legatees in remainder. This case, however, appears to be opposed to the modern current of authorities.

Where a man's wearing apparel was given to his widow for life, with

remainder over, it was held by Sir W. Page Wood, V. C., that the wearing apparel did not vest in the widow absolutely as things *quæ ipso usu consumuntur*, and that the sale thereof, and the payment of the income to the widow for her life, was reasonable. *Re Hall's Will*, 1 Jur. N. S. 974.

If, however, consumable articles are included in a residuary bequest for life, then they must be sold, and the interest only enjoyed by the tenant for life: *Randall v. Russell*, 3 Mer. 195. And see **Howe* [*317] *v. Earl of Dartmouth*, post, 676, 686.

Where a legacy is charged on real property, and no time is fixed for its payment, interest will be due from the testator's death: *Maxwell v. Wettenhall*, 2 P. Wms. 26; *Stonehouse v. Evelyn*, 3 P. Wms. 254; *Spurway v. Glynn*, 2 Ves. 483.

Where the testator has fixed a time for payment of a legacy, as, for instance, on the legatees's attaining a certain age, according to the general rule it will not, although it be vested, carry interest until the arrival of that time (*Heath v. Perry*, 3 Atk. 101; *Tyrrell v. Tyrrell*, 4 Ves. 1; and see *Thomas v. Attorney-General*, 2 Y. & C. Exch. Ca. 525); except where a legacy is left by a parent or a person in loco parentis to an infant, in which case, whether the legacy be vested or contingent, interest on the legacy will be allowed as maintenance from the death of the testator (*Acherley v. Wheeler*, 1 P. Wms. 783; *Hill v. Hill*, 3 V. B. 183; *Mills v. Roberts*, 1 Russ. & My. 555; *Leslie v. Leslie*, L. & G. t. Sugd. 1; *Rodgers v. Soutton*, 2 Kee, 598; *Wilson v. Maddison*, 2 Y. & C. C. C. 372; *Russell v. Dickson*, 2 D. & War. 133; *Harvey v. Harvey*, 2 P. Wms. 21; *Incedon v. Northcote*, 3 Atk. 438; *Chambers v. Godwin* 11 Ves. 2; *Brown v. Temperley*, 3 Russ. 263); or if the child be en ventre sa mere, from its birth (*Rawlins v. Rawlins*, 2 Cox, 425); and although there be a direction for accumulation (*Mole v. Mole*, 1 Dick 310; *McDermott v. Kealy*, 3 Russ. 264, n.); but whether the whole or part of the interest be allowed for maintenance, will be at the discretion of the Court.

"In the instance of a child," says Lord Alvanley, "the Court does not postpone the payment of interest till a year after the death of the parent; for the Court considers the parent to be under an obligation to provide, not only a future, but a present maintenance for his child; and therefore holds, that he could have postponed the time of payment only from the incapacity of the child to receive, but that he never meant to deprive him of the fruit of the legacy; which fruit is the only maintenance, and which maintenance he was bound to provide: *Crickett v. Dolby*, 3 Ves. 13; 1 American Leading Cases, 630, 5 ed.

Where, however, a specific sum is given for maintenance, although it be less than the interest, no more can in general be claimed (*Hearle v. Greenbank*, 3 Atk. 717; *Long v. Long*, 3 Ves. 286, n.); unless, perhaps, it is clearly insufficient, and the legacy is vested (*Aynsworth v.*

Pratchett, 13 Ves. 321; *Turner v. Turner*, 4 Sim. 430). Nor will maintenance be allowed out of a legacy where another fund is provided for that purpose. "It is clear," says Lord Kenyon, M. R., "that where other funds are provided for the maintenance, *then, if [318] the legacy be payable at a future day, it shall not carry interest until the day of payment comes, as in the case of a legacy to a perfect stranger:" *Wynch v. Wynch*, 1 Cox, 433, 434; *Wall v. Wall*, 15 Sim. 513; *Donovan v. Needham*, 9 Beav. 164; *Rudge v. Winnall*, 12 Beav. 357; *In re Rouse's Estate*, 9 Hare, 649.

The exception to the general rule will not be extended to other relatives than children, such as grandchildren, or nephews, or nieces, unless the testator has put himself in loco parentis: *Houghton v. Harrison*, 2 Atk. 330; *Butler v. Freeman*, 3 Atk. 58; *Descrambes v. Tomkins*, 4 Bro. C. C. 149, n.; 1 Cox, 133; *Festing v. Allen*, 5 Hare, 579; *Crickett v. Dolby*, 3 Ves. 10; 1 American Leading Cases, 630.

But as in the case of a parent or person in loco parentis, interest is payable upon the presumed intention of the testator, so it is payable in the case of a future legacy given by a person not standing in that relation to the legatee, if, from the terms of the will, it appears to have been his intention that the legatee should receive maintenance out of the legacy (see *Leslie v. Leslie*, L. & G. t. Sugd. 1; *Boddy v. Dawes*, 1 Kee. 362). And where a legacy is directed to be paid at a future time, with interest, the interest will be payable from the end of the year after the testator's death: *Knight v. Knight*, 2 S. & S. 490, 492.

The rate of interest, whether the legacy be or not charged on real estate, is usually 4l. per cent. (*Wood v. Bryant*, 2 Atk. 523; *Treves v. Townshend*, 1 Bro. C. C. 386; *Sitwell v. Bernard*, 6 Ves. 543); although the testator may have resided, or had money invested, in a country where a higher rate of interest is allowed (*Malcolm v. Martin*, 3 Bro. C. C. 50; *Stapleton v. Conway*, 1 Ves. 427; *Burke v. Ricketts*, 10 Ves. 330). Lord Alvanley has observed, that the ground on which the Court gives 4l. per cent. interest in such cases is "that the fund is supposed, in the course of the year, to come into the hands of the executor, and that the executor can make 4l. per cent. of it here. If it were made out, that the fund was abroad, and greater interest made, it might be otherwise" (*Malcolm v. Martin*, 3 Bro. C. C. 54.) Unless compound interest be directed by the will to be paid on legacies (*Arnold v. Arnold*, 2 My. & K. 365), interest will be computed on the principal, and not on the principal and interest (*Perkyns v. Baynton*, 1 Bro. C. C. 574; *Crackett v. Bethune*, 1 J. & W. 586); except under particular circumstances, as where an executor neglects to obey an express direction to accumulate: *Raphael v. Boehm*, 11 Ves. 92; 13 Ves. 590; *Dornford v. Dornford*, 12 Ves. 127.

As to whether a legacy or annuity is given free from legacy

[*319] *duty, see *Haynes v. Haynes*, 3 De G. M. & G. 590; *Marris v. Burton*, 11 Sm. 161; *Banks v. Braithwaite*, 32 L. J. (Ch.) 35; *In re Coles' Will*, 8 L. R. Eq. 271.

Currency in which legacies are payable.—In the absence of the intention of the testator appearing upon the will, which would of course be complied with (*Lansdowne v. Lansdowne*, 2 Bligh. 91), it will be presumed that a testator intended legatees to be paid in the currency of the country in which he resided, even though he may charge lands in another country with their payment in which the currency is different. See *Saunders v. Drake*, 2 Atk. 466; *Pierson v. Garnet*, 2 Bro. C. C. 28; *Malcolm v. Martin*, 3 Bro. C. C. 50; *Lansdowne v. Lansdowne*, 2 Bligh. 92; *Phipps v. Lord Anglesea*, 5 Vin. Abr. 208, pl. 8; 1 P. Wms. 966; *Wallis v. Brightwell*, 2 P. Wms. 88, 89; *Noel v. Rochfort*, 10 Bligh. N. S. 483; 4 C. & F. 158. And a legacy in a foreign country and foreign coin, as of sicca rupees, by a will in India, if paid by remittance to this country, the payment must be according to the current value of the rupee in India, without regard to the exchange or the expense of remittance: *Cockerell v. Barber*, 16 Ves. 461; *Campbell v. Graham*, 1 Russ. & My. 453; *Yates v. Maddan*, 16 Sim. 613; See 1 American Leading Cases, 645, 5 ed.

Strictly speaking, a bequest of that which is designated as being of a particular kind is specific, whether the testator does or does not refer to any particular thing as the subject of the gift, while a bequest of a particular thing may appropriately be termed individual, although the kind is incidentally mentioned or described. In the technical phraseology of the law, however, legacies of the former class are called general, those of the latter, specific. Thus a bequest of "a horse" is a general legacy, a bequest of "Flying Childers" or "Eclipse" a specific legacy.

That is consequently a specific legacy which confers a right to a particular thing or things, as distinguished from all others. A bequest of the testator's horse, or of all his horses, or of the stock

"standing in his name" in a bank or railway company, or of the amount due to him by an individual or corporation, is within this definition; and so is a bequest of the furniture in his dwelling house, or of the wine, which he imported in a particular year. But a bequest which is so worded that it may be satisfied by any object of the kind prescribed is general; and if the testator has no such property at his death, it is incumbent on the executor to carry out his will by purchasing what has been bequeathed, and transferring it to the legatee; *Norris v. Thompson*, 1 C. E. Green, 218, 222; *Davis v. Cain*, 1 Iredell Eq. 304.

A bequest of a ring, of a horse, or of a watch, is not specific in the legal sense of the term, although the testator designates the kind, by

providing that the watch shall be of English or American make, or the horse thoroughbred; and this is true *a fortiori* where the subject of bequest is the stock of a government or corporation, and one share presumably like every other, *ante*, 605. Agreeably to the weight of authority, a legacy or bequest which is general in the sense of the above rule, will not be rendered specific by showing that the testator owned property answering to that which he gave, and therefore presumably intended that it should go to satisfy the bequest, *ante*, 610. For although such evidence may justify a belief that he expected that the goods which he then had would remain in his possession until he died, and then serve to carry out his will, still it does not follow that he intended these to be the only means, or that their failure or insufficiency should invalidate the bequest; *Tift v. Porter*, 4 Selden, 516; *Davis v. Cain*, 1 Iredell Eq. 304; *Graham v. Graham*, 1 Busbee Eq. 291; *Corbin v. Mills*, 19 Grattan, 438; *Langdon v. Astor's Executors*, 1 Duer, 478, 545, 16 New York, 933. Such a legacy is consequently demonstrative, not specific; *De Nottebeck v. Astor*, 3 Kernan, 98, *post*, 660.

The subject matter of a specific legacy may be indicated as having been derived from a designated source; see *Spencer v. Higgins*, 22 Conn. 521; *Warren v. Wigfall*, 3 Dessausure, 47; *Pell v. Ball*, 1 Speer Eq. 48; *Lilly v. Curry*, 6 Bush, 590; as being in a particular place, or as having been acquired at a certain time; and it may be

said in general that any earmark will suffice which denotes that the testator intends to give a specific thing, and not merely that the legatee shall have a thing of the kind described. So a gift of a slave or a horse by name, as "Plato" or "Eclipse," will be specific if the testator has a chattel answering that description when the will is executed. A bequest of "two yearling heifers," which in fact refers to two heifers then in the possession of the testator, or of the "furniture and property brought by my wife at the time of our marriage," is specific; *Stickney v. Davis*, 16 Pick. 19; *Spencer v. Higgins*, 22 Conn. 521; and so is a bequest of "all my stock which I hold in the Union Bank;" *Blackstone v. Blackstone*, 3 Watts, 335; *M'Guire v. Evans*, 5 Iredell Equity, 269; *Brainard v. Cowdrey*, 16 Conn. 1; "of the Cincinnati five per cent. stock now in my possession;" *Alsop's Appeal*, 9 Barr, 374; or of the dividends and income of stock in a bank or railway company, notwithstanding a direction that if the stock is paid off, the executors shall invest the principal for the benefit of the legatee; *White v. Winchester*, 6 Pick. 48; *Cuthbert v. Cuthbert*, 3 Yeates, 486; *Manning v. Craig*, 3 Green Ch. 436; and every bequest of which, in express terms or by a necessary implication refers to what the testator then has, and cannot be satisfied by the substitution of other property of the same nature; *M'Guire v. Evans*, 5 Iredell Eq. 269. A bequest of a debt, or of a security for a debt, is spe-

cific; *Stout v. Hart*, 2 Halstead, 414; *Howell v. Hook*, 4 Iredell, Eq. 188; *Sparks v. Werden*, 21 Maryland, 156; *Mellon's Appeal*, 10 Wright, 165; and so is a bequest of the proceeds of a mortgage; *Gardner v. Printup*, 2 Barbour, 83; or of the money which may be received under a decree or judgment; *Chase v. Lockerman*, 11 Gill & Johnson, 185; *Galbreath v. Winter*, 16 Ohio, 64; but a bequest of a sum payable out of a debt, or contained in a bond or mortgage, is demonstrative and not specific; *Gallagher v. Gallagher*, 6 Watts, 675; *Giddings v. Seward*, 16 New York, 365. A legacy of money in a bag or drawer is specific, and so is a bequest of the money which the testator may be possessed of, or which shall be standing to his credit in bank; *Toole v. Swasey*, 106 Mass. 100; *Beck v. McGillis*, 9 Barb. 35; but a bequest of money generally, will not be rendered specific by a direction that it shall not be put out at interest, and shall be kept in gold and silver, until the testator's children come of age; *Mathis v. Mathis*, 3 Harrison, 59. Nor will a bequest of "\$850, now in the possession of my wife," be specific, when the testator goes on to direct his executors to pay her \$150 more, and declares it to be his intention to give her \$1000; *Enders v. Enders*, 2 Barbour, 362. A bequest of "promissory notes out of those in my hands," is, in its own nature specific; but a bequest payable in "such notes, if the legatee thinks fit," is obviously general; *Perry*

v. Maxwell, 2 Dev. Equity, 488. A bequest of such of the testator's carriages, or so much of his furniture as the legatee may choose to select, will be specific; that being certain which is capable of being reduced to certainty; *Wallace v. Wallace*, 3 Foster, 149; *Everitt v. Lane*, 2 Iredell Eq. 548.

In *Mann v. Mann*, 1 Johnson Ch. 231, 14 Johnson, 1, it was determined by the Chancellor and afterwards by the Court of Appeals, that a bequest to the testator's wife of all the rest and residue of the moneys belonging to him at the time of his decease, must be taken in its ordinary acceptation, as meaning only cash, although he had but \$500 in currency when he died, and not less than \$20,000 in bonds, mortgages, and other choses in action; and the court held that his declarations during his last illness were inadmissible to show that he used the word in a more extended sense, and meant that the gift should embrace the money which he had at interest. It was decided in like manner, in *Beck v. McGillis*, 9 Barb. 35, that nothing passed by a bequest "of all the money which the testator should be possessed of," but the cash actually in his hands when the will took effect, or which was then deposited to his account in bank. On the other hand, in *Morton v. Perry*, 1 Metcalf, 446, evidence that the testator possessed but \$36 in cash, and had just sold the land which constituted the bulk of his property, taking promissory notes for the price, was held to show in connec-

tion with the general tenor of the will, that a bequest of money was intended to pass the notes.

Agreeably to some of the earlier authorities, a bequest of a sum of money is pecuniary, although described as due by a third person, or secured by his note or bond; see *Rider v. Wagner*, 2 Peere Williams, 328; *White v. Winchester*, 6 Pick. 48, 55; *Walton v. Walton*, 7 Johnson Ch. 258; *Doughty v. Stilwell*, 1 Bradford, 300, 305; and in *Paulet's Case*, T. Raymond, 335, a legacy "of 5,000*l.*, which my sister, the Lady Cholmley hath now in her hands of mine, as by her bond made to me and my heirs doth appear," was sustained on this ground, although the bond had been paid before the testator's death. This decision was virtually overruled in the principal case; see *White v. Winchester*; and it is now established, that such bequests are specific, and not demonstrative or pecuniary, and will fail if the debt is satisfied or extinguished before the will goes into effect. See *Walton v. Walton*, *post*; *Stout v. Clark*, 2 Halstead, 414; *Howell v. Hook*, 4 Iredell Eq. 118; *Chase v. Lockerman*, 11 Gill & Johnson, 185; *Galbraith v. Winter*, 10 Ohio, 64; *Cogshell's Executors*, 3 Des-saussure, 384. In *Stout v. Clark*, a bequest of "all the money owing on a bond against Peter and John Phillips," was accordingly held to be specific; and the court said that the distinction taken by Lord Camden between a bequest of 500*l.* due to me by A. and a bequest of the debt, had

been exploded, and was no longer recognized by the courts.

The case of *Giddings v. Seward*, 16 New York, 365, diverges from this course of decision, and comes nearer to the line of the earlier precedents. The testatrix bequeathed "the sum of \$1,200, and interest on the same, contained in a bond and mortgage executed by Orrin W. Seward," to her mother for the term of her natural life, and after her decease to her husband. Selden, J., said that the idea of a specific legacy seemed to be excluded by the phraseology of the will itself. The gift was not of the bond and mortgage, but of the sum which they contained. It was, therefore, pecuniary with a demonstration of the bond as the source from whence the money was to be derived.

In *Corbin v. Mills*, 19 Grattan, 438, the question arose on the following bequests; one for life "of \$1,080, being the interest on the purchase-money of real estate in Main street, Richmond, sold by me to Morris," with a gift over of the principal; the other "of the sum of \$5,000 in Virginia State stock." Joynes, J., said that a legacy will not be construed to be specific unless such was clearly the intention. This did not appear as to the first bequest, which was in terms of a sum of money, and referred to "the purchase-money of a sale to Morris," as a fund which kept at interest, would afford the means for the annual payments. It could not be discovered from the will that the money was still due from Morris. It was, in

point of fact, still due at the date of the will, but if the whole of it had been collected by the testator as part of it was, the fund might still have been described as "the purchase-money of the lot sold to Morris." A bequest would not be adeemed by the conversion of the property from one form into another, when the designation was broad enough to cover both. The legacy was not specific, but demonstrative; that is to say, a general legacy with a reference to a particular fund as a means of satisfaction. On the other hand, the bequest of \$5,000 State stock did not refer to any particular stock, or depend on the testator's being possessed of that amount of State stock at the time of his death. The bequest was, therefore, not specific; it was a general legacy, but not demonstrative, because not charged on any particular fund.

The better opinion is that one may make a specific bequest of that which he does not possess, but hopes or intends to acquire. In *Sparks v. Weedon*, 21 Md. 126, the will contained two bequests, one to Wm. Jones, "of all the shares of stock standing in my name in the Freeman's Bank at the time of my death," and also "of the amount of the notes of James Sands;" and the other to Mary Jones, "of a note drawn by Igleheart & Co., for \$1,000, and of my silver plate and furniture, which she now has in her possession;" and it was held, that both were specific, and must abate in a

like proportion, in the event of the insufficiency of the personal estate.

In this instance, the stock in question was owned by the testator when he made the bequest, and continued to belong to him until he died, and it did not become necessary to consider whether the bequest would have been general or specific as to stock acquired subsequently to the execution of the will, but the point arose and was determined in *Fontaine v. Tyler*, 9 Price. The testator there bequeathed the sum of 10,000*l.* stock, in the reduced or consolidated bank annuities, with a proviso that if he should not have so much at his decease, his executors should make up the said sum, and hold the same for the legatee. He had at his death a much larger amount of such stock than that bequeathed. The legacy was held to be specific, with the substitution of a general pecuniary legacy in the event of the failure or ademption of the original gift.

In *Parrott v. Worsfold*, 1 Jacob & Walker, 574, the will contained a bequest of all the stocks which the testator might be possessed of, or entitled to at the time of his decease. Sir Thomas Plumer said, the words were general, including not only the stock that he had at the time of making his will, but all that he might subsequently acquire. Had it ever been decided that such words would constitute a specific legacy? They certainly did not, agreeably to the ordinary criterion that the bequest must be liable to ademption, for if the tes-

tator had sold the stocks which he then held, and bought others, they would have passed by the bequest.

This judgment was cited and approved in *Woodworth's Estate*, 31 California, 595; but it is now established under the recent course of decision, that a bequest of all the personal property of a certain kind that one may own or be possessed of at his death, is not less specific for being general, *ante*, 332, 336. This was virtually conceded in *Parrott v. Worsfold*, by Sir John Plumer, who observed, that a bequest of after-acquired property may be specific in a certain sense, as for instance a legacy of all the cattle and personal effects which shall belong to the testator at his death.

It results from these decisions, that a testator may, in bequeathing a debt, also give whatever he may at any time recover or receive from that source during his life, and where this precaution is observed the legacy will not be adeemed by payment; *Clark v. Brown*, 2 Smale & Gifford, 524; *Gardner v. Printup*, 2 Barb. 83. In the case last cited, the testator bequeathed "the proceeds" of a bond and mortgage. Gridley, J., said, that the bequest was clearly specific, embracing such of the avails of the bond as were on hand at the testator's death, and capable of being traced and identified as such. To this extent the legacy was effectual; but it was adeemed as to so much of the proceeds as had been used by him in the payment of his debts, or otherwise mingled with and sunk in his gen-

eral estate. In *Galbraith v. Winter*, 10 Ohio, 65, the court reached a different conclusion, apparently with less reason.

A bequest of the whole or of a given part of the effects of a certain kind, which the testator may own at his death, is at once general and specific; specific because it is confined to goods of that particular kind, general because any goods of that kind which the testator owns at his death may pass by the bequest. The law was so held in *Bethune v. Kennedy*, 1 Milne & Craig, 114, where the testator gave "100*l.* transfer stock in the long annuities," to A. and the like sum to B., and "the residue of my property, all I do or may possess in the funds or of copy or leasehold estates, to his sisters for life," with a limitation over at their death.

The court held that the bequest to the sisters was specific and not residuary, and entitled the legatees to the amount invested in the long annuities, to be enjoyed by them during their lives in the state in which it was left by the testatrix. The Master of the Rolls said that the test of a specific bequest is whether it would be liable to abate with the pecuniary legacies, if the personal estate proved to be insufficient to satisfy the debts. One who claimed under a gift of all the property of a particular kind, which the testator might possess, would not be liable to contribute under these circumstances, and such was the nature of the bequest under consideration.

In view of what was said, on

this occasion it may be proper to observe that freedom from liability to contribute to the payment of debts, is not a decisive test of a specific legacy, because it will exist wherever the testator manifests an intention to exonerate the legatee, whether the gift is general or specific, *ante*, 335. See *Blunt v. Hipkins*, 7 Simons, 43; *Lightfoot v. Lightfoot*, 27 Alabama, 351. In *Lightfoot v. Lightfoot*, the testator made several specific bequests, and directed that his executors should sell a certain "tract of land, two negroes and all stock not bequeathed, and pay his debts," and then gave "the rest of his negroes and any money that might remain to his grandchildren." The fund provided for the payment of the debts proved to be insufficient, and the question was whether the legacy to the grandchildren was entitled to exoneration at the expense of real estate which had been acquired subsequently to the execution of the will. Goldthwaite, J., said, that where all or any portion of the personal estate is given as a whole, and not as a residuary bequest, the intention presumably is that it shall not be liable to the charge of debts. The case before the court was virtually a bequest of all the slaves which the testator should possess at the time of his death and which had not been bequeathed to others. It was therefore within the rule that a gift of all the property which the testator has of a certain kind is a specific legacy, and entitled as such to exoneration at the expense of the heir.

It is well settled that assets which have been specifically bequeathed, do not abate with pecuniary and general legacies, and cannot be required to contribute to the payment of debts, until the entire exhaustion of the general personal estate and the descended lands, and will then be entitled to contribution, from lands devised, *ante*, 326; *Toole v. Swasey*, 106 Mass. 100; see *Brainerd v. Coudry*, 16 Conn. 1, 498; *Lightfoot v. Lightfoot*, 27 Alabama, 351; *Cornish v. Wilson*, 6 Gill, 391; *Nash v. Smallwood*, 6 Maryland, 394; *Alexander v. Worthington*, 5 Id. 471. Such at least is the rule as regards debts which are a charge on the real estate from their own nature, or with which it has been charged by the testator; *ante*, 326, 328; *Armstrong's Appeal*, 13 P. F. Smith, 312.

The courts incline against construing legacies as specific, in order to guard the legatee against the risk of ademption, and that the legacy may be liable to contribution and abatement, if the assets are insufficient to pay the debts and satisfy the general and pecuniary legacies, *Kirby v. Porter*, 4 Vesey, 748; *Smith v. Lampton*, 8 Dana, 69; *Tift v. Porter*, 4 Selden, 516; *Bell v. Hughes*, 8 Richardson, 397; *Norris v. Thompson*, 1 C. E. Green, 222, 542. But the doctrine should be confined within just limits, and not allowed to contravene the plain import of the will; *Ludlam's Appeal*, 1 Parsons, Eq. 116, *Norris v. Thompson*.

In *Ludlam's Appeal*, 1 Parsons Eq. 116; 1 Harris, 188; a bequest

of "one thousand dollars on the books of the loan office Pennsylvania, as per certificate No. 267," was held to be specific, and therefore adeemed by the payment of the loan before the will took effect. "It has been strongly urged on us," said King President, "that this is not a regular specific legacy, but one in the nature of a specific legacy; one in which a given sum of money is bequeathed, with reference to a particular fund out of which it is to be satisfied; and that this class of legacies are never held to be adeemed or extinguished by the sale or other disposition by the testator of the fund from which payment is to be made previous to his death. That a distinction does exist, between a bequest of a sum of money referring to a security or debt for its payment, and a gift of the security or debt itself, is undoubted, although Lord Thurlow, in *Ashburner v. McGuire*, seemed to have regarded it as a refinement. The leaning of courts of equity is always against regarding a legacy as specific. The will is always read with an inclination to hold a legacy general; and if there is the least opening to imagine the testator meant to give a sum of money, and referred to a particular fund only, as that out of which in the *first* place he meant it to be paid, the legatee will have this advantage, that it shall be considered pecuniary, so as not to have the legacy defeated by the destruction of the security; *Chaworth v. Beech*, 4 Vesey, 555, 565; *Ambler*, 568. The same legacy may be specific in one sense,

and pecuniary in another; specific as given out of a particular fund, and not out of the estate at large; pecuniary, as consisting only of definite sums of money, and not amounting to a gift of the fund itself, or any aliquot part of it: *Smith v. Fitzgerald*, 3 Ves. & Beam. 5. The kind of legacy alluded to is what is termed in the civil law a demonstrative legacy, that is, a general pecuniary legacy, with a particular security pointed out as a convenient mode of payment, where although such security may be called in or fail, the legacy will not be adeemed.

"Of this kind of legacy the case of *Kirby v. Potter*, 4 Vesey, 478, is an example. There a legacy to B. of 100*l.*, out of my reduced bank annuities, 3 per cents., 'was ruled to be a general and not a specific legacy.' Lord Alvanley holding the phrase '100*l.*, out of my reduced bank annuities,' meant that the executor should raise 100*l.* by selling so much of that stock; *Sibley v. Perry*, 7 Vesey, 522; *LeQuie v. French*, 8 Merivale, 49; *Deane v. Test*, 9 Vesey, 146; *Fowler v. Willoughby*, 2 Sim. & Stewart, 358, are cases determined on the same principle. The principle extracted from these cases is, that a sum of money bequeathed out of particular stock, is *prima facie* adjudged a money legacy, but liable to be considered a specific bequest, of so much of the identical stock which the testator had, when a clear intention appears upon the whole will. In *Barker v. Raynor*, 5 Madd. Ch. R. 217, it is said, that "when once it is de-

terminated that a legacy of a debt is specific and not demonstrative, the only safe and clear way is to adhere to the plain rule, that there is an end of the specific gift, if the specific thing does not exist at the testator's death."

Agreeably to the weight of authority a bequest of the whole or of a definite proportion of the personal estate is general, and as such bound to abate or contribute ratably with pecuniary legacies in the event of the deficiency of the assets. See *Bardwell v. Bardwell*, 10 Pick. 19; *Mayo v. Bland*, 4 Maryland Ch. 484; and it is immaterial that the testator in making such a gift enumerates the items of which it consists. *Walker's Estate*, 3 Rawle, 229; *Mayo v. Bland*, ante, 333, 335; unless these constitute the substantial part of the bequest, and the general words are merely formal. See *Blunt v. Hopkins*, 7 Simms, 431; *Graham v. Graham*, 1 Barber Eq. 291; *Brown v. James*, 3 Strobbart Eq. 24; *Minor v. Dabney*, 5 Randolph, 191; *Spraker v. Van Astyne*, 18 Wend. 204; *McLaughlin v. McLaughlin*, 12 Harris, 20. The question is nevertheless one of intention as deduced from the general tenor of the will, and where the testator gives one portion of his property, although generally, and directs that his debts shall be paid out of another portion, it will be presumed that he means the former to be exempt until the latter is exhausted. *McLaughlin v. McLaughlin*.

In *Armstrong's Appeal*, 13 P. F. Smith, 316, Sharswood, J., de-

fined a demonstrative legacy "as the bequest of a certain sum of money with a direction that it shall be paid out of a particular fund. It differs from a specific legacy in this respect, that if the fund out of which it is payable fails for any cause, it is nevertheless entitled to come on the estate as a general legacy, and it differs from a general legacy in this, that it does not abate in that class, but in the class of specific legacies; 1 Roper on Legacies, 153. It is settled by this court that in the marshalling of assets for the payment of the debts of a testator, specific devises of land abate proportionally with specific and demonstrative legacies; *Barkley's Estate*, 10 Barr, 387; *Hallowell's Estate*, 11 Harris, 223."

A demonstrative legacy may also be defined as a pecuniary or general legacy charged on a specific fund, which thus becomes primarily liable for the amount. A bequest of a debt is consequently specific, a bequest out of a debt demonstrative, and so of a bequest of the sum "contained" in a bond as distinguished from a legacy of the bond. See *Giddings v. Seward*, 16 New York, 365; *Gallagher v. Gallagher*, 6 Watts, 675, ante.

In *Enders v. Enders*, 2 Barb. 362, the following bequest "my said wife having now in her possession \$850, I direct my executors to pay her the sum of \$150 more so as to make the sum \$1000, my meaning and intention being to give her the sum of \$1000," was held to be a pecuniary legacy of

\$1000, with a demonstration of the fund in the wife's hands, as to the source whence \$850 of the amount was to be drawn. It was therefore incumbent on the executors to pay the whole, unless they could show that the legatee had the \$1000 or some part of it when the will took effect.

A bequest of specific things out of other things of the same kind, is *prima facie* not less specific than the source from whence the gift is to be drawn, *ante*; see *Maxwell v. Maxwell*, 6 Dev. Eq. 488; as where the legatee is empowered to choose such articles as he may desire among the testator's furniture or personal effects. See *Wallace v. Wallace*, 3 Foster, 149; *Everett v. Lane*, 2 Iredell Eq. 548. Where, however, the testator bequeathed "five hundred dollars in bank notes of the Bank of Kentucky, out of moneys of that description now in my hands," and directed his executors to invest the same in land for the use of the legatee, the Court held, in view of the extrinsic evidence, that the legacy was demonstrative and as such not adeemed, although all the Kentucky Bank notes in the testator's hands were expended before his death. *Smith v. Lampton*, 8 Dana, 69

It is well settled in accordance with the rule enunciated in *Armstrong's Appeal*, that a demonstrative legacy will not fail in consequence of the failure or insufficiency of the fund which is pointed out as the means of payment, or even where no such fund exists; *Geddings v. Seward*, 16 New York,

365; *Newton v. Stanley*, 28 Id. 61; *Welch's Appeal*, 4 Casey, 363; *Walls v. Stuart*, 4 Harris, 275, 281; *Gallagher v. Gallagher*, 6 Watts, 475; *Cogdell's Exor's v. The Widow*, 3 Dessausure, 346. Thus a bequest of \$10 due by J. S. is invalid if he owes nothing, or if the debt is paid in the testator's lifetime; but a bequest of \$10 out of the amount due by J. S. is a pecuniary legacy, and must be paid as such, whether J. S. is or is not indebted to the testator; *Walls v. Stuart*, *Gallagher v. Gallagher*, *Newton v. Stanley*. In like manner, where various sums were bequeathed out of the purchase-money of certain land which the testator had agreed to sell, it was held that the bequests were not specific, although they were thereby thrown on the personal estate, contrary to his expectation when the will was made; *Cogdell's Exor's v. The Widow*. But a bequest out of a fund, may be so worded as to show that the fund is meant to be the only source to which the legatee can look for payment, and the failure or alienation of the fund will then adeem the legacy, *ante*, 633. See *Balliett's Appeal*, 2 Harris, 451; *Walls v. Stewart*, 4 Id. 275. "If," said Bell, J., in *Walls v. Stewart*, "a legacy be given with reference to a particular fund, only as pointing out a convenient mode of payment, it is considered demonstrative, and the legatee will not be disappointed though the fund totally fails. But where the gift is of the fund itself, in whole or in part, or is so charged upon the object made

subject to it, as to show an intent to burden that object alone with the payment, it is esteemed specific, and consequently liable to be adeemed by the alienation or destruction of the object."

In determining the nature of a legacy, regard must be had to the rest of the will, as well as of the particular clause, and if the instrument taken as a whole, shows that the testator meant to give the identical property which he then owned, the bequest will be specific, although it might receive a different interpretation if considered separately; *Everett v. Lane*, 2 Iredell Eq. 548; *M'Guire v. Evans*, 5 Id. 269; *Stickney v. Davis*, 16 Pick. 19; *Norris v. Thomson*, 2 M'Carter, 493; 1 C. E. Green, 220.

In *Everett v. Lane*, the will contained the following bequest: 5th "I give and bequeath unto Lavinia Everett, one negro girl by the name of Lavinia, and my will and desire are that three of my negroes be sold, to wit: Bill, Burwell and Edmond. 6th. I give and bequeath unto my beloved wife the following property, viz.: all the balance of my lands and negroes which I am possessed of, and all my household and kitchen furniture, one year's provisions, five head of horses, her choice, one carriage, one yoke of oxen, her choice, three pens of hogs, her choice, five cows and calves, her choice, five sets of farming tools, her choice, one set of blacksmiths tools to her and her assigns forever." The court said that when the testator, after giving certain slaves

by name went on to bequeath "all the balance" of his land and negroes, the legacy was as much specific as if each slave had been given nominatim. So the bequest to his wife of five head of horses, of one yoke of oxen, etc., was rendered specific by the power given to her to choose, which implied that she was to make a selection among the chattels of that kind in the possession of the testator at his death. What he intended by the gift of one carriage and one set of blacksmith's tools was not less clear, because he owned but one carriage and one set of blacksmith's tools, and must be presumed to have had these in view in making the bequest. Where it appeared on the face of the will, that the testator meant to dispose of something in kind, it might be shown by parol that he had but one thing of that kind to dispose of. *Innes v. Johnson*, 4 Vesey, 568. But the bequest of one year's provisions could not be deemed specific, because it did not clearly appear that the supply was to be drawn exclusively from the produce of his farm, or that if this proved insufficient, the executors were not to buy what might be requisite for the subsistence of the legatee.

In *Tift v. Porter*, 4 Sheldon, 516, Johnson, J., said that this case went against the main current of decision, and could not be regarded as a precedent. There was no more ground for supposing that the expression "one carriage" meant any particular carriage, than there was for supposing that one year's provisions referred to pro-

visions then owned by the testator, and yet the latter bequest was held to be general, and the former specific. The reason assigned in *Everett v. Lane*, on the authority of *Innes v. Johnson*, may be open to criticism, but the conclusion was entirely just, because the entire clause showed unmistakably that the testator was treating of his farming stock and implements, and intended to apportion them among the legatees. Where one in disposing of various objects belonging to a class, directly or indirectly designates some of them as belonging to him, the others may be supposed to be his also, and if this inference is corroborated by proof that he owned them all at the date of the will, the legacy may well be deemed specific.

The case of *Stickney v. Davis*, 16 Pick, 19, admits of this explanation, and can hardly be sustained on any other ground. The testator there gave to his wife two cows from his stock of cattle, to the eldest of his two sons the remainder of his stock of cattle except one pair of yearling steers, and to the other son, one pair of yearling steers. The entire bequest was held to be specific on proof that he had but one pair of yearling steers when the will was executed, that he had reason to expect a speedy termination of his life, and that he died soon afterwards, while the steers were still yearlings.

In like manner a bequest will not readily be construed as general where such an interpretation

would, where taken with the other provisions of the will, compel the executor to dispose of property owned by the testator and answering to that bequeathed, and then purchase property of the same kind; *Ashton v. Ashton*, Cases temp. Talbot, 152. In *Graham v. Graham*, 1 Busbee Eq. 291, the testator bequeathed "one negro girl, named Mary, to his daughter, also 8000 lbs. of iron, and the same quantity of castings," and then gave another daughter "\$3000 worth of iron and castings at 3 cts. each." The court said that if these bequests were considered apart from the rest of the will, they could not be interpreted as specific. No particular iron or castings were mentioned, nor did the testator say my iron and castings, or the iron and castings which I may have on hand at the time of my death. Such a legacy resembled a legacy of so many shares of bank stock which is clearly a general legacy, although the testator owns the number of shares named. But on reading the other clauses of the will, there could be no doubt that the bequests were intended to be specific, because the executors were directed to sell all the property not named and given away specifically. If the iron and castings were not bequeathed specifically, they would have to be sold under this clause for whatever they would bring, and then repurchased for the use of the legatees. It was not to be supposed that the testator meant to enjoin a circuitous course when the end might be attained directly, and

without the loss incident to such sale.

Agreeably to the weight of authority, a general bequest of chattels will not be rendered specific by evidence that the testator was possessed of goods corresponding in amount or value to those bequeathed; but the course of decision has not been uniform, and it was contended at one period that the rule does not apply to stocks or other articles which are in their nature durable; *Jeffreys v. Jeffreys*, 3 Atkins, 120. In that case the bequest was "of 2702l. 3s. capital stock in the Bank of England," and "2000l. capital stock in the East India Company." At the time of making the will, the testator had the precise amount of stock bequeathed, but afterwards sold 702l. 3s. of the Bank of England stock. It was held that the testator having the stock when the will was executed, must be presumed to have intended to give that very individual stock, and, that the bequest was consequently adeemed *pro tanto* by the sale.

The Master of the Rolls said that where a man devises a certain quantity of corn or number of sheep generally, this is not to be considered as a devise of the corn or sheep which he then has, but a devise of quantity only, and though he has such quantity at the time of making the will, yet he cannot from the nature of the things be taken to intend that they shall go specifically to the legatee, and the bequest should rather be considered as a general one to be made good by the executors.

Where, on the other hand, he devises any quantity of bank or other stock, which being in its nature durable, may continue in the same state to his death, and has such stock at the time, he must be taken to intend that this shall be appropriated to the legatee, and not that his executors shall purchase the stock as a means of carrying out the bequest. This inference was peculiarly strong in the case before the court, because the stock bequeathed, and the stock which the testator owned, agreed exactly even to the shillings.

The case of *Innes v. Johnson*, 4 Vesey, 568, is nearly to the same effect. "The full interest of £300 upon bond" was there bequeathed to the testator's "sister during her natural life," with a gift over of "all the interest that shall be due upon the said bond, together with the principal," to his niece Christian Innes; and it was contended on behalf of the legatees, that the court should, in view of the inclination against specific legacies, presume that the bequest was for £300, secured by bond. The Master of the Rolls said there was among the assets one bond for the precise amount, and various other bonds for different amounts. If the bond for £300 had been the only one belonging to the testator, the presumption would have been that he meant that, but as he had several bonds, the case would have been doubtful but for the subsequent words "the said bond," which showed that he had reference to a particular bond. The legacy must, therefore, be regarded as specific.

These cases were cited and relied on in *White v. Winchester*, 6 Pick. 48. The testator there directed his executor to "appropriate towards the support of a school all the income of twenty-seven shares of the Beverly Bank, of ten and a half shares of the Marblehead Bank, and of fifteen shares in the Union Marine Insurance Office;" "and in case either of said companies shall be dissolved, then my executor shall invest the principal, and appropriate the interest as above." When the will was made, the testator owned the precise number of shares in the two banks and the insurance company, but afterwards sold his stock in the first-mentioned bank. The court said that whether a legacy is general or specific, depends on the donor's intention. Where one by will gives a certain amount of stock in a particular bank, and at the time has the exact amount so given, it is only reasonable to suppose that he intends to give the stock which he owns.

The inference was strengthened in the case under consideration by the provision for the investment of the principal, if the corporation should be dissolved. The alienation of the Beverly Bank stock was presumptive evidence that the testator intended to adeem that portion of the bequest, and it was corroborated by his suffering his will to remain unaltered after the sale.

Notwithstanding these decisions, there is a great preponderance of authority that words importing a general gift, will not

be controlled or limited by evidence that the testator had property answering to that which he bequeathed, and should, therefore, be presumed to have had exclusive reference to it; *Gilmer v. Gilmer*, 42 Alabama, 9; *Corbin v. Mills*, 19 Grattan, 438; *Davis v. Kane*, 1 Iredell, 304; *ante*, 610. In *Davis v. Cain*, the effects bequeathed were "my negro man Plato, the sum of \$2000 in money, and twenty-five shares of the stock of the Bank of North Carolina." The testator owned twenty-five shares in that bank, but it appeared that the charter of the institution expired before his death, and that a dividend had been declared on the capital. Daniel, J., said that if the testator had said my twenty-five shares of bank stock, it would have been a specific legacy, but he had not so expressed himself, and a conjecture, however plausible, that he intended the stock which he then held would not render the bequest specific. Being a general legacy, the executor might have been required to buy the prescribed number of shares, and as that had not been done, the legatee was entitled to the sum they would have cost. It was immaterial, that a dividend had been declared on the capital, because it had not been received by the testator, and still remained to his credit on the books of the corporation. It had been contended that the executors should only pay what the stock was worth in its altered state after deducting the dividend, but such a conclusion was inadmissible

because there had been no actual payment, and the amount was still standing to the testator's credit on the books. This case indicates that a general legacy of things of a certain kind, will be adeemed if the species becomes extinct after the date of the will and before it can take effect.

The law was held the same way in *Tift v. Porter*, 4 Selden, 516. The testator bequeathed "two hundred and forty shares of the Cayuga County Bank, to his wife, and also all his household furniture, books and wearing apparel," "all of which property and bank stock are to be delivered to her as soon as may be after letters testamentary shall have been granted, and in lieu of dower." He then bequeathed one hundred and twenty shares of stock in the same bank to another legatee, to be delivered in like manner. It was held, that as the will gave no indication that the shares bequeathed were to be taken from those owned by the testator, the legacy was general. Johnson, J., said, "A legacy is general when it is so given, as not to amount to a bequest of particular things or moneys of the testator, as distinguished from all others of the same kind. It is specific when it is a bequest of a specified part of the testator's personal estate, which is so distinguished; Wms. on Ex'rs. 838. In those cases in which legacies of stocks or shares in public funds have been held to be specific, some expression has been found from which an intention to confine the bequest to the particu-

lar shares of stock could be inferred. Where, for instance, the testator uses such language as "my shares" or any other equivalent designation, it has been held sufficient. But the mere possession by the testator at the date of his will of stock to an amount equalling or exceeding the legacy will not of itself make the bequest specific; Wms. on Ex'rs, 842; 1 Roper on Leg. 2067. The cases of *Davis v. Cain*, 1 Iredell Eq. R. 309; and *Robinson v. Addison*, 2 Beav. 515, are directly in point. In the first case, the bequest was twenty-five shares of the capital stock of the State Bank of North Carolina. The testator owned twenty-five such shares. The court say the legacy is not specific. If he had said my twenty-five shares of bank stock, it would have been a specific legacy. The other case was a bequest of five and one-half shares in the Leeds and Liverpool Canal, and all benefit and advantage thereof. The will contained two other bequests, each of five shares, in the same terms. At the time of making his will, testator owned fifteen and one-half shares of said stock. The only question was whether the legacies were specific. The Master of the Rolls, Lord Langdale in giving his judgment, said: In the gift, the testator has used no words of description or reference by which it appears that he meant to give the specific shares, which he then had. Various arguments depending on the general scope, and effect of the will were used for the purpose of showing that the

testator in giving the precise number of shares which he possessed, must have had those shares and none other in contemplation, and consequently must have meant specific gifts of them. It is, however clear, that the testator, if he had meant to give only the shares which he had, might have designated them as his, and that the mere circumstance of the testator having at the date of his will a particular property of equal amount to the bequest, of the like property which he has given, without designating it as the same, is not a ground upon which the court can conclude that the legacies are specific. So in *Partridge v. Partridge*, Ca. temp. Talbot, 226, a bequest of £1000 capital, South Sea stock, to a wife for life, with power of disposition among children, although the testator when he made his will had more than that amount of stock, was held to be general and not specific. To the same effect are *Simmons v. Vallance*, 4 Bro. C. C. 345, and *Sibley v. Perry*, 7 Vesey, 324. This last case is worthy to be more particularly mentioned, because in it there was a direction to transfer £1000 stock in the public funds called three per cent., consolidated, within three months after the testator's decease, and a similar direction to deliver is contained in the will of the testator in this case. Lord Eldon held the bequest not specific. In *Ashton v. Ashton*, Ca. temp. Talbot, 152, a bequest of £6000 South Sea annuities, in trust to sell and to lay out the proceeds, was held specific; the direction to sell

being inconsistent with giving such a meaning to the words as would authorize the executors to buy for the purpose of selling. The same argument plainly does not apply to a direction to transfer. That would be alike appropriate, whether the testator had or had not the stock." The cases of *Langdon v. Astor's Executors*, 1 Duer, 478, 545; 16 New York, 9, 33; and *DeNollebeck v. Astor*, 3 Kernan, 98, are to the same effect.

General words may, nevertheless, operate specifically, where it appears from the instrument as a whole, that the testator's intention was that the goods actually in his possession, or owned by him, should be appropriated to the purposes of the will.

In *Norris v. Thomson*, 2 McCarter, 493; 1 C. E. Green, 220, the testator devised "all the rest and residue of his estate, real and personal, in trust for the following uses and purposes: First. To give to my sister, Mrs. Caroline Norris, 250 shares of the capital stock of The New York and Baltimore Transportation lines; to my sister Amelia Reed, 250 shares of the capital stock of said line; to my niece Elizabeth Norris, 125 shares of the capital stock of said line. Second. I give to my friends, John M. Reed, Wm. H. Gatzmer, Dr. Horwitz and Joseph P. Norris, five bonds of \$1000 each of the Delaware and Raritan Canal Company, redeemable in 1889." It was admitted that the testator at "the date of his will and until he died owned certain shares of the New York and Baltimore Trans-

portation Company, exceeding the amount of those bequeathed, and also certain bonds of the Delaware and Raritan Canal Company, exceeding the number of those bequeathed and redeemable in 1889, and also sundry other bonds of the said company, redeemable in other years." The Chancellor held the bequest general, and assigned the following reasons: "It is a settled rule of construction, that a bequest of government securities, or shares in public companies, is not a specific bequest, unless there is a clear reference to the corpus of the fund;" 1 Roper on Leg. 214.

The same principle is clearly applicable to the bonds of corporations, which at the date of the will were outstanding and circulating, as well known securities in the stock market. To make a legacy of such stocks or securities specific, there must be something upon the face of the will to individuate them, and to distinguish them from all others of the same kind. Thus the legacy may be rendered specific by the use of terms, "*my stock*," or the stock, or part of the stock, now "*in my possession*," or "*standing in my name*," or "*owned by me*," or by indicating it to be sold and converted into money, or by any other form of expression which clearly indicates the purpose of the testator to give the specific thing, and not to designate the quantity or species of the thing bequeathed; 2 Williams on Ex'rs, 997; 1 Roper on Leg. 204. If by the terms of the will there be no such identification of the thing bequeathed, the legacy is

general, and if not found in his possession at his death, is tantamount to a direction to the executors to purchase such securities for the legatee, and the mere possession by the testator, at the date of his will, of a larger amount of stocks or bonds than are bequeathed, will not make the bequest specific, when it is given generally of stocks, or of stocks in particular funds, without further explanation; 1 Roper on Leg. 205; 2 Williams on Ex'rs, 999."

When, however, the question came before the Court of Appeals, this decision was reversed on the ground that taking the bequest to the trustees in connection with the purpose for which the trust was created, it sufficiently appeared that the testator meant to dispose of the shares which he then held, as distinguished from others of the same kind.

ADEMPTION.—It results from the definition of a specific legacy, that if the thing bequeathed is aliened or destroyed, or if it is converted into another thing although of the same kind, the bequest will fail. The rule is commonly said to be irrespective of intention, but a more accurate statement is, that an intention which is not expressed, will not be implied, although the intention which is expressed relates to something which does not exist, or which is beyond the reach of the will. Or, to state the principle somewhat differently, the failure of a gift does not justify a Court in substituting something else that has not been given. A specific

bequest of stock will be adeemed, if the stock be sold, because what the testator bequeathed was the stock, and not the money into which it is turned, and it is immaterial that he subsequently buys other stock in the same corporation, unless the language of the will indicates that his intention was, not merely to give the stock which he then had, but any stock of the same kind which he might afterwards acquire.

It has been repeatedly held in accordance with this principle, that a specific bequest is necessarily defeated by the alienation of the subject matter; *Blackstone v. Blackstone*, 3 Watts, 335; *Alsop's Appeal*, 9 Barr, 371; *Newcomb v. St. Peter's Church*, 2 Sandford Ch. 636; *Goddard v. Wagner*, 1 Strobbart Eq. 1; *Whitlock v. Vaun*, 38 Georgia, 562. This conclusion may be deduced from the change of purpose implied in making a different disposition of the property bequeathed, or from the incapacity of the will to operate on that which does not belong to the testator. If the former ground were the only one, there would be more reason for concurring with the opinion expressed in *White v. Winchester*, 6 Pick. 48, that the presumption is one of fact, and may be rebutted by facts or circumstances indicating an opposite design. But it is now generally conceded that whether parol and extrinsic evidence is or is not admissible to rebut a presumptive revocation, it can have no place where, supposing the intention to be un-

changed, there is nothing to which it can apply; *Hope v. Harmer*, 9 Harris, 351; *Blackstone v. Blackstone*.

In the case last cited, a bequest of "two hundred and fifty shares, which I hold in the Union Bank of Pennsylvania," was accordingly held to be adeemed by a sale in the testator's lifetime, notwithstanding clear and uncontroverted proof that he meant the bequest to subsist and take effect, and that his motive for parting with the stock was to invest the proceeds for the benefit of the legatees, in a way that would be less exposed to risk. "The rule that the annihilation of a specific legacy, or such a change in its state as renders it another thing, annuls the gift," was said by Gibson, C. J. "to be irrespective of intention and too well established under the authorities to be shaken."

In *Alsop's Appeal*, 9 Barr, 374, a bequest of "the Cincinnati nine per cent. stock, now in my possession," was in like manner adeemed pro tanto, by the sale of part of the stock in the testator's lifetime; and it was held to be immaterial, that he had subsequently executed a codicil confirming the bequest and charging it upon his estate, "in the same manner as if it was herein stated," because the codicil did not vary the nature of the bequest, and merely republished it as it had been originally made, to wit, specifically. It was said to be well settled that the republication of a will formally, or by annexing a codicil, would not restore a specific legacy which had been adeemed by the

sale or extinguishment of the interest given. See *Powells v. Mansfield*, 3 Mylne & Craig, 376; *Langdon v. Astor's Executors*, 16 New York, 9, 37, *ante*, 633; *post*, notes to *Ex parte Pye*.

The authorities are not less clear, that a bequest of a chose in action, will be adeemed by the payment or satisfaction of the debt during the testator's life, although the proceeds remain in his hands, or have been converted by him into another demand of the like kind. The rule applies equally whether the bequest is of a debt due by an individual, or of the stock of a private or public corporation, or of the State; and it is immaterial whether the payment is made in pursuance of a demand from the creditor, or is forced on him by the debtor, or results from the act of the law, contrary to the wish of both parties; *Walton v. Walton*, 7 Johnson, Ch. 258; *Cuthbert v. Cuthbert*, 3 Yeates, 486. In every such case the thing given ceases to exist, and the bequest goes with it. In *Cuthbert v. Cuthbert*, a legacy of the dividends of \$8000 government stock in trust for the separate use of the testator's niece, the principal to go to the trustees as; aid off by the government, was adjudged to have been adeemed by the payment of the stock, while in *Ludlam's Estate*, 1 Parsons Eq. 116; 1 Harris, 188, the same result ensued from the act of the State of Pennsylvania, in paying the stock which constituted the subject of the bequest.

The question arose in *Walton v.*

Walton, 7 Johnson Ch. 258; under the following circumstances. The testator bequeathed all his right, title and interest in thirty shares of the Bank of the United States, and in four shares of the Northern and Western Lock Navigation Companies. The charter of the bank expired not long afterwards and the assets were conveyed to trustees, for the benefit of the stockholders. Various dividends were declared in the execution of the trust, and received by the testator, but a large amount of property remained in the hands of the trustees at his death. During the same period the franchise and property of the Northern and Western Navigation Company, were taken by the State by virtue of the right of eminent domain, and a considerable sum awarded as compensation, part of which only had been paid when the will went into effect. Two points arose on this evidence, were the bequests specific? had they been adeemed wholly or pro tanto? The first question was answered affirmatively, and the court held as to the second, that the sums which had been paid were necessarily withdrawn from the operation of the will, but that it remained in force as to the residue, notwithstanding the change of circumstances through which the interest of the testator had been converted, from the original form of stock, into a mere pecuniary demand. "I am of opinion," said Chancellor Kent, "that these bank shares were given as a specific legacy. The testator evidently

meant to give those identical shares, whether they were worth more or less, and not the value of them in money. This would appear to be a very clear point; yet in considering this doctrine of ademption, it is difficult sometimes to perceive the distinction which is endeavored to be kept up through all the cases, between specific and general pecuniary legacies. Where a debt or specific chattel is bequeathed (*legatum nominis vel debiti*), the specific legacy is extinguished in the lifetime of the testator, by the extinguishment of the thing itself, as by payment of the debt, or by the sale or conversion of the chattel. But the ademption does not apply to a pecuniary or demonstrative legacy, which is general in its nature, though a particular fund be pointed out by the will to satisfy it. If the fund fails, such a legacy is to be made good out of the general assets, as the fund is designated only as the most convenient means by which to discharge it, and becomes descriptive of the amount or value of the gift.

"We have an example of this kind of money legacy given in the civil law, and of the sound principle upon which the distinction is supported. The testator gave to *Pamphila* 400 *aurei* or pieces of gold, and referred to a debt which *Julius*, his agent, owed him, and to his property in the army, and to his cash. (*Aureos quadringentos Pamphilæ dari volo, ita ut infra scriptum est: ab Julio auctore aureos, tot; et in castris quos habeo, tot: et in numerato*

quos habeo, tot.) He died without altering his will, but after he had converted all that property to other uses; and the question was, whether the legacy was due? The answer of *Julian*, the civilian, was, that the testator intended only to point out to his heirs, the funds from which the legacy could most easily be drawn, without intending to annex a condition to a pure gift, and that the legacy was, consequently, to be paid. Dig. 30, l. 96. De Legatis.

"The cases in the *English* books turn on very refined distinctions between a specific and a pure legacy. Thus, for instance, where the testator gave to his niece 500 pounds, which *Lady C.* owed him by bond (*Pawlet's case*, T. Raym. 335); or where the testator enumerated his mortgages, bonds and notes, and after giving an annuity out of the annual interest, directed his mortgages, bonds and notes, stating the amount, to be vested in trustees for charitable uses (*Attorney-General v. Parkin*, Amb. 566); or where he gave 1400 pounds for which he had sold his estate that day (*Carteret v. Carteret*, cited in 2 Bro. 114); or where he gave the money arising on a bill of exchange for 1500 pounds (*Coleman v. Coleman*, 2 Vesey, Jun. 639); in all these cases, the receipt of the debt by the testator, was held to be no ademption, because the legacies were considered as pecuniary and not specific, notwithstanding a reference was made to a particular part of the estate, as the part out of which the testator thought it most convenient

they should be paid. The courts are so desirous of construing the bequest to be general, that if there be the least opening to imagine the testator meant to give a sum of money, and referred to a particular fund *only*, as that out of which he meant it to be paid, it shall be construed pecuniary, so that the legacy may not be defeated by the destruction of the security.

“On the other hand, in the case of a bequest of *the interest of a bond of 3500 pounds, for life, to B., and the principal, on her decease, to C.* (*Ashburner v. M'Guire*, 2 Bro. 108); or where the testator *bequeathed the residue (after deducting 500 pounds) of the money owing to him by Sir H. M.* (*Rider v. Wager*, 2 P. Wms. 328); or *8000 pounds, the amount of a banker's note (Chaworth v. Beech*, 4 Vesey, 555); or *the interest of 300 pounds upon bond, to the legatee for life, and after her death he bequeathed over the principal and interest (Juner v. Johnson*, 4 Vesey, 568); or *where he gave all the stock he had in the three per cents., being about 5000 pounds (Humphreys v. Humphreys*, 2 Cox, 184); or *the sum or sums of money which his executors might receive on a note of 400 pounds (Fryer v. Morris*, 9 Vesey, 360); in all these cases, the legacies were held to be specific, and a receipt of the money by the testator an ademption of the legacy. The reasoning on this subject is, that if the legacy is meant to consist of the *security*, it is specific, though the testator begins by

giving the sum due upon it. A legacy of a debt, unless there is ground for considering it a legacy of money, and that the security is referred to as the best mode of paying it out of the assets, is as much specific as the legacy of a horse, or any movable chattel whatever. If the specific thing is disposed of or extinguished, the legacy is gone. Lord Thurlow said, in *Stanley v. Potter* (2 Cox, 180), that the question, in these cases, did not turn on the intention of the testator, and that the idea of proceeding on the *animus adimendi* had introduced confusion. Where the testator gave a specific chattel in specie, the ademption follows, of course, on a sale, or change, or destruction of the chattel, and the ademption becomes a rule of law, and not a question of intention. But I apprehend the words of Lord Thurlow are to be taken with considerable qualification; and that it is essentially a question of intention, when we are inquiring into the character of the legacy, upon the distinction taken in the civil law, between a demonstrative legacy, where the testator gives a general legacy, but points out the fund to satisfy it and where he bequeaths a specific debt. In *Coleman v. Coleman*, Lord Loughborough puts the question of general or specific legacy entirely on intention.

“But it is unnecessary to examine the decisions further on this point. The present case, as to the bank shares, is one to which the doctrine of ademption applies. It

is impossible to mistake the construction of the will, or to consider the legacy other than a specific one, and that being granted, it follows, of course, that the legacy was adeemed *pro tanto*, or as far as the testator received the dividends. And I think it is equally certain, that the legacy of the shares was not wholly adeemed, or the legacy destroyed or extinguished by the variation of the testator's interest in those shares, owing to the dissolution of the charter. The fund was varied, and differently arranged, and diminished in value by operation of law, but not destroyed, nor its identity lost. In *Backwell v. Child* (Amb. 260), a partner by will bequeathed a certain proportion of the profits of the partnership, and afterwards the partnership expired, and was renewed with a variation as to the amount of the interest of the partners; yet it was held, that the renewal of the articles was not an ademption or revocation of the will. A case still stronger and more analogous, is that of *Ashburner v. M'Guire*, already mentioned. The testator bequeathed to his sister, for life, the interest of a bond, due him, and he gave the principal, on her death, to her children. The debtor became a bankrupt, and the testator proved the debt under the commission, and received a dividend, and died. Lord Thurlow decreed against the administrator and residuary legatees, that the bond should be delivered to the sister and her children, that they might receive the future divi-

dends of the bankrupt's estate. The legacy was considered adeemed so far only as the dividend had been received by the testator; and the chancellor held, as Lord Camden and others had held before him, that there was no ground for a distinction between a voluntary payment and one coerced by suit or demand. In both cases, the legacy of the debt, so far as payment had been made, was extinguished. But though the value of the debt had become greatly impaired by the bankruptcy of the debtor, and his estate had passed, by act of law, into the hands of trustees, to be distributed according to prescribed rules, the legatee was entitled to what remained of the debt. Upon the same principle, the plaintiff, in this case, must be entitled to the future dividends, if any, upon the testator's 'right, interest and property in the thirty shares.'"

The case of *Havens v. Havens*, 1 Sandford Ch. 334, affords another instance of the principle that a specific bequest will not be adeemed by a change which leaves the subject matter substantially the same. In *Havens v. Havens*, the testator bequeathed his stock in the Firemen's Insurance Company then amounting to one hundred shares. After the making of the will the Insurance Company became insolvent, the whole of the capital being exhausted in the payment of the losses which had resulted from a conflagration in New York. The testator then filled up forty shares of his stock by a new subscription under

an act of Assembly conferring the requisite authority, and suffered the remaining sixty shares to be issued to third persons. The court held that the forty shares passed by the bequest. It was as much the same stock, as a ship is the same after it has been repaired or rebuilt piecemeal, although there remains little or nothing of the original stuff.

By statute in Kentucky, the conversion of money or property which has been bequeathed to one or more of the heirs of the testator, into property or things of a like or of a different kind, is not an ademption of the legacy or devise, but the legatee shall receive the value thereof unless a contrary intention appears in the will, or from extrinsic evidence; *Lilly v. Curry*, 6 Bush. 590; *Wiekliiff v. Preston*, 2 Metcalf Ky. 178.

Under the revised statutes of New York, a conveyance, settlement, deed, or other act of a testator, by which his estate or interest in property previously devised or bequeathed by him, shall be altered but not wholly divested, shall not be deemed a revocation of the devise or bequest of such property, but said devise or bequest shall pass the actual estate or interest of the testator which would otherwise descend to his heirs or pass to his next of kin, unless an intention to revoke is declared in the instrument which makes the alteration; R. S. chap. 6, title 1, sect. 39; *Doughty v. Stillwell*, 1 Bradford, 309; 2 American Lead. Cases, 537, 5 ed.

It seems to have been held at one

period in England, that ademption is a question of intention, depending on whether the alienation or destruction of the property was meant to revoke the bequest, *ante*, 626, and traces of this opinion are discoverable in some of the decisions in the United States. See *Stout v. Hart*, 2 Halstead, 418; *White v. Winchester*, 6 Pick. 48; *Blake v. Blake*, 16 Georgia, 119. Agreeably to this view, his declarations are admissible in evidence to show that he regarded the legacy as still in force, and meant that the legatee should have an equivalent for what he had lost. The weight of authority is now conclusively that when there is no subject matter to which the intention expressed in the will applies, the existence of another or different intention cannot be proved by parol consistently with the statutes by which the power of devising is regulated or conferred. It follows that whether the interest bequeathed is extinguished by a payment or release, or alienated by a sale, ademption will ensue as a legal inference, although the testator did not desire or intend such a result, and would have guarded against it if he had been better informed, or if time and opportunity had permitted him to make another will; *Barclay v. Rainer*, 5 Maddock, 208; *Hope v. Harmer*, 9 Harris, 361; *Blackstone v. Blackstone*; *Beck v. M'Gillis*, 9 Barb. 35.

In *Barclay v. Rainer*, 5 Maddock, 208, the testator bequeathed two policies of insurance on the life of his wife to his executors in trust to pay the annual premiums

so long as she should live, and from and after her decease to receive the principal sums due thereon, and after deducting the costs and advances to pay the sum of £500 to his daughter Maria, and invest the residue in the funds in trust for the testator's nephew. The wife died in the lifetime of the husband, who received the amount of the insurance, and it was held that the gift had failed, although his expectation was disappointed by the event, and he could not have declined to receive the money, *ante*, 623.

The question whether payment will adeem a specific legacy where the creditor is insane and therefore incapable of assenting, arose in *Hope v. Harmer*, 9 Harris, 361. Black, C. J. said, "that the distinction between the case where the testator called in the debt and that where the debtor paid it of his own accord, was now finally discarded, and that the test was whether the subject remained in specie at the testator's death." Tried by this rule, payment to the committee of a lunatic was as complete an ademption as any payment that could have been made to the testator while his mind was unimpaired, *ante*, 628.

Payment is nevertheless so far a question of intention that it is not until the money has left the pocket of the debtor and reached that of the creditor, that a demand can be said to be satisfied necessarily, and irrespective of design; and a change in the form of the security or the substitution of one security for another, will no more adeem a bequest of a debt than it

will discharge a mortgage by which the debt is secured; *Stout v. Hart*, 2 Halstead, 418; *Ford v. Ford*, 3 Foster, 412; *Anthony v. Smith*, 1 Busbee Eq. 188; *Gardner v. Printup*, 2 Barb. 83; 2 American Lead. Cases, 264, 5 ed. For a like reason a legacy of the stock of a bank or railway company will not be adeemed by the dissolution of the corporation through the expiration of its charter or from any other cause, followed by the appointment of a receiver or assignee, and the declaration of a dividend on the capital which is not actually paid; *Walton v. Walton*, 7 Johnson Ch. 528. The principle is the same when the effects of the debtor are transferred to an assignee in bankruptcy or insolvency; and it may be said in general that so much of a demand or chose in action as remains outstanding will pass by a specific bequest despite any change of form or partial payment.

In *Ford v. Ford*, 3 Foster, 212; the bequest was as follows: "I give and bequeath to my wife, Mehitable Ford, all notes of hand which are payable to me at the date of this codicil." At that time the testator held four notes, signed by Samuel Hill as principal and Jacob Hill as surety, but subsequently surrendered them and discharged the surety, and took four notes from the principal secured by a mortgage. The court held, on the strength of the principal case and of *Walton v. Walton*, that the bequest was manifestly specific, but inasmuch as the change of form did not impair the identity of the fund there was no ademption.

"In *Sheffield v. The Earl of Coventry*, 2 Russ. & Mylne. 317;" said Gilchrist, C. J., "the testator gave his son a legacy of "£20,000 in the joint stock of the annuities, transferable at the Bank of England, commonly called four per cent. bank annuities." The only four per cent. bank annuities existing at the date of the will were reduced by act of Parliament to three and a half per cents.; afterwards, and before the testator's death, a new stock of four per cent. bank annuities was created. It was held that the testator's intention could not be confined to the four per cent. bank annuities existing at the date of the will, that the will spoke at the testator's death, and that the son was entitled to £20,000 in the then existing bank annuities.

"If the debt is lost or extinguished the legacy will fail. But if it still subsist and although in another form is substantially the same, there will be no ademption, or only to the extent of the amount actually paid. This conclusion was strengthened by the analogy of the cases which established that although a mortgage will only cover the debt which it was originally intended to secure, and if that is paid or extinguished cannot be kept alive by a parol agreement, it will yet be valid so long as the identity of the debt is unchanged. In *Davis v. Maynard*, 9 Mass. 242, a note secured by a mortgage was given up and a recognizance accepted for the sum due, and this was held not to discharge the mortgage. In *Pome-*

roy v. Rice, 16 Pick. 22; a *feme sole* held a note secured by a mortgage; after her marriage her husband gave up the note and took a new one, and this was held not to discharge the mortgage. To the same effect is the case of *Watkins v. Hill*, 8 Pick. 522; In *Dunham v. Day*, 15 Johns. Rep. 554; it was decided that where a mortgage was given as security for the payment of promissory notes which are from time to time renewed, the renewal is not to be deemed an extinguishment of the original debt so as to affect the continuance of the security, or unless an agreement can be inferred from the circumstances; *Johnson v. Cleaves*, 15 New Hamp. 332. This court adopted the same principal in *Elliott v. Sleeper*, 2 New Hamp. 525. In the case of the *Bank v. Willard*, 10 New Hamp. 210; a joint and several note was given, secured by a mortgage. The note was surrendered and two notes given signed by the debtors severally. Ch. J. Parker, said in pronouncing the judgment of the court, "the debt has certainly not been paid. If the taking of the separate securities may operate as a discharge of the former note, so that no action could be maintained on that, the debt itself has not been extinguished. No money has been paid nor any release given. Nothing has been accepted in satisfaction of the debt. It is a mere change of the security and of the evidence of the debt from a joint and several note to two several ones, so that the debtors no longer stand as sureties to each other for the proportion of each."

"In the present case the debt existing at the date of the codicil has not been paid by the substitution of the new notes and the mortgage for the original notes. Its identity has not been lost and nothing has been accepted in satisfaction of it. There is merely a change of the security and of the evidence of the debt from joint and several notes, to notes secured by mortgage."

It results from the same principle, that a specific bequest of a chose in action will not be adeemed by the substitution of a third person for the original debtor, because the obligation remains although transferred to other shoulders; *Gardiner v. Printup*, 2 Barb. 83; *Doughty v. Stilwell*, 1 Bradford, 300, 309. Such is, in effect, the case where, as in *Walton v. Walton*, the charter of a bank expires, and the assets pass into the hands of trustees, or where a debtor is discharged in consideration of his assigning his effects for the benefit of his creditors. In *Gardner v. Printup*, a mortgagor, the mortgagee, and a purchaser of the mortgaged premises, entered into an agreement that the mortgagor should be credited with the whole of the purchase-money on the payment of part, and the execution by the purchaser of a bond for the residue, and the court held that a bequest "of the proceeds" of the mortgage was adeemed only to the extent of the sum actually received, and that the legatee was entitled to the amount remaining due and unpaid on the bond.

When, however, the effect of the transaction is to extinguish the

demand bequeathed, ademption follows as a legal consequence, whether the means are payment, a release, or the acceptance of some new thing in satisfaction. In *Beck v. McGillies*, 9 Barb. 35, a mortgage which had been specifically bequeathed, was foreclosed, and the premises sold to a third person, who gave a new bond and mortgage for the debt. The legacy was held to be adeemed, although a memorandum was found among the testator's papers declaring that the new bond and mortgage were but a renewal of the old, and that his intention was that they should pass under the will. *Harris, J.*, said that it was immaterial that nothing was actually paid to the testator, or received by him, because the original bond and mortgage were as much satisfied by the foreclosure sale, as if the price had been handed over to the mortgagee, and again loaned to the purchaser. That the amount remained outstanding in a new security upon the same property did not vary the legal aspect of the case, or operate to save the legacy. The rule that if a specific legacy does not exist at the death of the testator, it is adeemed, is inflexible, and prevails without regard to the hardship that may result from its application.

In *Kent v. Summerville*, 7 Gill & Johnson, 265, the testator bequeathed a bond to a third person, and named the obligor as his executor. The latter assented to the bequest, and delivered the bond to the legatee, by whom it was subsequently transferred for value to

an assignee, who brought debt against the obligor. Buchanan, C. J., said that on the assent of the executor to a specific legacy, the legal title to it vested in the legatee, who might maintain trover or replevin, or where the bequest was of a bond or note, proceed to recover the amount in the name of the executor. Where, however, the debtor was named as executor, the bond was extinguished at common law, and it became requisite for the legatee to apply for relief to a court of equity. By the statute law of Maryland, naming a debtor as executor did not operate to extinguish any just claim which the testator had against him, and it was further provided that the holder of a written assignment of a chose in action for the payment of money, might maintain an action in his own name against the debtor. The plaintiff was, therefore, entitled to judgment for the amount of the bond. See *Howell v. Hoak*, 4 Iredell Eq. 188.

There is no rule of law which precludes one who bequeaths a thing, from also bequeathing that into which it may subsequently be converted, and this precaution should be observed wherever it is desirable to guard against the ademption of the bequest. See *Langdon v. Astor*, 1 Duer, 478. A bequest of stocks may consequently be accompanied with a direction that if they are paid off or sold before the testator dies, the legatee shall be entitled to the money or an equivalent amount. Under these circumstances, a pecuniary is superimposed on a specific bequest, and

may take effect if the other fails. See *Fontaine v. Tyler*, 9 Price, 37. But a bequest may, without ceasing to be specific, be so worded as not only to comprise the property in its existing form, but notwithstanding any modification which it may subsequently undergo. It is well settled, that a bequest of the proceeds of debt will not be adeemed by payment, and the principle is the same where the debt is bequeathed and its proceeds. What the testator means to give under these circumstances, is the fund, and the legacy will be valid so long as that can be traced and identified. See *Gardner v. Printup*, 2 Barb. 88; *Corbin v. Mills*, 19 Grattan, 438. *Doughty v. Stilwell*, 1 Bradford, 300, 309; *Clark v. Brown*, 2 Smale & Giffard, 52; *Spence v. Higgins*, 22 Conn. 521; *ante*, 625.

In *Clark v. Brown*, 2 Smale & Giffard, 524, the testator gave "one-third part of whatever sum or sums of money might arise and be received from his claim" against the estate of a deceased debtor, to his son, another third part to his wife, and the residue to his son-in-law. The larger part of the claim was subsequently paid to the testator, and invested in his name in the public funds, and remained in that form until his death. The Vice Chancellor said that "the gift was not of the debt, as such, but of the money that would result from the recovery of the debt. It did not therefore become inoperative when the debt was paid. Moreover, in the case of *Barker v. Rainer*, 5 Maddox, 208;

2 Russell, 122; Sir John Leach, had adverted to a principle arising in the civil law, that where a testator sets apart a specific sum received by him, in order that it may enure to the benefit of the legatee, the doctrine of ademption or extinction does not apply."

The true ground for the decision seems to be that the bequest was of a fund, and that the acts of the testator were admissible in evidence, as denoting his intention that the continuity of the thing bequeathed should be unbroken, or to speak more accurately, as identifying the amount standing in his name in the funds, as that which had been derived from the collection of the debt. See *Warren v. Wigfall*, 3 Dessausure, 47; *Pell v. Ball*, 1 Speer Eq. 48; *Spence v. Higgins*, 22 Conn.; *Doughty v. Stilwell*, 1 Bradford, 309.

In *Spence v. Higgins*, David Spence, bequeathed to his wife "all the furniture and property she brought with her at our marriage." It appeared in evidence that she then owned two promissory notes, which were collected by her husband and deposited in a savings bank to her credit. He died some ten years after the date of the will, and it was held that the bequest was specific, and not only passed the principal, but the interest that had accrued during his life. In *Warren v. Wigfall*, 3 Dessausure, 47; a bequest of the whole of the property that the testator's wife had brought on their marriage, was in like manner held to be a specific legacy. In the subsequent case of *Pell v. Ball*, 1 Speer Eq.

48; "the bequest was to my beloved wife of all the property, personal and real, that I have received or may receive hereafter from her father's estate," and the chancellor was clearly of opinion that this was a specific legacy of all the assets which had come from the source indicated in the will, so far as they still existed in their then form, but not as it would seem of the property into which they had been converted by the testator, during his lifetime. This decision was reversed by the Court of Errors on the ground, that as all that the testator had received through his wife was in money, the legacy must also be regarded as pecuniary, although it would have been specific if her fortune had consisted of stock, slaves, machinery or other chattels. The true method in this case would have been to treat the bequest as being of all that the testator might possess at his death, which could be traced and identified as having been derived from his father-in-law's estate.

Although a bequest of a debt, will not be defeated by payment, where it appears from the will that the testator contemplated such an event, and meant that the proceeds should go to the legatee, yet the rule does not apply, when the gift is of what may be collected after his decease; *Chase v. Lockerman*, 11 Gill & Johnson, 185. In *Fryer v. Morris*, 9 Vesey, 360; a bequest "of all such sums as my executors may receive on a note given to me by Messrs. Cross & Co.," was accordingly held to be adeemed

on proof that the note had been paid to the testator during his life. The distinction is obviously just; but this can hardly be said of *Galbreath v. Winter*, 10 Ohio, 65; where payment was held to be an ademption, although the bequest was of "all that may be collected," and there were no apt words to indicate that the testator referred to what might be paid to his executors, as distinguished from what he might receive in person.

PAROL AND EXTRINSIC EVIDENCE.—It is well settled that the intention of the testator, should be deduced not from the language of the will alone, but from reading it in view of the subject matter, and with the aid of the light which such a comparison affords. Wigram on Wills, Part 1, pl. 76, 96; *Doe v. Martin*, 1 Nev. & Man. 524. This is a general principle which applies to wills in common with deeds, and other written instruments, 1 Smith's Lead Cases, 495, 7 Am. ed.; 2 Id. 256; *Bainbridge v. Wade*, 16 Q. B. 89; *Goldshede v. Swan*, 1 Exchequer, 154. Fully to understand any writer, we must look from his standpoint, and have a competent knowledge of the objects to which he refers, *Doe v. Hiscocks*, 5 M. & W. 363, 368; *Osborne v. Osborne*, 24 Grattan, 392. Parol evidence is therefore always admissible to identify the property bequeathed, and ascertain whether it answers the description given in the will. See *Pell v. Ball*, 1 Speer Eq. 48; *Goddard v. Wagner*, 1 Strobhart Eq. 1; *Stickney v. Davis*, 16 Pick. 18; *Morton v.*

Perry, 1 Metcalf, 446; *Selwood v. Mildmay*, 3 Vesey, 306; *ante*, 352. Or as the rule is stated by Mr. Wigram, "for the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every material fact, relating to the person who claims to be interested under the will, and to the property claimed, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of the interest he has given by his will;" Wigram on Wills, Part 1, sect. 17; *Woolston's Lessee v. White*, 5 Maryland, 304; *Warner v. Miltenberg's Lessee*, 21 Maryland, 272.

Agreeably to another proposition of the same writer, even where "there is nothing in the context of a will to indicate that the testator has used the words in which he has expressed himself in any other than the strict and primary sense, but his words so interpreted are insensible, with reference to extrinsic circumstances, a court of law may look into the extrinsic circumstances of the case to see whether the meaning of the words be sensible in any popular or secondary sense of which with reference to these circumstances they are capable;" *Pell v. Ball*, 1 Speer Eq. 48, 86; Wigram on Wills, Part. 1, Sect. 15; *Doe v. Hiscocks*, 5 M. & W. 363, 369.

These principles have been ap-

plied under a great variety of circumstances. In *Selwood v. Mildmay*, 3 Vesey, 306, the testator gave to his wife the interest and proceeds of £1250 part of "my stock in the four per cent. annuities of the Bank of England." It appeared from the testimony taken before the master, that the testator's four per cent. bank annuities had been sold shortly before the making of the will, and the proceeds reinvested in the "Long Annuities." Sir R. P. Arden, said, "that the case was one of latent ambiguity, arising from a mistake which the court would rectify by a decree that the legatee should have the £1250 out of the general personal estate."

It has been said of this case, "that it was a wrong application of a correct principle;" *Doe v. Hiscocks*, 5 M. & W. 363, 71. This must be conceded if, as Sir James Wigram contends, there was "no correspondence or agreement between the description in the will and the subject intended. The testator did not even imperfectly describe the thing which he meant to describe, but on the contrary, as the evidence proved, described one thing when he meant another;" Wigram on Wills, part 1, pl. 132. But it may seemingly be ranged under the established rule that "*falsa demonstratio non nocet*," where enough appears upon the instrument to show the intention after the false description is rejected; 2 Smith's Lead. Cases, 468, 7 Am. ed.; *Miller v. Travis*, 8 Bing. 244, 253; *Richards v. Humphreys*, 15 Pick. 133; notes to *Ex parte Pye*, *post*.

In *Selwood v. Mildmay*, the effect of the parol evidence was to substitute another thing of a like kind for that bequeathed; but a specific legacy may in the same way be shown to be general, or a general legacy specific; *White v. Beatty*, 1 Dev. Eq. 87, 320; *White v. Green*, 1 Iredell Eq. 45; *Boys v. Williams*, 3 Simons, 563; 2 Russell & Mylne; *Crockat v. Crockat*, 2 Peere Williams, 164, *ante*, 337, 350, 352. In the case last cited, £550 were bequeathed as being in the hands of a third person. It appeared in evidence that the testator had, before making his will, received various payments on account, and the legacy was held to be demonstrative, as the only rendering of the language of the will consistent with the interest to which it referred; *ante*, 625. See *White v. Green*, 1 Iredell Eq. 45, for an application of the same principle in another form.

In like manner although money is *prima facie* to be understood as meaning cash, extrinsic evidence may still be admissible to show that what the testator had in view, was certain promissory notes which he had received for the purchase-money of land sold shortly before the execution of the will; *Morton v. Perry*, 1 Metcalf, 446. So a will reciting that the testator has given one thousand dollars by note to his son, may take effect as a pecuniary bequest of that amount, although the note is invalid for want of a consideration; *Loring v. Sumner*, 23 Pick. 28.

The weight of authority is, that the testator's oral or written de

clarations cannot be received in evidence as an aid to the interpretation of his will, or for the purpose of ascertaining to what it refers; *Clayton v. Lord Nugent*, 13 M. & W. 200; *Allen v. Allen*, 18 Howard, 385; *Mann v. Mann*, 1 Johnson, Ch. 231; 14 Johnson, 1; *Grey v. Sharp*, 1 Mylne & Keen, 509, 602, except in so far as they are part of the *res gestæ*, or where they are evidence of some fact which would be admissible if proved by other evidence; *Preedy v. Holtom*, 4 Adol. & El. 76; *Herbert v. Reed*, 16 Vesey, 481; or show that the language of the will was habitually used by the testator in a peculiar sense; *Baumont v. Fell*, 2 Peere Wms. 141; *Doe v. Hiscocks*, 5 M.

& W. 363, 371, 372; *Clayton v. Lord Nugent*, 13 Id. 200, 207. Where, nevertheless, a legal inference is drawn against the literal interpretation of the will, the testator's declarations are admissible to show that his meaning was in strict accordance with what he wrote; and evidence of like kind may then be adduced on the other side; notes to *Ex parte Pye*, *post*. It is, moreover, a general if not invariable rule, that an equity arising on parol and extrinsic evidence, may be rebutted by the means which are used to set it up; See *Zeiter v. Zeiter*, 4 Watts, 212; *Zeigler v. Eckert*, 6 Barr, 13; 2 American Lead. Cases, 525, 5 ed.

[*320]

* HOWE *v.* EARL OF DARTMOUTH.
HOWE *v.* COUNTESS OF AYLESBURY.

MAY 22, 1803.

REPORTED 7 VES. 137.

CONVERSION OF RESIDUE BEQUEATHED TO PERSONS IN SUCCESSION.]—*General rule, that where personal property is bequeathed for life, with remainders over, and not specifically, it is to be converted into the Three per Cents., subject, in the case of a real security, to an inquiry, whether it will be for the benefit of all parties; and the tenant for life is entitled only upon that principle.*

Bequest of personal estate not held specific merely from being combined with a devise of land.

WILLIAM EARLE OF STRAFFORD, by his will, dated the 25th of October, 1774, gave his wife, Anne Countess of Strafford, *all his personal estate whatsoever* (except the furniture of Wentworth Castle) *for her life*, subject to the following outpayments and legacies. He also left to her all his houses, gardens, parks, and woods, and all his landed estates for her life; and afterwards all his personal and landed estates to his eldest sister Lady Anne Conolly for her life: and then to the eldest son of George Byng, Esq.; and afterwards to his second, third, or any later sons he

may have by the testator's niece Mrs. Byng; and then to the eldest son and other sons successively of the Earl of Buckingham by his niece Caroline, but all of them to be subject to the following outpayments and legacies. He left his wife the sum of 15,000*l.*, to dispose of for ever as she pleases, and the value of 500*l.* in furniture in Wentworth Castle of whatever sort she chooses, else the whole furniture to be *hers, if she meets with any difficulty in this disposition. He gave several [*321] legacies and annuities, and declared he would have all his debts paid, and gave all his servants a year's wages.

The testator died on the 10th of March, 1791. Anne Countess of Strafford died in his life, on the 9th of February, 1785. Lady Anne Conolly filed a bill for an account of the personal estate, &c. By a decree made at the Rolls on the 17th of May, 1793, the usual accounts were directed; and it was declared that the plaintiff would be entitled to the interest of the clear residue of the testator's personal estate during her life; and an inquiry was directed, who were the next of kin of the testator at the time of his death.

The Master's report, dated the 7th of March, 1793, stated the account of the personal estate, part of which consisted of the following stocks and annuities, standing in the testator's name at his death:—

4320*l.* Bank Stock :

9572*l.* per annum Long Annuities ;

750*l.* per annum Short Annuities.

Under orders made in the cause, the sums of 15,000*l.* and 4000*l.* had been paid in by the executors, and laid out in 3*l.* per cent. Consolidated Annuities.

By a decretal order, made on the 7th of May, 1796, the balance of the personal estate in the hands of the executors, and of the interest, &c., was ordered to be paid into the Bank; and that the executors should transfer the 4320*l.* Bank Stock, the 9572*l.* per Annum Long Annuities, and 750*l.* per Annum Short Annuities, to the Accountant-General, in trust in the cause; and that the said funds, when so transferred, should be sold with his privity; and that the money to arise by such sale should be laid out in the purchase of 3*l.* per Cent. Annuities, in trust in the cause, subject to a further order; and that the Master should appropriate a sufficient part of the said Bank Annuities, when purchased, to answer the growing payments of the several annuities; and that, as any of the annuitants should die, the funds appropriated *i.e. [*322] spectively should fall into the general residue, with liberty to apply; and it was ordered, that the interest of the residue of the said Bank Annuities after such appropriation, and also the interest and dividends of the said 4320*l.* Bank Stock, should be paid to the plaintiff Lady Anne Conolly for her life, and on her death any person or persons entitled thereto were to be at liberty to apply; and after providing for the costs out of the balance of the personal estate, and for the arrears of the annuities out of the

sum of 2067*l.* 6*s.* 1*d.*, the balance of the interest and dividends received by the executors and ordered to be paid into the Bank, it was ordered, that the remainder should be paid to Lady Anne Conolly; and also that 1846*l.* 9*s.* 7*d.*, cash in the Bank, which had arisen from interest of the funds in which part of the testator's personal estate had been invested, should be also paid to her; and that the dividends of 24,619*l.* 4*s.* 10*d.*, 3*l.* per Cent. Bank Annuities, in which the sums received by the executors from the personal estate had been invested, should from time to time be paid to her during her life, and on her death any persons claiming to be entitled were to be at liberty to apply; and it was ordered, that the executors should get in the outstanding personal estate, and that so much thereof as should consist of interest, should be paid to Lady Anne Conolly, and so much as consisted of principal should be paid into the Bank, subject to farther order.

The Master's farther report, dated the 10th of December, 1796, stated, that the Bank Stock and the Long and Short Annuities had been sold, and the produce laid out in 3*l.* per Cent. Annuities.

Upon the death of the plaintiff Lady Anne Conolly, the suit was revived by her executors; and the cause coming on before Lord Alvanley, then Master of the Rolls, for farther directions on the subsequent report, it was insisted, on the part of Mr. Byng, that Lady Anne Conolly had received, for interest and dividends accrued on the Bank Stock and the Long and Short Annuities, and the produce thereof laid out in Bank 3*l.* per Cent. Annuities, [323] *large sums more than she was entitled to, if those funds had been sold, as they ought to have been immediately after the testator's decease, and the produce invested in a permanent fund, viz, the 3*l.* per Cent. Consolidated Bank Annuities. The Master of the Rolls directed inquiries with reference to that question between the executors of Lady Anne Conolly and Mr. Byng, and the other parties interested in the residue of the personal estate; with liberty to present a petition to re-hear the order of 1796, as to the payments thereby directed to be made to Lady Anne Conolly.

The re-hearing was argued before Lord Rosslyn, but no judgment was given.

Mr. *Mansfield*, Mr. *Lloyd*, Mr. *W. Agar*, Mr. *Wingfield*, Mr. *Sergeant Palmer*, Mr. *Bell*, and Mr. *Richards*, for different parties, in support of the petition of re-hearing.

The tenants for life of such funds as Bank Annuities, carrying a higher interest, and Long and Short Annuities, wearing out rapidly, are not entitled to the enjoyment of them in specie; but there is a standing rule of the Court, for the benefit of all parties interested, that those funds shall be laid out in the more equal fund, the 3*l.* per Cents. No party ought to suffer by the circumstance, that what ought to have been done, and what the Court would have directed to be done, immediately on the testator's death, was not done. The state of this question is, that the late

Lord Chancellor went out of office without having delivered any opinion upon the point; and Lord Alvanley though he could not decide against the order of the Lord Chancellor; supposing his Lordship to have been of opinion, that there was something particular in this will, upon the distinction between the gift of a general residue for life, with remainder over, and a specific bequest of this sort of property; in which case it could not be sold, and the dividends follow, of course, from the death of the testator; even the rule, that takes place in general legacies, postponing the payment of interest to the end of ^a year from the death, [*324] not attaching upon it. But there is nothing specific in this will. This is a mere gift of the residue of the personal estate for life, subject to the payment of debts, legacies, and annuities. Under every such will, the Court has always sold this sort of property, if there was any wearing out fund, not specifically given, or to any fund as to which the tenant for life had an advantage over those in remainder.¹ This is to be found in every decree; and is so familiar, that no report of such case is to be met with in print. *Cranch v. Cranch*;² *Powell v. Cleaver*,³ and other cases, have

¹ *Gibson v. Butt*, 7 Ves. 59.

² James Cranch, by his will, dated the 22nd of June, 1791, after several legacies to his children, gave the residue of his money, lands, tenements, goods, chattels, or estates, to his wife for life, and after her death to be equally divided among his children who should be living; and appointed his wife executrix.

Decree for an account, such part as was already invested in Government securities was to be transferred to the Accountant-General; and the executrix admitting that 3943*l.* 13*s.* 9*d.* 5*l.* per Cent. Bank Annuities was standing in her name, it was ordered, that the same should be transferred, &c., and the dividends paid to her for life; with liberty for the plaintiffs to apply at her decease.

The Master's report, dated the 11th of July, 1797, stated, that the personal estate consisted of leasehold premises.

By an order, dated the 24th of July, 1797, it was, among other things, ordered that the 5*l.* per Cent. Bank Annuities, should be sold, and the money laid out in 3*l.* per Cent. Annuities, the interest to be paid to her for life, with liberty to the parties interested in the residue after her death to apply. An inquiry was directed, whether it was for the benefit of the persons entitled to the clear residue of the personal estate to have the leasehold premises sold; and, if it would be for their benefit, it was ordered, that they should be sold; and that the money should be laid out in the 3*l.* per Cents; the dividends to be paid to her for life; with liberty to apply after her death.

³ John Powell, by his will, dated the 8th of August, 1775, devised all his manors, and real estate to Cleaver and others for ninety-nine years; remainder to Arthur Roberts and his first and other sons in tail; remainder to William Roberts and his first and other sons in tail male; remainders over; and he directed his trustees, whom he also appointed his executors, to lay out the residue of his personal estate in the purchase of lands, to be settled to the same uses.

The bill was filed by the first tenant for life, and the usual decree was made. By an order dated the 31st of January, 1788, 552*l.* 3*s.* 9*d.* Long Annuities, and 3000*l.* India Stock, standing in the testator's name at his decease, were directed to be sold, and the produce laid out in 3*l.* per Cent. Annuities; and as to 33,610*l.* Bank 4*l.* per Cent. Annuities, and 23,897*l.* Bank 5*l.* per Cent. Annuities, an inquiry was directed, whether the fund of the testator's estate would be in a better condition by selling the same and investing the produce in 3*l.* per Cent. Annuities; and the Master certifying that it would, an order was made on the 21st of May, 1788, for the sale of those funds, and investing the produce in the 3*l.* per Cents.

Elizabeth Hoadley by her will bequeathed the residue of her personal estate

been selected, proving the invariable rule to sell Bank Stock, Long and Short Annuities, leases, &c., when the Court is informed by the record of the nature of the property. The consequence is, the residuary legatee is not entitled to anything till the debts and legacies are paid, and the residue ascertained. An objection has frequently been made by an annuitant, when the executor has desired to pay the *fund into Court, that it would stop the [*325] interest. But an executor makes those payments at his peril. The Court has sometimes ordered the interest to be paid to the tenant for life; but that must be considered to have been without prejudice. In the instance of a Short Annuity, the tenant for life would wear out the thing. Some certain rule must be established. The rights of the parties must be the same as if the testator had converted the property immediately before his death. That or some other definite time must be fixed by the Court. It cannot depend upon the account, the acting of the executor, &c. The possibility of collusion between the tenant for life and the executor must be attended to. Suppose the executor was himself tenant for life.

Mr. *Romilly* and Mr. *Trower*, for the executors of Lady Anne Conolly, in support of the decree.

The first question is, whether Lady Anne Conolly was entitled to the annual produce of the personal estate at the death of the testator; if not, the next consideration is, whether, the executors having paid it to her, and particularly the dividends of the Bank Stock, those payments ought to be called back.

The personal estate is given to her for life specifically. As this disposition is expressed, it is the same as if the testator had enumerated the particular articles, of which the personal estate consisted. He has not given his personal estate to his executors, in trust to sell, &c., and that what remains shall be given to those persons: but he has given the personal estate to them specifically, as he has given the land. The Lord Chancellor considered, that there was nothing in the will, which made it necessary for the executor to convert this property into any other fund. For many purposes a bequest of all the personal estate is considered specific; for instance, upon the question of exoneration, where there is a charge of debts. There is no doubt of the general rule: but this question does not depend upon it. In the case put by your Lordship, of a man having an annuity for the life of A., and bequeathing his personal estate to A. for life, remainder *to his son, [*326] there was a clear intention that it should be sold. But suppose he had expressly described the annuity, however absurd,

to Dr. Ashe for life, and after his decease to be divided among his children: to the sons at the age of twenty-one; to the daughters at that age or marriage.

An order was made, that 11,800*l.* Bank 5*l.* per Cent. Annuities should be sold and the produce laid out in the 3*l.* per Cents.

Similar orders were made as to 5*l.* per Cent. Annuities in *Chancey v. Rees*, *Peppin v. Lovewell*, and *Dagley v. Leake*; and in *Griffiths v. Grieve*, as to 4*l.* per Cent. Annuities. See *Barthelomon v. Scholey*, as to Short Annuities.

it must be considered specific. If the only property was 40*l.* a-year, barely sufficient for a maintenance, and clearly intended for that purpose, upon this principle the rule must extend to that case. The rule is founded in convenience; but there is no fixed principle, that executors are bound of necessity to make the conversion at the testator's death, or any given time afterwards. The executor ought not to change a permanent fund producing a larger interest to another producing a smaller, if such conversion is not required for the payment of debts. The habit is to do it when the executor is called into this Court, not where he is not called upon, and no question is raised. If he is liable to question for not doing so, it must be upon the principle of *devastavit*. The consequence will be, that there will be no possibility of executing a will without the direction of the Court, if, though not called upon by the remainder-man, he must do it at his own peril immediately. No given period has been ascertained, after which the remainder-man shall have a right to call upon him. The Court makes the conversion, but does not consider the executor as having done wrong in not having converted. No instance can be found, where it has come into Court several years after the death, and the executor has been charged. The period of the conversion in this instance at all events ought to be, not the time of the testator's death, but the year 1796, when the order was made; for it was competent to them to call upon the executor at a prior time.

The second question is of considerable novelty, as to what is to be done with the dividends received, particularly upon the Bank Stock. With reference to the Bank Stock, as distinguished from the Annuities, no case has established that the executor had done wrong by paying to the tenant for life the interest of some permanent fund, though producing more than if the property was invested in the 3*l.* per Cents.; and to make this party *account* for what she has received, that proposition must be made out. This must have often occurred. A considerable part of the property might have been out upon securities at 5*l.* per cent. If the tenant for life, to whom the interest was paid by the executor, died insolvent, would that be a *devastavit*? No such decree was ever made. Upon that hypothesis it would be necessary for the executor immediately to call in all the securities, Bank Stock, India Stock, mortgages, &c., and to invest the whole in 3*l.* per Cents. [*327]

The Lord Chancellor [Eldon] desired the counsel in reply not to trouble himself upon the point whether the bequest was specific, and to advert to the Bank Stock.

Mr. *Mansfield*, in reply.—In this respect there is no difference between the Bank Stock and the Annuities. The price is perfectly accidental, and is never considered. The Court says, first, Bank Stock is the stock of a trading company, not a government fund, secured by the Legislature. The former also produces a high dividend, and is therefore more liable to fluctuation and

uncertainty. For these reasons, this Court never suffers those funds to remain which are considered hazardous, and, to a certain extent, wasteful. The tenant for life cannot have any more right to advantage in the shape of that large dividend, than of Long and Short Annuities. The Court goes further, ordering the conversion of 4*l.* per Cents., a government fund, probably on the principle that they are liable to be redeemed, and not so permanent a fund. With respect to refunding, these are trustees. Their conduct cannot affect the rights; and it happens that there are dividends now due to Lady Anne Conolly in Court, which, if the decision is against her, the executors have no objection to apply to the refunding, if it is to take place. If an executor had ignorantly and honestly made the payment, the Court would be unwilling to call upon him; but is there a doubt that the person receiving the payments would be called on? In a few years more these Short Annuities will expire. Suppose the whole property [*328] was in these circumstances. It does not very *frequently happen that any payment is made upon the residue before the interference of the Court, which prevents this accident. Several orders may, however, be found. In *Holder v. Holder*,¹ an account was directed of all the excess that had been received of Short Annuities beyond 4*l.* per cent.

LORD CHANCELLOR ELDON.—No question arises upon this will, except whether this is a specific bequest of such personal estate as was the testator's at the time of his death. Lord Rosslyn is represented to have had considerable doubt whether it was not specific; and if it is, I agree, not only Lady Anne Conolly, up to the date of the decree, but afterwards, and Mr. Bing and the other persons in remainder, must take the specific produce of what is specifically given. But if it is so to be considered, the decree is not correct, considering the bequest specific to the date of that decree, and no longer. It is wrong, therefore, in any way.

Upon the question, whether this is specific, it must be either upon the words describing the personal estate, or upon the construction of those words, coupled with the devise of all his landed estates.

With respect to the latter, every *devise of land*, whether in particular or general terms, must of necessity be specific, from this circumstance, that a man can devise only what he has at the time of devising. Upon that ground, in a case at the Cockpit, it was held, that a residuary devisee of land is as much a specific devisee as a particular devisee is.

But it is quite different as to *personal estate*. The question must be, *did he mean to dispose of what he had at the date of the will, or of that which he should have at his death?* If he meant the former, then every part of that identical personal estate, which is disposed of between the date of the will and the death, is a legacy

¹ In Chancery, May, 1789.

adeemed: pro tanto it is gone. If the question is, whether those subjects. to be acquired between the date of his will and his death, should pass, I cannot say he did *mean that. If not, it can only be specific thus: that the persons to take the [329] personal estate he should have at his death in different interests should enjoy it as he left it.

Not one word of this will goes to that. It is given as "all his personal estate;" and the mode in which he says it is to be enjoyed, is to one for life, and to the others afterwards. Then, the Court says, *it is to be construed as to the perishable part, so that one shall take for life, and the others afterwards; and unless the testator directs the mode, so that it is to continue as it was, the Court understands that it shall be put in such a state, that the others may enjoy it after the decease of the first; and the thing is quite equal; for it might consist of a vast number of particulars; for instance, a personal annuity, not to commence in enjoyment till the expiration of twenty years from the death of the testator, payable upon a contingency, perhaps. If, in this case, it is equitable that Long or Short Annuities should be sold, to give every one an equal chance, the Court acts equally in the other case; for those future interests are, for the sake of the tenant for life, to be converted into a present interest, being sold immediately, in order to yield an immediate interest to the tenant for life. As in the one case, that in which the tenant for life has too great an interest, is melted for the benefit of the rest; in the other, that, of which, if it remained in specie, he might never receive anything, is brought in, and he has immediately the interest of its present worth.*

As to the annuity charged upon this estate, the tenant for life, if entitled to the whole, would be properly paying out of the aggregate property the annuities. But it would be great injustice to those in remainder, if these capital sums were paid out of that part of the bulk of the property which does not consist of perishable interests, and were not to be thrown in proportion upon the perishable part. The ordinary rule of apportioning requires, that, in some degree, a provision should be made out of those, the Short Annuities, if they remain, and not out of the 3l. per Cents. only.

*The cases alluded to, where personal estate has been taken to be specifically given, do not apply. First, where [330] a residuary legatee takes it [the residue] as a specific gift, not subject to debts, the inference, that he is to take that personal estate, is not made, in general cases, upon the bequest of all the testator's personal estate, but upon the effect of that, connected with what arises out of other parts of the will, with regard to the intention to fix upon other funds charges that would primarily fall upon that fund; and that must be made out, not by conjectures, but by declaration plain, or manifest intention.¹ That is the principle upon which it is agreed these cases are to

¹ See *Ancaster v. Mayer*, ante, Vol. 1, p. 630, and note.

be construed; and the intention has never been considered manifest merely from a disposition of the personal estate in the same clause with land; which must be taken to be specifically given. But those cases do not go the length, that, if the enjoyment is portioned out in life interests, with remainders over, it is specific, I am clearly of opinion, therefore, that this is not a case in which the personal estate is in this sense specifically given, with a direction that it shall remain specifically such as it was at the testator's death; and the purposes for which it is given are those for which it is admitted there is a general rule, that these perishable funds are to be converted in such a way as to produce capital bearing interest.

I was astonished when that was doubted. From general recollection, I had considered the practice to be, that the first moment the observation of the Court was drawn to the fact, the Court would not permit property to be laid out, or to remain upon such funds, under a direction to lay it out in government securities, but would immediately order it to be converted into that which the Court deems, for the execution of trusts, a government security.

I pass over what has been said as to real securities; for there is a great difference between real securities, or Bank Stock, for instance, and government securities. Bank Stock is as safe, I [*331] trust and believe, as any government security; but it is not government security; and therefore this Court does not lay out, or leave, the property in Bank Stock; and what the Court will decree, it expects from trustees and executors; I will not state what the Court would do, where executors had not made these conversions. That depends upon many circumstances. But I abide by Lord Kenyon's rule in the case of *Mr. Champion*, an executor, before which time it was doubted whether an executor could lay out the property in the 3 $\frac{1}{2}$ per Cents. Lord Kenyon, who was a repository of valuable knowledge, produced a dictum of Lord Northington, that the Court would protect an executor in doing what it would order him to do. The Court in this case would order him to do that.

It is not so in the case of a mortgage. The Court would not permit a real security to be called in without an inquiry, whether it would be for the benefit of every person; and it is accident that some part of the assets will produce more interest than a genuine trust security. In some instances, there is little doubt, it may be not only for the benefit of the tenant for life, but for the substantial interest of the remainder-man, that the property should not be shifted from a good real security.

The question then is, whether the Court will change the fund, not as between the remainder-man and the executor, but in a question between the tenant for life and the remainder-man; and the question with the executor cannot well arise, so as to be acted upon, till a failure by the tenant for life, or those who represent him; for the justice of the case, if the tenant for life has received

so much, would be, that he should bring it back in case of the executor, who paid him. If the rule is, that the fund shall not remain, it is impossible to say, the date of the decree shall decide. I do not like to put it upon the possibility of collusion; but that is not to be totally neglected, for it may happen, that the executor himself may be the tenant for life, and then he has an interest in delay. Of necessity there must be a great delay, before *there can be a final decree in a cause of great property, [*332] and it may be very much protracted where there is an interest. However, I do not put it upon that. But if the principle is, that the Court, when its observation is thrown upon it, will order the conversion, it ought to be considered, to all practicable purposes as converted, when it could be first converted. That is the genuine inference from the other principle. If the Court has ever attended to the difficulties often thrown before it, with regard to perishable property of other kinds, as leasehold estate,¹ &c., it never has as to stock. You can learn the price at which it might be converted on any day, and the moment the Court was ordered by the Legislature to lay out its funds in stock, it necessarily held, that for this purpose stock must always be considered of the same value. It is for the benefit of the creditor that it should be thrown into a lasting fund; and it is equal to all the parties interested. As to Bank Stock, the Court has ordered 4*l.* per Cents. and 5*l.* per Cents. to be sold and converted into 3*l.* per Cents., upon this ground, that, however likely, or not, that they may be redeemed, the Courts look at them as a fund that is not permanent, though it may remain for ever; and considers, that from that quality, there is an advantage to the present holder, who gets more interest, because they are liable to be redeemed.² I do not know whether the reasoning is as just in practice as it is in theory. Property cannot be laid out by this Court in Bank Stock in the execution of a trust to lay it out in government securities, for it is not a government security. Converting that, therefore, the executors would have done what this Court would have ordered, and that falls under the same consideration, and the advantage, if any, ought not to accrue to the tenant for life. The account, therefore, must go as to that, as well as the Long and Short Annuities, *from the time at which it would have been* *converted, *if the observation of the Court* [*333] *had been drawn to the fact that the executors were possessed of those funds.*

This petition of rehearing is therefore well founded.

¹ Gibson v. Bott, 7 Ves. 89.

² In a recent case, however, an executrix, who was also tenant for life under a will directing the residuary estate to be sold, and the proceeds invested in government or other good security, was held not to be personally liable for not converting into Consols a sum of Navy £5 per Cent. Annuities forming part of the residuary estate: Baud v. Fardell, 7 De G. Mac. & G. 628. And see now 22 & 23 Vict. c. 35, s. 32; and 23 & 24 Vict. c. 38, ss. 11 & 12, and General Order of Feb. 1861; and Hume v. Richardson, 31 L. J. N. S. (Ch.) 713; and see note to Brice v. Stokes, post.

Where property of a perishable or wasting nature, such as Long Annuities or leaseholds, is given to persons in succession, an important question arises, whether it is to be converted into other property of a permanent nature, so as to insure the enjoyment of it by every person successively, or whether it is to remain in specie unconverted, leaving to those in remainder only a chance of enjoyment, or at all events of taking the property much diminished in value. It was decided by Lord Eldon, in the principal case, which appears to be the first reported case in which the subject was thoroughly discussed, that, as a general rule (and in the absence of any express or implied intention of the testator, that it is to be enjoyed in specie), perishable property is to be converted in such a way as to produce capital bearing interest, and put in such a state that the others may enjoy it after the decease of the first.

Upon the same principle, Lord Eldon lays it down, that reversionary property (a personal annuity, for instance), not to commence till the expiration of twenty years from the death of the testator, or payable on a contingency, given to persons in succession, ought to be similarly converted. "If, in the one case," observes his Lordship, "it is equitable, that Long or Short Annuities should be sold, to give every one an equal chance, the Court acts equally in the other case; for those future interests are, for the sake of the tenant for life, to be converted into a present interest, being sold immediately, in order to yield an immediate interest to the tenant for life. As in the one case, that in which the tenant for life has too great an interest, is melted for the benefit of the rest; in the other, that of which, if it remained in specie, he might never receive anything, is brought in, and he has immediately the interest of its present worth." Ante, p. 329. And see the remarks of Lord Brougham in *Prendergast v. Prendergast*, 3 H. L. C. 218; *Wightwick v. Lord*, 3 Jur. N. S. 699; *S. C. nom. Lord v. Wightwick*, 4 De G. Mac. & G. 803; *Johnson v. Routh*, 3 Jur. N. S. 1048, 27 L. J. (Ch.) 305; *Countess of Harrington v. Sir William Atherton*, 2 De G. Jo. & Sm. 352.

"Very nice distinctions," observes Lord Cottenham, "have been taken, and must have been taken, in determining whether the tenant for life is to have the income *of the property in the state in which [*334] it is at the time of the testator's death, or the income of the produce of the conversion of the property. The principle upon which all the cases on the subject turn is clear enough, although its application is not always very easy.

"All that *Howe v. Lord Dartmouth* decided—and that was not the first decision to the same effect—is, that where the residue or bulk of the property is left en masse, and it is given to several persons in succession as tenants for life and remainder-men, it is the duty of the Court to carry into effect the apparent intention of the testator. How is the

apparent intention to be ascertained, if the testator has given no particular directions? If, although he has given no directions at all, yet he has carved out parts of the property to be enjoyed in strict settlement by certain persons, it is evident that the property must be put in such a state as will allow of its being so enjoyed. That cannot be, unless it is taken out of a temporary fund, and put into a permanent fund.

“But that is merely an inference from the mode in which the property is to be enjoyed, if no direction is given as to how the property is to be managed. It is equally clear, that if a person gives certain property specifically to one person for life, with remainder over afterwards, then, although there is danger that one object of his bounty will be defeated by the tenancy for life lasting as long as the property endures, yet there is a manifestation of intention which the Court cannot overlook.

“If a testator gives leasehold property to one for life, with remainder afterwards, he is the best judge whether the remainder-man is to enjoy. The intention is the other way, so far as it is declared; and the terms of a gift, as a declaration of intention, preclude the Court from considering that he might have meant that it should be converted.

“Those two kinds of cases are free from difficulty; but other cases of very great difficulty may occur, in which it may be very doubtful whether the testator has left property specifically, but in which there are expressions which raise the question, whether the property is not to be enjoyed specifically; for, as the Master of the Rolls appears to have observed in the present case, the word ‘specific,’ when used in speaking of cases of this sort, is not to be taken as used in its strictest sense, but as implying a question whether, upon the whole, the testator intended that the property should be enjoyed in specie. Those are questions of difficulty, because the Court has to find out what was the intention of the testator as to the mode of management, and as to the mode of enjoyment:” **Pickering v. Pickering*, 4 My. & Cr. 298. [*335]

The result of the rule laid down by Lord Eldon, in *Howe v. Lord Dartmouth*, and by Lord Cottenham, in *Pickering v. Pickering*, appears to be, that where personal estate is given in terms amounting to a general residuary bequest, to be enjoyed by persons in succession, the interpretation the Court puts upon the bequest is, that the persons indicated are to enjoy the same thing in succession; and in order to effectuate that intention, the Court, as a general rule, converts into permanent investments so much of the personalty as is of a wasting or perishable nature at the death of the testator, and also reversionary interests. The rule did not originally ascribe to testators the intention to effect such conversions, except in so far as a testator may be supposed to intend that which the law will do; but the Court, finding the intention of the testator to be, that the objects to his bounty shall

take successive interests in one and the same thing, converts the property, as the only means of giving effect to that intention: Per Sir J. Wigram, V. C., 3 Hare, 611.

A few instances may be given of the application of the rule laid down in the principal case.

In *Fearns v. Young*, 9 Ves. 549, the testator bequeathed to his wife, the interest of one-half of his property during her life, with liberty to dispose of one-half of the said half as she might think proper, at her decease; the other half of that half should devolve at her decease to his daughter; and the other half of his said property he bequeathed to his said daughter. The testator was a member of a partnership, the term of which expired thirteen months after his decease, and his proportion of the profits during that time amounted to the sum of 2070*l.* 13*s.*, which, according to the articles, was payable, one-half at the end of one year, and the other at the end of two years after the termination of the partnership. Lord Eldon allowed an exception to the Master's report, who had allowed the claim of the widow to 1035*l.* 6*s.* 6*d.*, a moiety of the sum of 2070*l.* 13*s.* as being due to her in the nature of interest money accrued due after the death of the testator. "The rule," said his Lordship, "as to personal estate, is, that what is not specifically given, and consists of an interest wearing out, or an interest at present saleable, but in point of enjoyment future, the whole is converted into money in a question between the tenant for life and the remainder-man; and, though the general rule as to legatees is to give interest from the end of one year from the death, I have seen a great variety of decrees, directing inquiries, how much of the fund had arisen from interest, and how much from *capital; in order [*336] to determine between the tenant for life and the remainder-man. In this case, it is impossible to say the widow is to have nothing in the nature of interest upon the capital so formed at the end of thirteen months, on account of the times of payment at the end of two and three years; for it is clear, if the testator had died possessed of a bond, by the condition of which the money had been secured to him, to be paid in two and three years after his death, without interest, between the tenant for life and the remainder-man, a value must have been set upon at that time, and of its present worth, at least the tenant for life would be entitled to interest. It is like a lease, to commence at the end of one or two years afterwards; but it is saleable immediately, and the sum produced would be a capital; the interest of which, from the end of one year, at least, ought to go to the tenant for life.

"In this case, then, the balance being ascertained at the end of thirteen months, the tenant for life must at least have interest upon such a sum as was at that time the value of the sum so ascertained; regard being had to the fact of the payment in moieties at the end of one and two years from that time. As to the year in which the profit was

making, there is great difficulty ; but, if the rule is, that between tenant for life and remainder-man, the former is entitled to what is actually produced, as interest from the death, it would be very hard upon the widow, that as it was employed in trade, and making a great deal more than 4 or 5 per cent., she shall not have either the profit or the interest. It is fair, that, if he bound himself to leave his capital in a trade, for the purpose of increase, still the value of the capital at the death, with the additional capital, whatever it might be ultimately, in consequence of being so employed, should yield an interest. It is not very well settled, whether the tenant for life is entitled to the interest from the death, or from a year afterwards. Baron Thompson once told me, that the first payment of an annuity was made at the end of a year, and so I took it ; but, at that time, the opinion of several of the Masters was, that it was not to be paid until two years ; and an annuitant is no more than tenant for life or part of the capital.

“ In this case, I think, the defendant ought to have from the death, to the termination of the partnership, interest at a given rate, and not the profit ; and then, at the end of the partnership, the capital, by the articles, was a dead fund, in moities for one and two years ; but she is not, therefore, to be deprived of interest upon it, but is entitled to interest upon the capital, though dead, with reference to the circumstance, that one-half is not to be collected till the end *of one year, the other not till the end of two years, calculating what [*337] was then the value of the sums respectively ; for instance, the value of 1000*l.*, payable at the end of one year, and another sum of 1000*l.*, payable at the end of two years. The exception, therefore, must be allowed ; and the minutes must be arranged upon that principle.”

In *Mills v. Mills*, 7 Sim. 501, the testator gave all his freehold and leasehold messuages and hereditaments, ready money, securities for money, stock in public funds, goods, chattels, and effects, and all other his real and personal estate and effects, to trustees, in trust to pay the rents of his freehold and leasehold estates, and the dividends, interests, and proceeds of his money in the funds and other his said personal estate, to his daughter for life ; and after her death, to stand possessed of his said freehold and leasehold estates, money in the funds, and all other his said real and personal estate, for the children of his daughter. The testator, at the date of his will, and at his death, was possessed of leasehold estates, turnpike securities, Bank Stock, and other personal estate. It was held by Sir L. Shadwell, V. C., that the bequest to the trustees was a general residuary bequest, and that the leaseholds and Bank Stock ought to be sold, and the proceeds invested in the Three per Cents. ; and an inquiry was directed whether the turnpike securities were real and permanent securities.

In *Fryer v. Butter*, 8 Sim. 442, the testator gave to M. W. an annuity of 40*l.* for life, payable out of his Long Annuities ; and directed,

that at M. W.'s death the principal out of which the annuity arose should go to his next of kin then living; and he further directed, that the annuity should be secured on his stock of Long Annuities. The testator died possessed of 509*l.* Long Annuities; Sir L. Shadwell, V. C., held, that a fund for payment of the annuity ought to be provided in the Three per Cents., and that the money required for that purpose ought to be raised by the sale of part of the Long Annuities, and that the remainder of the Long Annuities formed part of the testator's residuary estate.

In *Benn v. Dixon*, 10 Sim. 636, the testator gave to his wife the whole of the interest arising from his property, both real and personal, during her life; and in case he should die without issue, he gave after the death of his wife, the whole of his property, both real and personal, to his brothers and sister. The testator died possessed of leasehold, and was also seised of real estate. It was held by Sir L. Shadwell, V. C., that the widow was not entitled to the leasehold property in specie during her life, but only to the dividends of stock to be purchased with [*338] the proceeds of the sale of it. "As the will *stands," said his Honor, "there is nothing on the face of it to prevent the application of the rule of law that perishable property must be sold and converted into money, and invested in the funds, in order to produce the same interest to the remainder-man as was enjoyed by the tenant for life." And see *Litchfield v. Baker*, 2 Beav. 481; *Sutherland v. Cooke*, 1 Coll. 498; *Pickup v. Atkinson*, 2 Hare, 625; *Caldecott v. Caldecott*, 1 Y. & C. C. C. 312; *Johnson v. Johnson*, 2 Coll. 441; *Chambers v. Chambers*, 15 Sim. 183; *Litchfield v. Baker*, 13 Beav. 447; *Morgan v. Morgan*, 14 Beav. 72; *Hood v. Clapham*, 19 Beav. 90; *Jebb v. Tugwell*, 20 Beav. 84; 7 De G. Mac. & G. 663; *Blann v. Bell*, 5 De Gex & Sm. 658; 2 De G. Mac & G. 775; *Howard v. Kay*, 27 L. J. N. S. (Ch.) 448; *Craig v. Wheeler*, 29 L. J. (Ch.) 374.

The mere absence of a direction to convert the property has never been construed to mean that it should be enjoyed in specie by legatees in succession: *Johnson v. Johnson*, 2 Coll. 441; *Morgan v. Morgan*, 14 Beav. 72, 83.

Where perishable, wasting, or reversionary property is given to persons in succession, specifically, in the strict sense of that term, then there can be no reason for converting it, although the trustees have a discretionary power to do so. Thus, in *Lord v. Godfrey*, 4 Madd. 455, the testator bequeathed the residue of the stocks and funds then or at his decease, standing in his name, after payment of his debts, to trustees, to pay the interest and dividends to his wife for life, with remainder to C. L., and empowered his trustees, at their discretion, to change the stock as often as to them should seem fit and proper. At the testator's death there were Long Annuities standing in his name, producing 365*l.* per annum. Sir J. Leach, V. C., held, that the widow

was entitled to enjoy the Long Annuities in specie. "It would, I think," said his Honor, "be too much to intend that the testator meant to authorize the trustee at their pleasure, to diminish the gift he had before made to his wife. Such a power is given to trustees with a view to the security of the property, and not with a view to vary or affect the relative rights of the legatees." And see *Bethune v. Kennedy*, 1 My. & Cr. 114; *Evans v. Jones*, 2 Coll. 516; *Marshall v. Bremner*, 2 Sm. & G. 237; *Mills v. Brown*, 21 Beav. 1; *Fielding v. Preston*, 1 DeG. & Jo. 438.

If an intention can be collected from the will, that property shall be enjoyed in specie, as it existed at the death of the testator, although the property be not, in a technical sense, specifically bequeathed, it ought not to be converted. And it has been observed by the Vice-Chancellor Wigram, in *Hinves v. Hinves*, 3 Hare, 611, that in the more modern cases (unless perhaps, the decisions of the Vice-Chancellor of England, in *Mills v. Mills* and *Benn v. Dixon*, must be excepted) the Court, in applying the rule, has leant against conversion as strongly as is consistent with the supposition that the rule itself is well founded. See also *Mackie v. Mackie*, 5 Hare, 70, 77; *Holgate v. Jennings*, 24 Beav. 623. [*339]

Thus it has been held, that an express direction for sale at a particular period, indicates an intention that there should be no previous sale or conversion: *Alcock v. Sloper*, 2 My. & K. 699; *Daniel v. Warren*, 2 Y. & C. C. C. 290; *Morgan v. Morgan*, 14 Beav. 74, 83; *Skirving v. Williams*, 24 Beav. 275; *Rowe v. Rowe*, 29 Beav. 276. A direction that certain property comprised in a residuary bequest should not be converted during a certain term of years is tantamount to a direction that it should remain in specie during that term, and the tenant for life will be entitled to the income of it while it so remains in specie (*Green v. Britten*, 1 De G. Jo. & Sm. 655), or until it is sold under a discretionary power vested in trustees. (*Ib.*)

So, where there was a direction in a will, that trustees should in their sole discretion sell so much, and such part of the residuary estate as they might think necessary, the Court would not interfere with their discretion, so as to prevent the tenants for life enjoying leaseholds in specie, especially as a considerable time had elapsed since such discretion had been exercised: *In re Sewell's Estate*, 11 L. R. Eq. 80.

And where the trust of a residue was to pay the *rents*, issues, profits, and annual proceeds to persons in succession, and it appeared that the testator had no other property except leaseholds, to which the term "*rents*" was applicable, Lord Langdale held the testator did not intend the leaseholds to be converted, saying, that he could not declare it to be a case of conversion without striking out altogether the word "*rents*" which was twice repeated in the will: *Goodenough v. Tremamondo*, 2

Beav. 512; *Skirving v. Williams*, 24 Beav. 275; *Vachell v. Roberts*, 32 Beav. 140.

Upon the same principle, in *Alcock v. Slopers*, 2 My. & K. 699, Sir John Leach, with regard to a general residuary bequest, upon trust to permit the testator's widow to receive the rents, profits, *dividends*, and annual proceeds thereof, for life, held, that the word "*dividends*" had reference to Long Annuities, of which part of the testator's estate consisted, and that the use of the word "*dividends*," was equivalent to a direction that the widow should enjoy the Long Annuities in specie.

These decisions were commented on by Sir James Wigram, V. C., in *Pickup v. Atkinson*, 4 Hare, 624; and although he appears to admit that some weight was given to the words "*rents*" and "*dividends*,"

[*340] *he considers that they depended also upon other circumstances. In that case, where the testator died possessed of leaseholds, Long Annuities, and 3l. 5s. per Cent. Annuities, and ready money, he held, that a bequest of the rents and profits, dividends, and interest of a residue, comprising that property did not indicate an intention that it was to be enjoyed in specie; he thought that the correct reasoning upon those words, considered alone, must be analogous to that which is applied to the residue itself. The mere enumeration of particulars in the latter case does not give a specific character to the bequest, because the whole clause is, in effect, a mere residuary bequest. He thought the same observation applied to a case like that; the enumeration of the particulars of income being nothing more than a gift of the income of the residue, which means income only. That conclusion appeared to his Honor to be put beyond dispute when it was considered that the words "*rents, profits, dividends, and interest*," in that case meant rents, profits, dividends, and interest, not of the property the testator then had, but of such property, real, personal, or mixed, as he might happen to have at the time of his death. The same conclusion arose from the words of the gift over namely, "the whole of such residue of my said property."

However, in *Cafe v. Bent*, 5 Hare, 36, where there was a direction, which referred to the general residue of the estate (which included leaseholds), and not to leaseholds specifically bequeathed, that the trustees should retain a percentage on the *rents* to be collected, his Honor held the direction, fortified by other expressions in the will, was evidence that the testator contemplated the enjoyment in specie of the leasehold property comprised in the general residue, by the legatees. "Although this direction," he observed, "might perhaps be satisfied by applying it to such rents and profits of those leaseholds as should arise before a sale, I think the cases of *Pickering v. Pickering*, and *Goodenough v. Tremamondo*, are authorities for putting a more precise construction on the words '*rents*,' and for holding that this will carries intrinsic evidence that the testator contemplated the enjoyment in

specie of the leaseholds in question. This conclusion is fortified by the other circumstances to which I have referred, although those circumstances, standing alone would not, in my judgment, have been sufficient evidence of the same intention. I have gone at some length into this question, because I consider myself bound by *Howe v. Lord Dartmouth*, except where I can find a necessary implication to the contrary. The circumstances referred to by his Honor were a power of leasing, *which he thought might apply to the leaseholds specifically bequeathed and a direction to sell particular parts of the personal [*341] estate; with regard to which the inference had been drawn in argument that the testator did not intend his residuary estate to be sold. His Honor observed, that, standing alone, it would have no effect on his mind; that the rule in *Howe v. Lord Dartmouth*, did not proceed upon the assumption that the testator intended his property to be sold, except so far as a testator might be presumed to intend that which the law will imply from the directions in his will. That the rule proceeded upon this, that the testator has intended the enjoyment of perishable property by different persons in succession; and this the Court could only accomplish by means of a sale. To this also might be added the consideration, that the argument might prove too much; for it would prove (if it proved anything) that no part of the residuary estate was to be sold,—a length to which it would be extremely difficult to carry the argument with success. See *Hunt v. Scott*, 1 De G. & S. 219; *Howe v. Howe*, 14 Jur. 359; *Burton v. Mount*, 2 De G. & Sm. 383; *Crowe v. Crisford*, 17 Beav. 507; *Blann v. Bell*, 5 De G. & Sm. 658; 2 De G. Mac. & G. 775; *Harris v. Poyner*, 1 Drew. 174; *Hind v. Selby*, 22 Beav. 373; *Wearing v. Wearing*, 23 Beav. 99; *Bowden v. Bowden*, 17 Sim. 65; *Skirving v. Williams*, 24 Beav. 275; *Boys v. Boys*, 28 Beav. 436.

Where, however, there was an express trust to convert the residuary personal estate into money, immediately after the testator's death, and to invest the amount "in the Bank of England," it was held that a mere direction to permit a person to receive all the rents and profits, *dividends*, or annual produce of his personal estate for life for his own use was not sufficient to qualify the direction to convert, and authorize the trustees to pay the tenant for life the dividends of the Long Annuities in specie: *Bate v Hooper*, 5 De G. Mac. & G. 338, 344.

A direction that powers of attorney should be given to cestuis que trust entitled to receive in succession the income of property, may show the testator's intention that they were to enjoy it in specie. Thus, in *Neville v. Fortescue*, 16 Sim. 333, a testator bequeathed all his personal property by reference to limitations of real estate in strict settlement, and then directed that the persons entitled under the limitations should, under letters of attorney and powers from the trustees (which he empowered and required them to grant), receive the yearly

dividends which might arise out of the public or other funds, and the yearly interest which might arise from other parts of his personal property under the same restrictions and limitations, and to the same extent *on which they held his real estates. Sir L. Shadwell, [*342] V. C., held that the tenant for life was entitled to the enjoyment of Long Annuities and Bank Stock in specie. "The testator," observed his Honor, "contemplated that various powers of attorney might be necessary to be executed by his trustees, in order to enable the persons who were to enjoy his personal estate in succession to receive the annual proceeds of it. This seems to me to demonstrate that he intended the cestuis que trust to enjoy his personal estate in the state in which it might be at the time of his death."

A direction to *divide* property after the death of the tenant for life, has been held to indicate an intention that the tenant for life should enjoy the property in specie: *Collins v. Collins*, 2 My. & K. 703. And see *Bethune v. Kennedy*, 1 My. & Cr. 114; *Pickering v. Pickering*, 2 Beav. 31; 4 My. & Cr. 289, 300; *Vaughan v. Buck*, 1 Ph. 75; *Oakes v. Strachey*, 13 Sim. 414; *Daniel v. Warren*, 2 Y. & C. C. C. 290; *Hubbard v. Young*, 10 Beav. 203; *House v. Way*, 12 Jur. 958; *Holgate v. Jennings*, 24 Beav. 623. The Vice-Chancellor Wigram, however, has observed, that he could not understand how a direction to divide could help the Court to determine what was to be divided; and he did not think that *Collins v. Collins* turned on that: *Pickup v. Atkinson*, 4 Hare, 630. And it must be remarked, that, in some of the older cases, and in *Mills v. Mills*, 7 Sim. 501, the direction to divide was not noticed as in any way indicative of the testator's intention.

An exception from a general direction to convert, may show an intention that Long Annuities are to be enjoyed in specie. Thus, in *Wilday v. Sandys*, 7 L. R. Eq. 455, a testator gave his residuary estate to trustees in trust to convert into money such parts thereof as should not at his decease consist in money, or be invested in any of the public funds or government securities and to invest the same in such public funds or government securities as to them should seem most advantageous, and to pay the interest dividends, and annual proceeds of such residue to his children in equal shares for their lives, and after their deaths, upon other trusts. It was held by Lord Romilly, M. R., that the Long Annuities, of which the testator died possessed, were within the exception from the trust for conversion, and that the tenants for life were entitled to enjoy them in specie.

Where a tenant for life is entitled to the enjoyment of leaseholds in specie, and they are taken by a public company, and the purchase-money is paid into Court, he is entitled to the same benefit thereout as he would have had from the lease (8 & 9 Vict. c. 18, s. 74), and as [*343] leasehold property *is of a wearing-out character, it is evident that the mere interest of the purchase-money cannot be con-

sidered an adequate compensation to the tenant for life. Thus, in *Jeffreys v. Conner*, 28 Beav. 328, leaseholds bequeathed to one for life, with remainder over, were taken by a railway company, and the purchase-money was invested in Consols. The tenant for life only received the dividends. It was held by Sir John Romilly, M. R., on her death (her representatives consenting to take it) that her estate was entitled, out of the Consols, to the difference between the dividends received and the aggregate amount of the rental which would have accrued during her life, if the leaseholds had not been taken. See also *Morres v. Hodges*, 27 Beav. 625; and *In re Money's Trusts*, 31 L. J., N. S. (Ch.) 496.

Where the tenant for life in such case outlives the term for which he is entitled as tenant for life, he will become absolutely entitled to the whole fund: *In re Beaufoy's Estate*, 1 Sm. & Giff. 20; and see *Phillips v. Sargent*, 7 Hare, 33.

Where a tenant for life is entitled to enjoy in specie, the rule is that investments may remain, but debts must be realised: see *Holgate v. Jennings*, 24 Beav. 623, in which case Sir John Romilly, M. R., appears to have treated Turnpike Bonds as debts.

A power to vary securities is important, as showing that the testator did not intend his residue to remain on perishable securities: *Morgan v. Morgan*, 14 Beav. 72, 85. But it is said by Sir John Leach, V. C., in *Lord v. Godfrey*, 4 Madd. 459, that such power is given to trustees with a view to the security of the property, and not with the view to vary or affect the relative rights of the legatees.

Where property the subject matter of a bequest given to persons in succession, is found by the trustees of a testator to be so laid out as to be secure, and to produce a large annual income, but is not capable of immediate conversion without loss and damage to the estate; there the rule is not to convert the property, but to set a value upon it, and to give the tenant for life 4l. per cent. on such value, and the residue of the income must then be invested, and the income of the investment paid to the tenant for life, but the corpus must be secured for the remainder-man. See *Gibson v. Bott*, 7 Ves. 89; *Caldecott v. Caldecott*, 1 Y. & C. C. C. 312; *Meyer v. Simonsen*, 5 De G. & Sm. 723; *Arnold v. Ennis*, 2 Ir. Ch. Rep. 601; *Re Llewellyn's Trusts*, 29 Beav. 171. In *Brown v. Gellatly*, 2 L. R. Ch. App. 751, the testator Duncan Dunbar, after giving his property to trustees, with full power to realize the same when and in such manner as they might see fit, empowered them to sail his ships for the benefit of his estate, until they could be satisfactorily *sold. The ships gained considerable earnings after the testator's death. It was held by Lord Justice Cairns, affirming the [*344] decision of Lord Romilly, M. R., that the tenants for life of the residuary estate were not entitled to the earnings of the ships as income, but (in this respect, varying the decision of the Master of the Rolls) that they were entitled to interest at 4l. per cent., on the value of the ships

from the testator's death. "With regard to the ships," said his Lordship, "the testator has put them simply in the position of property, which was to be converted cautiously, and in proper time, and as to which, there was no breach of trust in the executor's delaying to convert it, but, which was when converted, and when invested, to be enjoyed as the residue of his estate. In that state of things, it seems to me, that this case falls exactly within the third division pointed out by Sir James Parker, in the case of *Meyer v. Simonsen* (5 De. G. & Sm. 723), and that a value must be set upon the ships, as at the death of the testator, and the tenant for life must have 4 per cent. on such value, and the residue of the profits must of course be invested, and become a part of the estate."

When according to the construction of a will the executors have full power to retain upon certain securities, for as long as they think it advantageous, the money invested by the testator in those securities, or to invest upon securities of any of those descriptions, the money obtained by the conversion of any part of the testator's estate, while any such securities form part of the testator's estate, the tenant for life is entitled to the specific income of the securities, just as if they had been 3l. per cent. Consols: *Brown v. Gellatly*, 2 L. R. Ch. App. 751, 758. See, also, *Lambert v. Lambert*, 20 W. R. (V. C. B.), 943.

When trustees do not convert securities which they were not authorised by the testator to retain, the tenant for life will only be entitled to an income from the testator's death, equal to the dividends of the Consols, which would have been produced by a sale and investment in Consols, at a year from the testator's death, and not as in *Robinson v. Robinson* (1 De G. Mac. & G. 247), to an income equal to interest at 4l. per cent. on their value: *Brown v. Gellatly*, 2 L. R. Ch. App. 751; see also *Dimes v. Scott*, 4 Russ. 195; *Taylor v. Clark*, 1 Hare, 161; *Gibbs v. Gibbs*, 26 L. T. (N. S.) 865.

It may here be mentioned that in a recent case where trustees were made liable for having improperly allowed perishable property to remain in specie and to be enjoyed by the tenant for life, they were allowed, by means of an inquiry in the same suit, to recover back against the estate of the *tenant for life the amount overpaid to him [*345] *Hood v. Clapham*, 19 Beav. 90.

And where trustees, having a discretion as to the time of conversion, allow reversionary property to remain unsold until it fall into possession, the tenant for life will be entitled to have paid to him in respect of interest out of the property, the amount which he would have received had the trustees sold the property at the end of one year after the testator's death. The principle upon which the Court will proceed in such a case, in calculating what is payable to the tenant for life, is to ascertain the value of the reversion, on the assumption that it was to fall in on the day when it actually fell in; this would represent the capi-

tal, had the sale not been delayed, and to pay the difference between the sum so ascertained, and the whole of the property which had fallen into possession to the tenant for life, as representing the income which he would have received had the sale not been delayed: *Wilkinson v. Duncan*, 23 Beav. 469; see *Cox v. Cox*, 8 L. R. Eq. 343.

Agreeably to the common law, the grant of a life interest in a chattel passed the entire ownership, although the subject was a term of years extending beyond the possible duration of human life, and it followed that a limitation over on such a gift was void. Williams on Personal Property, 235. The difficulty was surmounted by the aid of a doctrine which seems to have been derived from the civil law. It is obviously possible to provide that one shall be entitled to use a chattel so long as he lives, and that the right of property shall vest in another at his death. A legatee for life of personalty is accordingly regarded as having a mere usufruct, and if the goods are delivered to him, they must be accounted for when he dies. See *Westcott v. Cady*, 5 Johnson Ch. 344; *Gillespie v. Miller*, Ib. 21; *Moffatt v. Strong*, 10 Johnson, 12; *Holman's Appeal*, 12 Harris, 174, 178; *Waldo v. Cummings*, 45 Illinois, 421. *Cooper v. Cooper*, 2 Brevard, 355; *Horne v. Lyeth*, 4 Harris & J. 431; *Burne v. Lester*, 53 Illinois, 325; *Smith v. Bell*, 6 Peters, 68.

In *Westcott v. Cady*, Chancellor Kent, observed: The law is too well settled to be drawn into question at this late day, that a limitation of personal goods and chattels

or money in remainder, after a bequest for life is good. In *Randall v. Russel*, 3 Merivale, 190, the testator gave his farm and stock, and crops thereon, to his wife, during her natural life if she should continue so long unmarried. The Master of the Rolls, observed upon the case, that originally by the English law, there could be no limitation over of a chattel, but a gift for life carried the absolute interest. Then a distinction was taken between the use and the property. The use might be given to one for life, and the property afterwards to another. A gift for life of a chattel was now construed to be a gift of the usufruct only. He referred to what Lord Alvanley had said in *Porter v. Townley*, 3 Vesey, 311, that there had been great doubt what a person having a limited use of articles, as corn, hay, &c., of which the use consists in the consumption, must do. He conceived that a gift for life, if specific, of things "*quæ ipso usu consumuntur*" was a gift of the property, and that there could not be a limitation over after a life interest in such articles. When the use and the property can have no separate existence, the old rule must prevail, and a limitation over after a life interest is void."

In applying the principle, regard

must be had to the intention of the testator as deduced from the language of the will, and the nature of the property bequeathed. *Calhoun v. Ferguson*, 3 Richardson's Eq. 160; *Wooten v. Burch*, 2 Maryland Ch. 190; *Golder County v. Littlejohn*, 30 Wisconsin, 351. His purpose, presumably, is that the legatee for life shall enjoy the subject matter of the bequest while he lives, and that it shall pass on his decease, to the remainder-man, with as little change or deterioration as is compatible with the benefit designed for the legatee for life. These ends are not identical, and may prove inconsistent, because the first taker may use or employ the property in a way to render it less valuable or cause it to be lost. Such a result may ensue without intentional wrong or gross negligence, from a bad investment, or in the case of perishable chattels through the lapse of time. The proper mode of carrying out the will is consequently that which affords security to the remainder-man, without prejudice to the life tenant. Two ways are open to the executor—one, to hand the property over to the legatee for life, on the faith of an express or implied undertaking on his part that it shall be forthcoming when he dies; the other, to convert so much of it as is not in a form to bear interest into money, and then invest the whole for the benefit of the persons who are successively entitled under the will. The latter method is obviously the more equitable, as diminishing the risk of loss and

deterioration, and securing equality of enjoyment as far as the nature of the case admits. It should, therefore, be adopted, unless a different intention is disclosed in the will, or appears by a reasonable inference from the nature of the bequest.

It is accordingly well settled that where the whole or a part of the entire personal estate, or of so much of it as may remain after the payment of debts and legacies, is left to one or more persons for life, with a bequest over on their decease, any portion of it which is not permanently and securely invested must be sold or collected, and the proceeds put at interest on good security for the use of all concerned; *Jones v. Simmons*, 7 Iredell Eq. 178; *Saunders v. Houghton*, 8 Id. 217; *Spear v. Tinkham*, 2 Barb. Ch. 211; *Burnett v. Lester*, 53 Illinois, 325, 335; *Golder County v. Littlejohn*; *Kinmouth v. Brigham*, 5 Allen, 276; *Healy v. Toppan*, 45 New Hamp. 243; *Thorp v. Petit*, 1 C. E. Green, 487; *Smith v. Barham*, 2 Dev. Eq. 420, 428; *Henderson v. Vaux*, 10 Yerger, 30; *Covenhoven v. Shuler*, 2 Paige, 132. When, said the chancellor, in *Covenhoven v. Shuler*, "there is a bequest for life, or other limited period, with a limitation over, of specific articles, such as books, plate, &c., which are not necessarily consumed in the using, the first taker was formerly required to give security, that the articles should be forthcoming on the happening of the contemplated event. And the remainder-man

must take them in the situation in which they will be left by the ordinary prudent use thereof by the first taker; *Hale v. Burrodale*, 1 Eq. Ca. Abr. 461; *Bracken v. Bently*, 1 Rep. in Ch. 110. The modern practice in such cases is only to require an inventory of the articles, specifying that they belong to the first taker for the particular period only, and afterwards to the person in remainder; and security is not required, unless there is danger that the articles may be wasted or otherwise lost to the remainder-man; *Foley v. Burnell*, 1 Bro. Ch. Ca. 279; *Slanney v. Style*, 3 Peere Wms. 336. Whether a gift for life or specific articles, as of hay, grain, &c., which must necessarily be consumed in the using, is to be considered an absolute gift of the property, or whether they must be sold, and the interest or income only of the money applied to the use of the tenant for life, appears to be a question still unsettled in England; 3 Ves. 314; 3 Mer. 194. But none of these principles, in relation to specific bequests of particular articles, whether capable of a separate use for life or otherwise, are applicable to this case. Where there is a general bequest of a residue for life, with a remainder over, although it includes articles of both descriptions as well as other property, the whole must be sold, and converted into money by the executor, and the proceeds must be invested in permanent securities, and the interest or income only is to be paid to the legatee for life. This distinction

is recognized by the master of the rolls, in *Randall v. Russell*, 3 Mer. R. 193. He says, if such articles are included in a residuary bequest for life, then they are to be sold, and the interest enjoyed by the tenant for life. This is also recognized by Roper and Preston, as a settled principle of law, in England; Prest. on Leg. 96; Roper on Leg. 209; see also *Howe v. Earl of Dartmouth*, 7 Vesey, 137, and cases in notes."

It was declared in like manner in *Howard v. Howard*, 1 C. E. Green, 487, that "where there is a general bequest for life with remainder over, the whole must be sold and converted into money by the executor, the proceeds invested, and the interest only paid to the legatee for life; *Howe v. Earl of Dartmouth*, 7 Vesey, 137; *Randall v. Russell*, 3 Mer. 193; *Covenhoven v. Shuler*, 2 Paige, 132; *Cairns v. Chaubert*, 9 Paige, 163; 2 Kent. Com. 553; 2 Story's Eq. Jurs. 845; Willard's Eq. Jurs. 332; 2 Williams on Exr's. (ed. 1849), 1196; *Reed v. Eddy*, 2 Green's R. 176; *Ackerman's Adm'r. v. Freeland, Ex'r*, 1 McCarter, 23. The rule prevails unless there is an indication of an intention on the part of the testator, that the legatee for life should receive the property bequeathed; *Collins v. Collins*, 2 Mylne & Keen, 703; *Pickering v. Pickering*, 2 Beav. 31; S. C., 4 Mylne & C. 289, 1 Story's Eq. 604, note 1. There is nothing upon the face of this will to indicate an intention that the specific property should be received by the legatee. The circumstance that the bequest of

the general personal estate is in the same sentence with that of the real, the devise of which is necessarily specific, will not be sufficient to make it a specific legacy; *Howe v. The Earl of Dartmouth*, 7 Vesey, 1372; Wms. on Exor's, 1006."

Such a conclusion is the more reasonable because it is the right and duty of an executor to collect the assets and convert them into money. Williams on Executors, 932; *Johns v. Johns*, 1 M'Cord, 132; Chitty's General Practice, 528. His power in this regard is absolute, and extends to chattels that have been specifically bequeathed. *Spade v. Smith*, 3 Russell, 511; Williams on Executors, 1340. He has the legal title, and may bring trespass if the legatee removes the property without his consent, *Johns v. Johns*; Toller, 240; Bacon's Abr. title 4, S., 3 pl. 84. Where, however, there are no debts, or none that cannot be satisfied from other sources, he may be restrained by an injunction from frustrating the intention of the testator by disposing of the subject of a specific legacy. *Clarke v. Ormonde*, Jacob Ch. 108. And there is no doubt that after the demands of creditors have been satisfied, relief may be afforded against an executor who insists on converting the goods or securities, contrary to the wishes of a general or residuary legatee. See *Evans v. Iglehart*, 6 Gill. & J. 196.

A somewhat different rule prevails in Maryland where the right of the legatee for life to have the property delivered into his own

hands, depends not so much on the difference between a specific and a residuary bequest, as on whether the nature of the property is such that it can be enjoyed without being actually possessed. *Evans v. Iglehart*, 6 Gill & J. 171. In *Wooten v. Burch*, 2 Maryland Ch. 190, the testator bequeathed all his real and personal estate to his wife for life with remainder over. She went into possession of the personal property and so wasted or mismanaged it, that nothing remained at her death. The court held that as to so much of the estate as consisted of money, and might have been put at interest, there was a breach of the condition of the bond which she had given as executrix, for which the surties were answerable, but that no recovery could be had against them for the loss of the specific chattels which she was entitled to hold in her capacity as legatee.

"It is no longer an open question in this state that when money, or personal property whose use is the conversion into money, is either specifically given to one for life by a will, or is included in the bequest of a general residue, an investment thereof must be made by the executor in some safe and productive fund so as to secure the dividends to the legatee for life, and the principal after his death to the legatee in remainder. *Evans et al. v. Iglehart et al.*, 6 Gill & Johns, 172. If, say the Court of Appeals in the case referred to, the surplus or residue thus bequeathed consists of money or property, whose use is the conversion into

money, and which it could not for that reason be intended should be specifically enjoyed nor consumed in the use, but be by the executor converted into money for the benefit of the estate, an investment thereof must be made. But if, on the contrary, the property bequeathed is such that its use is its consumption, the legatee for life takes the absolute and entire interest, and the legatee over gets nothing." *Wooten v. Burch*, 2 Maryland Ch. 190.

It is not always easy to determine what property should be deemed insecure or hazardous within the rule advanced in *Howe v. Lord Dartmouth*. There can be little doubt in the case of chattels personal, which are for the greater part perishable, and can seldom be rendered productive without the actual use which may result in waste or deterioration. So terms for years must be sold although for a different reason, as growing every day less valuable, and liable to run out before they reach the hands of the remainderman. What course shall be pursued in the case of choses in action, is a question of more difficulty, which is answered differently in the various states. If there be any general principle, it is that while the executor should not call in or alter the investments, made by the testator without a sufficient cause, he will not be justified in retaining any security which he would not have been justified in acquiring. *Kinmouth v. Brigham*, 5 Allen, 270, 278. The authorities agree in two con-

ditions, one that the investment must be secure; the other, that it shall have a stable value which will not fail or expire during the continuance of the trust, and will presumably be as available to the last taker as it was to the first. If the form in which the property was left by the testator meets these requirements it need not be changed, if it does not, the mere circumstance that it was chosen by him is not a sufficient reason for incurring a risk which might be avoided by a timely sale. An executor need not, for example, dispose of stock in the funded debt of the government or state, or of a municipal corporation in good credit, because if such securities were sold it would be difficult to point out in what way the proceeds could be invested with greater safety, nor need he call in money which has been lent on bond and mortgage. In Massachusetts, the stock of a manufacturing or railway company, or the bond or note of an individual, secured by such a pledge, is not deemed a hazardous investment, or one that must necessarily be avoided by a trustee, and it follows that an executor need not dispose of such securities where they have been purchased by the testator. See *Kinmouth v. Brigham*; *Clark v. Garfield*, 8 Allen, 427; *Lovell v. Minot*, 20 Pick. 119; *Harvard College v. Amory*, 9 Id. 446. The law of Pennsylvania and generally of the other states, is more stringent, and does not sanction the investment of trust money on any foundation which is less secure than real

estate, or the public faith. See *Smith v. Smith*, 4 Johnson Ch. 281; *King v. Talbot*, 40 New York, 76; *Nye's Estate*, 5 W. & S. 254; *Will's Appeal*, 10 Harris, 330; Notes to *Townley v. Sheborne*, *post*. But all the courts agree that property which is perishable or precarious, as for instance, shipping, or the machinery of a factory, or the interest of the testator as a special or general partner, must be converted by the executor with all convenient despatch, although the existing investment is profitable, and might in his opinion, and that of competent persons, be retained with comparatively little risk. See *Kinmouth v. Brigham*, *Balch v. Hatch*, 10 Gray, 402; *Covenhoven v. Shuber*, 2 Paige, 132; *Williamson v. Williamson*, 6 Id. 298; *Cairns v. Chaubert*, 9 Id. 160; *Healy v. Toppan*, 45 New Hampshire, 243; *Thorp v. Petit*, 1 C. E. Green, 487.

The obligation to convert a residuary bequest into money, may arise not only where the property is insecure in its actual form, but where it must become less valuable or cease to exist with the lapse of time. *Healey v. Toppan* 45, New Hampshire, 243; *Kinmouth v. Brigham*, 5 Allen, 276. Hence while one to whom a chattel real is specifically bequeathed for life, is entitled to the possession and enjoyment of the land, although he may live until the lease has expired, and leave nothing for the remainder-man, yet where such an interest is conferred by a residuary bequest, it must be sold, and the

proceeds invested as a means of placing the second taker on the same level with the first; *Cairns v. Chaubert*, 9 Paige, 160. The law was so held in *Cairns v. Chaubert*, and it was said to follow, that a bequest of all the income of the testator's real and personal property to several persons in succession, entitled the remainder-men to require that a toll bridge which formed the most profitable part of the estate, should be disposed of by the executor, and the purchase-money placed at interest on good security for their benefit and that of the legatee for life; the ground of the decision being that the franchise had only been granted for a limited period, and would expire before the gift over took effect. See *Balch v. Hulbert*, 10 Gray, 402.

It results from the same principle that although a specific bequest for life with a gift over of things "*quæ ipso consumuntur usu*," confers an absolute interest on the first taker; this rule does not apply where such articles are embraced in a residuary or general legacy and they must then be converted into money as a means of securing the remainder-man without disappointing the first taker; *ante*, 643; *Burnett v. Lester*, 53 Illinois, 325.

The rule applies conversely in favor of the life tenant, who may require that a reversionary or other interest which cannot be reduced to possession or made available as a source of income in its actual form, shall be sold and the proceeds invested for the use

of all concerned. *Healey v. Toppan*, 45 New Hampshire, 243, 266, ante, 683.

The presumption in favor of converting perishable or wasting property, will be repelled by any provision which indicates that the effects are to remain in their actual form during the life of the first taker, *Henderson v. Vaulx*, 10 Yerger, 30, as where the will directs that they shall be sold at his death, and the proceeds distributed among the remainder-men, *Holman's Appeal*, 12 Harris 174; *Golder County v. Littlejohn*, 30 Wisconsin, 351; *Calhoun v. Ferguson*, 3 Richardson Eq. 160, 166. The rule is ancillary and merely a means of attaining the end which the testator presumably had in view, and if it appears from the context or on the face of the bequest, that he intended that the life tenant should use or possess the property in its existing state, his purpose will be carried into effect, although the bequest is residuary and consists of perishable property.

In *Golder County v. Littlejohn*, 30 Wisconsin, 351, the testator's estate consisted of bonds, promissory notes and other choses in action, and also of household furniture, wearing apparel, &c. He appointed his wife and the defendant executors, and directed that she should enjoy his property during her life, and that it should be sold at her death and the proceeds distributed among his next of kin. The defendant disposed of the whole and gave the purchase-money to her. The court

held that taking the words of the legacy in connection with the subject matter, it must be regarded as a specific bequest of so much of the effects as could not be enjoyed without possession, but not of the choses in action. It followed that the defendant was answerable to the remainder-men for the latter, which it was his duty to have invested, but not for the former which he might have delivered in specie to the widow, and must be regarded as having sold as her agent. Lyon J., said: "The general rule is, that where there is a bequest of the whole of the testator's personal estate, or of the residue thereof after the payment of debts, expenses of administration and legacies, to one person for life, with the remainder to others after the termination of the life estate, the whole property must be converted into money and invested in permanent securities by the executor, and the income only paid to the legatee for life. But if it can be gathered from the will that the testator intended that such legatee for life should enjoy the property in its then condition, the bequest is specific and the legatee is entitled to the possession and enjoyment of the property, thus specifically bequeathed, although the bequest be made in general terms and without any particular designation of the property. * * * See notes to *Howe v. The Earl of Dartmouth*, 7 Ves. 137; 2 Lead. Cases in Eq. 686; *Healey v. Toppan*, 45 N. H. 243; *Morgan v. Moran*, 14 Beavan, 72.

In the present case the will ex-

pressly gives to the legatee for life the use and enjoyment of the property, and by directing that it be sold after her death, the testator evidently intended that it should not be sold before her death, but that she should have the possession and use of it during her life. It necessarily follows that in respect to the property which was of a character to be possessed, used, enjoyed and sold, that is the personal chattels as distinguished from the choses in action, the legacy is specific, and Mrs. Potts was entitled to the possession, use and enjoyment of such chattels in specie, during her life. This proposition is conceded to be correct in the brief of the counsel for the plaintiff. Had Mr. Kellogg been sole executor, and had he delivered those chattels to Mrs. Potts, his liability therefor as an executor, at least so long as she lived would have been terminated, because in that case he would have disposed of the property precisely in accordance with the direction of the testator, and the requirements of law. Had Mrs. Potts died possessed of the property, it would doubtless have been his duty as executor to resume possession of it, and to have sold it for the benefit of the other legatees, but while she lived he would of had no further control over it, and could not be held liable as executor on account of it. Again, had Mrs. Potts sold or destroyed the property after it came into her possession, the remedy of the legatees in remainder would not be

against Mr. Kellogg as executor, or upon his bond as such, but against the personal representatives of Mrs. Potts after her death; *French v. Hatch*, 8 Foster, 331; *Wescott v. Cady*, 5 John. Ch. 334; 2 Lead. Cases in Eq. 706.

In this case the legatee for life was executrix of the will, and the possession of the property by her co-executor was her possession, and we think that such possession immediately vested in her by operation of law as legatee, that of the executors as such being thereby divested, and that the subsequent sale thereof by Mr. Kellogg, and the payment of the proceeds to her, were not the acts of Mr. Kellogg as executor, but rather as agent of the legatee for life.

If these views are correct, it seems to follow that no action can be maintained upon the bond of the executors, for the proceeds of the sales of such chattels, as were specifically bequeathed to Mrs. Potts for life.

It is true that some of the cases hold that it is the duty of the executor to take a receipt for the property from the legatee for life, specifying therein the estate which the latter has in the property, and this is doubtless the proper mode in which to transact the business, but we do not find that it has ever been held that a failure to take such a receipt will render the executor liable upon his bond, for the value of such property.

We perceive no good reason for holding that such liability exists by reason of a failure to take the

proper receipt from the legatee for life, especially when such legatee is also an executor.

We conclude therefore that there can be no recovery upon the bond of the executors for the value of the property specifically bequeathed to Mrs. Potts for life.

We find nothing in the will to evidence an intent on the part of the testator to make a specific bequest of the choses in action, which constituted the bulk of his personal estate. Such property, from its very nature, does not admit of use, enjoyment and sale in the sense in which those terms are evidently used in the will. As to these the bequest to Mrs. Potts for life is general and not specific. Under the authorities above cited it is quite impossible to give any other construction to the will in this behalf. Hence the general rule before stated is applicable, and it was the duty of the executors to collect the notes and sums unpaid on the land contract described in the inventory, and to sell the railroad stock, to invest the whole proceeds thereof in permanent securities, to pay over the interest accruing thereon to the legatee for life, to retain such securities for the benefit of the legatees in remainder, and after the death of the legatee for life it was the duty of the surviving executor Mr. Kellogg, to convert such securities into money, and distribute the proceeds as directed by the will.

The failure of the executors and of Mr. Kellogg, after the death of Mrs. Potts, to perform these duties

or the most of them, is an additional breach of the conditions of their bond."

In like manner where the testator bequeathed the residue of his personal estate to his wife during her life or widowhood, to use in any lawful manner, with a proviso that if she married again one-half should be hers, and that she should be at liberty to take any part of the rest at a valuation, the court held that the testator manifestly intended that no more of the property should be sold than was requisite to pay his debts, and that his widow should take the residue, subject only to the obligation of accounting for it at her death; *Harrison v. Foster*, 9 Alabama, 955.

The duty of converting a bequest for life into money, is based exclusively on the presumed intention of the testator that the remainder-man shall enjoy the same benefit as the first taker, and does not arise where a different purpose appears in the will. A specific legacy of a chattel to one for life and then over, consequently entitles the legatee to the possession and enjoyment of the property, although the effect may be to leave little or nothing for those who are to come after him. For as the testator manifestly intends that he shall have the goods in their existing form, his purpose will not be frustrated by turning them into money. *Golder County v. Littlejohn*, 30 Wisconsin, 351; *Swain v. Sproill*, 4 Jones Eq. 252. The argument is still stronger in this direction, in the case of a general

legacy of chattels of a certain kind, because if such effects do not exist among the testator's goods, it is the duty of the executor to procure them as a means of carrying out the will, which necessarily implies that they are not to be sold when they do. See *Graham v. Graham*, 1 Busbee Eq. 291; *ante*, notes to *Ashburner v. Maguire*.

It has accordingly been held in numerous instances, that an executor does not incur any liability by handing over chattels that have been generally or specifically bequeathed for life, to the legatee, although they are wasted by the latter, or converted to his own use. No recovery, therefore, can be had under these circumstances against the executor or the sureties on his official bond; *Wooten v. Burch*; *Golder County v. Littlejohn*, *ante*, 703; and the remainderman must seek redress through a bill in equity against the personal representatives of the first taker, for an account, and that they be directed to surrender so much of the property as remains, and make compensation for any part of it that has been lost or destroyed through his default. *Westcott v. Cady*, 5 Johnson Ch. 334; *French v. Hatch*, 8 Foster, 331.

It is well settled in accordance with this principle, that where furniture, books, jewelry, farming implements, or other chattels of a like kind, which cannot be enjoyed without using them, are specifically bequeathed to one for life with remainder over, the legatee is entitled to the custody and pos-

session of the goods as the only means of giving effect to the will, and should not be required to give security, because his inability to comply with the demand might frustrate the bequest. *DePeyster v. Clendenning*, 8 Paige, 295, 303; *Kinnard v. Kinnard*, 5 Watts, 109; *Brinton's Estate*, 7 Id. 203; *Rainey v. Heath*, 2 Patton & Heath, 206. The executor's duty consequently is, to hand the property over to the first taker, without imposing any other condition than that of signing an inventory for the information of the persons who may be ultimately entitled under the will. *Healey v. Toppan*, 45 New Hampshire, 243, 261; *Rowe v. White*, 1 C. E. Green, 411; *Homer v. Shelton*, 2 Metcalfe, 194, 205. Formerly, said Wilde, J., in the case last cited, "the rule in chancery was to require security from the tenant for life of personal property, in favor of the person entitled to the remainder. But in *Foley v. Burnell*, 1 Bro. C. C. 279, Lord Thurlow, says, that the cases as to tenant for life giving security for goods have been overruled" and the court now demands only an inventory, which is more equal justice; as there ought to be danger in order to require security. If there should hereafter appear good cause to apprehend that the property would be wasted, secreted or removed by the plaintiff, in such a case a court of chancery might undoubtedly interfere. 2 Kent Com., 3 ed. 354; *Langworthy v. Chadwick*, 13 Connecticut, 42.

This rule appears just and rea-

sonable in respect to bequests of goods and chattels for life, with remainder over, where the tenant for life is entitled to the use of the goods and chattels. But as to gifts by will, of stocks, or money, with remainder over of the capital, or stocks, a different rule may apply. In such case the executor may be entitled to hold the property in trust until the death of the legatee for life, taking the interest or income only to his own use, unless some different provision should be contained in the will."

The case is no longer the same where money, or securities which resemble money in the capacity for bearing interest, are bequeathed to two or more persons successively, for as property of this description may be enjoyed without actual possession, there is no ground for jeopardizing the interest of the remainder-man by delivering the corpus of the fund to the legatee for life, and it should be held or invested by the executor; *Homer v. Shelton*, 2 Metcalf, 194, 205; see *Golder County v. Littlejohn*; *Wooten v. Burch*, 2 Maryland Ch. 190; *Spear v. Tinkham*, 2 Barb. Ch. 211; *The Trustees v. Cole*, 20 Barb. 321, 330; 16 New York, 83, 90, 95; *Field v. Hitchcock*, 17 Pick. 182; *Clarke v. Burdick*, 6 Rhode Island, 151. A gift of money to one for life and then over "is a gift of the interest only, and it is the executor's duty to invest the money, and pay the income to the person entitled for life, and preserve the principal for him who is entitled to take afterwards;" *Field v. Hitchcock*.

Such at least is the logical conclusion, although some of the authorities indicate that a pecuniary legatee for life is entitled to receive the principal, on giving security that it shall be paid at his decease to the remainder-man; see *Eichelberger v. Barnitz*, 17 S. & R. 293; *Kinnard v. Kinnard*, 5 Watts, 108; *Brinton's Estate*, 7 Id. 203; *Rodgers v. Rodgers*, 7 Watts, 15; *Burnett v. Lester*, 53 Illinois, 325, 335; and others; that it should be handed over to him on his personal responsibility, unless there is just cause to apprehend that he will remove the fund beyond the jurisdiction of the court, or convert it absolutely to his own use; *Rowe v. White*, 1 C. E. Greene; *Waldo v. Cummings*, 45 Illinois, 416, 421, 430.

By Act of Assembly in Pennsylvania, "wherever any personal property, or the income, profits, or dividends thereof shall be bequeathed to any person for life, or for a term of years, or during any other limited period, or upon a condition or contingency, the executor shall deliver the property so bequeathed to the legatee, on his giving such security in the Orphans' Court as will secure the interest of the person or persons entitled in remainder; see *Clevestine's Appeal*, 3 Harris, 495; *Bedford's Appeal*, 4 Wright, 18; *Green's Appeal*, 6 Id. 25.

In *Kinnard v. Kinnard*, 5 Watts, 108, the court held that although security cannot ordinarily be required for the return of goods which have been specifically bequeathed for life, with a limita-

tion over, yet where the subject matter of the gift is money, the legatee is not entitled to recover, without securing the remainderman. In this case the testator bequeathed all his estate to his wife during her natural life, and directed that after her decease it should be sold, and one-half the proceeds paid to her, and the residue distributed among his nephews. Kennedy, J., said, that the direction that the property should be disposed of after the wife's death, showed that the intention was that she should have the use of it in kind while she lived. As it regarded that portion of the estate which consisted of goods, all that could be required of the first taker was to sign and deliver an inventory of the goods, acknowledging that they were his for life only, and that whatever was not necessarily consumed in using them was to be surrendered at his death. It was indeed questionable whether a legacy for life of things *quæ ipso consumuntur usu* did not confer an absolute right, and if so, a gift over would be repugnant and invalid; see *Merrill v. Emery*, 10 Pick. 517, 512; *Randall v. Russell*, 3 Merrivale, 194; unless the quantity was so great as to indicate that they were meant to be converted into money in order to make the bequest available, when the residuary bequest would be good, and the first legatee required to give security. But where the legacy consisted of money, or was to be converted into money by the terms of the will, it was the inva-

riable practice to require security of the first legatee, although he might be perfectly responsible, and there was no reason to believe that the property would be wasted or destroyed while in his possession.

It has been held, and seems to be generally conceded that where stocks, bonds, or other choses in action are bequeathed in terms which confer the entire ownership, subject to be divested if the legatee dies without children, or the happening of any other future event, he may claim the property at the expiration of a year from the testator's death, without giving security for repayment in case the contingency should happen, *Condict v. King*, 2 Beaseley, 375, 383; *Raney v. Heath*, 2 Patton & Heath, 206, 224; *Rowe v. White*, 1 C. E. Green, 411; *Griffiths v. Smith*, 1 Vesey, Jr. 97; *Homer v. Shelton*; *Fisk v. Cobb*, 6 Gray, 144; see *The Trustees v. Kellogg*, 16 New York, 83, 95. In *Homer v. Shelton*, the bequest was to the plaintiff for his own use forever, with a proviso that if he should die leaving only one child living at his death, such child should take one-third only of the legacy, and the remainder should go to the testator's other children. Wilde, J., said, "the plaintiff is not tenant for life, he has an estate in fee simple in the real estate devised to him, and an absolute ownership of the personal property. Words which give a fee in real estate, give an absolute property in personal estate. It is true there is a contingent limitation over by way

of executory devise, but the contingency may never occur. The plaintiff, though he has but one child, may have others or lose the one now living:” It was held in like manner in *Fisk v. Cobb*, that a legacy to one, his heirs and assigns, with a bequest over in case he dies without issue, is to be paid to him without requiring security, although he renounces the office of executor to which he has been appointed by the will, and removes to another state, unless there is danger of his wasting, removing or secreting the property.

On the other hand in *Eichelberger v. Barnitz*, 17 S. & R. 293; where a pecuniary bequest was made to a grandson, with a proviso that if he should die without issue the money should be divided among the testator’s children, the court held the limitation good, and that the legatee was not entitled to the possession of the fund without securing the executory devisee. A similar view was taken in *The Trustees v. Cole*, 20 Barb. 321; and *The Trustees v. Kellogg*, 16 New York, 83, 90, 95; although Denio, C. J. dissented.

Whatever the rule may be under ordinary circumstances, it is clear that where there is reason to believe, that one to whom personal effects have been bequeathed for life or years, or subject to a divesting clause, will waste or misappropriate the property if it is entrusted to his care, he may be required to give security for the protection of those who are to come after him, *Hudson v. Wadsworth*, 3 Conn. 348; *Langworthy*

v. Chadwick, 13 Id. 42; *Eichelberger v. Barnitz*, 17 S. & R. 293. In *Langworthy v. Chadwick*, the mere fact that the legatee was about to remove to another state, was held to render it incumbent on him to secure the executory devisee, although there was no distinct allegation of insolvency; and such is clearly the law where it appears that he is insolvent, and intends to put the property beyond the jurisdiction of the court; *Moffatt v. Moffatt*, 10 Hen. & Munf. 593; *Howard v. Howard*, 4 C. E. Green, 468.

The obligation of a legatee for life of specific chattels, depends on the language of the will and the nature of the property bequeathed. If the gift is of corn, wine, hay, wearing apparel, or other things which cannot be used without consuming them, the “usufruct” is so nearly equivalent to ownership, that the first taker may deal with the goods as he thinks proper, and those who follow him, will at the most be entitled to such articles as remain in specie at his death. *Holman’s Appeal*, 12 Harris, 176, 178; *Kinnard v. Kinnard*, 5 Watts, 108, 110; *The Trustees v. Kellogg*, 16 New York, 83, 93. *ante*, 643. In general, one who has the right to consume may alien, because he would otherwise have no motive for economy. “When an absolute power of disposal is given to the first taker, he may defeat the bequest over, and therefore it is void. *Patterson v. Ellis*, 11 Wend. 259, 277; *Pinkney v. Pinkney*, 1 Bradford, 269, 272. In *Merrill v. Emory*, 10 Pick.

507, the testator bequeathed all the family stores that might be on hand at his death, to his wife for her life, with a proviso, that all that she left should go to his granddaughter. His wife survived him, but died some days afterwards without having consumed any portion of the stores, and it was held, that they belonged to her administrator, and not to the granddaughter. The weight of authority is in accordance with this decision, that chattels which are necessarily consumed in using them, cannot be made the subject of a limitation over, after a specific bequest for life; *The State v. Warrington*, 4 Harrington, 55; *Cady v. Westcott*; *Calhoun v. Ferguson*, 3 Richardson Eq. 160, 167; *Healy v. Toppan*, 243, 262.

A different rule prevails where the legacy consists of plate, books, furniture or other chattels, which may be put to their appropriate use without material loss or diminution, and it will then be incumbent on the legatee to take care that the property be not needlessly injured or destroyed. He will accordingly be answerable for injuries arising from negligence, though not for loss or decay through natural causes, or for the wear which is inseparable from use *Calhoun v. Ferguson*, 3 Richardson Eq. 160, 167; *Weeks v. Weeks*, 5 New Hamp. 527; *French v. Hatch*, 8 Foster, 331; *Woods v. Sullivan*, 1 Swan 508.

In *Holman's Appeal*, the testator devised all his estate real and personal property to his wife during

her widowhood or natural life, with a provision that on her death or marriage, it should be sold and the proceeds distributed among his children. The widow who was also named executrix, took possession of the personal property which consisted of horses, kine, household furniture, farm implements and some grain and liquors. She died after a lapse of thirty years, and it became a question whether her estate was answerable for the articles which had disappeared during her life. Lewis, J., said that "a life estate in goods is in many respects analogous to the usufruct of movables under the civil law, and depends for its effect on whether the legatee can have the benefit which the testator presumably intended to confer, and yet leave the property intact for his successors. Thus provisions, grain and liquors are wholly consumed when one uses them, while cattle, hangings, beds and other movables, suffer some diminution by use, and even from the bare effect of time, and at last perish. He who has the "usufruct" of a totality of goods, has also the right to enjoy and use all the movable effects, according to their nature; to consume what is liable to be consumed in its ordinary use, to gather from the living creatures, the profits which they yield, and receive the interest of debts which bear interest, and in fine to the appropriate use and enjoyment of everything according to its kind.

Things which are not consumed immediately by the use of them, may be put to the use for which

they are designed, without abusing them, taking due care of them, and they are to be restored to the proprietor in the condition in which they shall happen to be after the usufruct has expired, although wasted and diminished by the effect of the use, provided the usufructuary has not misused them. Things which are consumed in the use, become the property of the usufructuary, since he cannot use them but by consuming them. In the case of living animals which reproduce themselves, the usufructuary is entitled to the progeny; but in that case he is bound to preserve entire the number he has received, so that when any of them die he must fill up their places out of the fruits; see *Flowers v. Franklin*, 5 Watts, 265. Money in possession, or in action, is not necessarily impaired by the use, because the use of money is nothing more than the interest or dividends, which may be enjoyed by the usufructuary without diminishing the principal; 1 Donat, 61, tit. 11; 4 Russell's Rep. 200; 3 Merrivale's Rep. 194; 7 Vesey, Jr. 137; 9 Id. 549; 2 Kent, 354; 5 Watts, 108; 7 Watts, 203.

In the case under consideration the presumption after such a lapse of time, was strongly in favor of the legatee. No evidence of negligence had been adduced, and it might reasonably be inferred, that the missing articles had perished or been worn out without default on her part."

It seems that a legatee for life is ordinarily entitled to any accretions which the property may

receive from his skill and industry, or through the operation of natural causes; *Calhoun v. Ferguson*, 3 Richardson Eq. 160, 167; *Saunders v. Haughton*, 8 Iredell Eq. 217, 222; *Woods v. Sullivan*, 1 Swan, 507. "The life tenant is entitled to all the increase of flocks and herds, beyond what is necessary to keep up the stock, and therefore is bound to the exercise of extraordinary diligence for keeping it up, and delivering it over undiminished to the remainder-man;" *Calhoun v. Ferguson*, ante, 643.

The question depends in this, as in most other cases where one takes under a will, on the testator's intention as disclosed in the instrument; *Calhoun v. Ferguson*; *Flowers v. Franklin*, 5 Watts, 258.

In the case last cited, the testator gave his wife his farm and dwelling house during her life, to be "improved" for her use and that of the family, and also "all his farming utensils, cattle, sheep and swine, to be kept on the farm, and used in improving the same," with a further clause providing that the real and personal estate thus given, should vest at her decease in his children and grandchildren; Kennedy, J., said that the testator's object was to confer all his personal estate on the legatee for the term of her life, for the benefit of his family as a whole. His intention clearly was that she should deal with the property as he had done himself, supplying what was used or worn out, and rearing the progeny of the ani-

mals to fill the place of those who died. It followed that the cattle, grain, and farming implements on hand at her death, though not the same as those she had originally received, must be regarded as having been substituted for them, and within the reach and operation of the will. The remainder-men were consequently entitled to them under the bequest, as against the executors of the first legatee. It is held on like grounds in South Carolina, that where the whole of an estate consisting of land under cultivation as a farm, with the stock of slaves, cattle, agricultural implements and provisions, is bequeathed to one for life with remainder over, it is the duty of the life tenant to maintain the property in the same condition, replacing articles which are consumed or worn out, by others, although he may not be liable for a partial deterioration not due to negligence, and compensated by an increase of value in other respects; see *Robertson v. Collier*, 1 Hill Ch. 370; *Patterson v. Devlin*, 1 McMullin, 459; *Calhoun v. Ferguson*, 3 Richardson Eq. 160.

The question is to a great extent one of intention, and if the will indicates that the power of the legatee for life is to be absolute, those who comes after him must take the property as he leaves it, without a recourse to his estate for what he has used or aliened; *German v. German*, 3 Casey, 116. The principle is clearly stated in the judgment delivered in this case by Chief Justice Lewis. "Personal property

is so transitory and destructible in its nature, that a right to enjoy it during life, necessarily carries with it privileges, which do not belong to the grant of a life estate in land. A life estate in personal property undoubtedly gives the donee a right to consume such articles as cannot be enjoyed without consuming them, and a right to wear out by use such as cannot be used without wearing out. But the extent of liability over to the remainder-men, is to be governed by the intention of the donor, as manifested in the instrument which evidences the gift. It is in general, a just rule that where a life estate only is given, and the remainder is given over to others, the representatives of the donee for life should account for the value of the property according to the principles of the civil law as adopted by the court of chancery; Justinian's Inst., book 2, tit. 4; Domat, pt. 1, book 1, sec. 989; Civil Code, Louisiana, art. 542; Frederician Code, part 2, book 4, tit. 5, sec. 3; *Holman's Appeal*, 12 Harris, 178. Where the parties claim under a will, the intention of the testator is to be collected not from particular clauses, but from the whole instrument, and where repugnant clauses appear, the last is to be regarded as expressing his final design on the subject."

"By the will of John German, his wife Barbara, was to have 'the privilege to choose and keep during her natural life, or widowhood, all such personal property

as she may think proper.' If this clause was the only one in the will bearing on the question, the widow's estate might be held to some measure of accountability for the articles used, consumed or disposed of during her life. But nothing is given over at her death except 'such property as may then be left.' When it is considered that the testator professed an intention to dispose of his whole estate, the implication seems clear that the widow's representatives were not to be held accountable for anything beyond the articles 'left' at her death. Any other construction by which a claim upon her estate is reserved, would leave her husband intestate as to such claim, and this is manifestly contrary to his intention. But the personal property which the widow is at liberty to choose, does not include money in possession or choses in action. The clauses of the will directing the sale of the articles not selected by her, as well as those which may be left at her death, show that the testator in this part of his will, did not intend to embrace any other than such articles as are usually sold by executors for the payment of debts, and for the purpose of distributing the proceeds." Among the goods selected by the widow were a note of \$98, and \$221 which had been received by the testator for produce shortly before his death; these items were deducted and judgment entered in her favor for the residue without security.

In *French v. Hatch* 8 Foster, 331; it was held that a bequest of

bank stock to the testator's wife for life, with a proviso that she should be at liberty to use so much of the principal as might be required for her comfortable support and maintenance, did not confer an absolute right of property, and that the court would determine whether the legatee had gone beyond the bounds prescribed, and make her estate answerable for any excess. But the better opinion seems to be that such a gift empowers the donee to say what his needs require, and that his judgment is not subject to control or revision.

Strictly speaking, a residuary legatee is not entitled to interest as such, although the income which is or ought to have been derived from the estate will go to augment the fund for his benefit. But while a residuary legacy does not carry interest as against the executor, unless the latter is in default, a different rule prevails as between one to whom such a bequest is made for life, and the remainderman. For as each taker is presumably intended to have an equal benefit, so the whole income of the estate before it is finally converted into money, and invested in due course of law, and which is not required for other purposes, will be regarded as principal for the benefit of the remainderman, while the life tenant will be entitled to interest from the testator's death, on the value of the fund as thus augmented; *Williamson v. Williamson*, 6 Paige, 298.

In *Williamson v. Williamson*, various pecuniary legacies were bequeathed, and the residue given

the testator's wife, with a limitation over, and the point was whether the income during the first year after his decease, on so much of the fund as would be needed when the year elapsed for pecuniary legacies which did not bear interest till then, belonged to the widow, or fell into the bulk of the estate, and were to be invested for her benefit and that of the remainderman. The court adopted the latter view on the authority of the principal case; but held that she was entitled to interest from the time when the will went into effect on the whole amount of the fund as finally ascertained. Chancellor Walworth said: "The children to whom pecuniary legacies were given, were all otherwise provided for by the testator, so that the interest on their legacies was not wanted for their support. And as no time was prescribed in the will for the payment of such legacies, except that they should be paid as soon as convenient, the executors were right in supposing that they came within the general rule, and that the legatees were not entitled to interest until the expiration of one year from the testator's death. The appellant's counsel supposes that the bequest of the use of the residuary estate to the widow during her life or widowhood, depends upon the same principle, and that the whole income of the personal estate for the first year is to be added to the general residue, giving to her the interest on this accumulated fund, only from the expiration of the first year.

The result of the English cases appears to be, and I have not been able to find any in this country establishing a different principle, that in the bequest of a life estate in a residuary fund, and where no time is prescribed in the will for the commencement of the interest, or the enjoyment of the use or income of such residue, the legatee for life is entitled to the interest or income of the clear residue as afterwards ascertained, to be computed from the time of the death of the testator. All the cases which appear to conflict with this rule, except the two decided by Sir John Leach, which are no longer to be considered as authority, will be found to be the cases in which the testator had directed one species of property to be converted into another, or the residuary fund to be invested in a particular manner, and had then given a life estate in the fund as thus converted or invested. In such cases it appears to be consistent with the will of the testator to consider the life interest as commencing when the conversion takes place, or the investment is made, either within the year or at the expiration of that time. But as a year is considered a reasonable time for the executor to comply with the testator's directions as to the conversion or investment, the legatee for life cannot be kept out of the interest or income beyond that period. In the case under consideration, there is no direction for a conversion of the fund, or for the investment thereof in any particular manner, before

the right of the widow to the use thereof for life was to commence. And as it appears that a great portion of the personal estate was in bonds and mortgages and other securities, which were drawing interest at the time of the death of the testator, there is no good reason for depriving her of the use of the residuary estate for an entire year.

But although the surrogate's decision was correct as to the widow's right to the interest of the residuary estate from the death of the testator, the principle upon which such interest is computed is altogether erroneous. It was not the intention of the testator to give his wife the interest or income of his whole personal estate, until the debts and legacies should be paid, or for the term of one year, and then the interest upon the residuary estate after that time. But it was his intention to give her the use or income of the same residuary fund, the capital of which was to be distributed to his three sons upon her death or re-marriage.

"The case of *Covenhoven v. Shuler*, 2 Paige, Rep. 132, and the authorities there referred to, settle the principle that where there is a general bequest of a residue of the testator's personal estate for life, with a remainder over after the death of the first taker, the whole residuary fund is to be invested for the benefit of the remainder-man; and the tenant for life is only entitled to the interest or income of that fund. And to ascertain the amount of

such residuary fund, so as to apportion the capital and the income properly between the remainder-man and the tenant for life, the executor, upon settling the estate at the end of the year, must estimate the whole estate at what is then ascertained to have been its cash value, at the testator's death, after paying all debts, legacies, and expenses of administration, and other proper charges and commissions. But, in making such deduction for legacies payable at a future day, and which do not draw interest, the whole amount of the legacies is not to be deducted, but only such a sum as, if properly invested, would at the time when the legacies become payable, have produced the requisite sum, exclusive of all expenses and risk of loss. The rule in England, as between the legatee for life and the remainder-man, is to invest, or consider the fund as invested, in the three per cents., being two per cent. less than the legal rate of interest in that country; *Howe v. Earl of Dartmouth*, 7 Ves. 137. Upon the same principle, according to the legal rate of interest here, the income of a five per cent. stock, which stocks can generally be purchased at about the par value, may be considered as a reasonable discount upon a legacy payable at the end of the year, for the purpose of ascertaining the value of the residuary estate at the death of the testator." See 1 American Leading Cases, 634, 5 ed.

The object of the rule that perishable and wasting property

comprised in a bequest for life, should be converted into money, is to equalize the benefit to the first taker and the remainder-man, and hence a delay in the sale should not be allowed to affect the result. The income of the estate during the interval will consequently be added to the purchase-money, and the whole invested, after deducting so much as will afford the legatee for life the interest to which he is entitled on the market value of the property from the testator's death. See *Healy v. Toppan*, 45 New Hamp. 243; *Kinmouth v. Brigham*, 5 Allen, 276. This may be illustrated by an example. A leasehold estate which has been sublet for \$10,000 per annum, and which will expire in five years, is bequeathed to one for life with a remainder over. It will bring \$40,000 if thrown at once into the market, but the executor collects the rents for two years, and then sells the lease for \$25,000. If the amount which has been received from the sub-tenants is paid over to the first legatee, he will be largely a gainer by the postponement of the sale, while the remainder-man will lose in an equal ratio. The executor is therefore chargeable with an amount as capital, which would if invested at the testator's death, produce the sums which he receives when they are actually received, and the residue will be viewed as income, and distributable as such; *Kinmouth v. Brigham*; *Williamson v. Williamson*, 6 Paige, 298.

In *Kinmouth v. Brigham*, 5 Allen, 276, the material facts as

given in the opinion of the court were as follows: "The testator who died February 22d, 1860, by his will, after certain specific legacies therein set forth, bequeathed the whole residue of his estate to trustees, in trust to invest the same carefully, and keep the same safely invested, and as often as once in each year to divide the net income thereof into three parts, one of which they should pay over to his wife during her natural life. The same persons were named as executors and trustees.

A part of his estate was his interest in a limited partnership, which was formed September 4th, 1858, to continue for four years; and to which he had contributed \$50,000 as special partner. By the articles of partnership, he was to be entitled to one-half of the profits, and might withdraw the same semi-annually; any balance of profits left in the business was to be on interest; he was to bear one-half of the losses to the extent of his capital invested, and make good the same semi-annually, and at the end of the term, the general partners were to take the stock, fixtures and goodwill, and to pay over to him the capital which he had contributed, and the net profits then due. It was also provided, that if either of the general partners should violate any of the partnership covenants, the testator and his representatives should have the right to dissolve it, and take possession of the stock, stand, property, and business, and carry on the business on his or their own account; and that in case of the

death of either of the general partners within two years, the partnership should continue until the time of the next semi-annual accounting, and the testator and his representatives should then have the same right to take the property and the business. By the will, the executors were authorized not to avail themselves of this last provision, unless they should see fit.

The business had been established and carried on by the testator, previous to the formation of the special partnership. The special partnership has proved extremely profitable, the testator having received a large sum as profits before his death, and the executors have received as profits and capital \$158,558.44, since their appointment.

The plaintiff now seeks to compel the executors to distribute the sum of \$158,558.44, as the net income of the estate.

The English rule is perfectly well settled that where the residue of personal property is left without specific description, and is given in succession to a tenant for life and remainder-man, it shall be invested in a permanent fund so that the successive takers shall enjoy it in the same condition, and with the same productive capacity. The reason of the rule is the obvious and just consideration that the intention of the testator is expressly declared to give the enjoyment of the same fund to the successive takers, and that this can only be done by fixing the value of the fund at the time when

the right of the first taker to its use commences. The leading case is *Howe v. Dartmouth*, 7 Ves. 137; This was followed by *Fearus v. Young*, 9 Ves. 549; where the doctrine was applied to the case of money invested in a partnership at the death of the testator. Many of the subsequent cases are collected and reviewed in 2 White and Tudor Lead. Case in Equity, (Amer. ed.) 686 and seq., in the notes to *Howe v. Dartmouth*, and these with others have been carefully presented in the argument of this cause.

In the application of this rule the English courts of chancery by a long course of decisions, have determined that an investment in the three per cents. is to be generally regarded as the only investment which will be sanctioned or directed by the court as safe and permanent, though in a few cases a reference has been made to a master to find whether an existing security at a higher rate of interest is not absolutely safe and more beneficial to all the parties; *Coldecott v. Coldecott*, 1 Young & Coll. 312, 737. But wherever property is specifically bequeathed or where the intention can be gathered from the whole will, that it should be enjoyed in specie, the rule does not apply.

And the rule itself, so far as it requires an investment in public securities, has never been adopted in this commonwealth; as was said by Chief Justice Shaw, in *Lovell v. Minot*, 2 Pick. 119; there are no public securities in this country, which would answer

these requisitions of an English court of equity, and the only rule which has been recognized by this court as obligatory upon a trustee in making investments is, that he shall act in good faith and in the exercise of sound discretion.

In *Lovell v. Minot*, an investment by a guardian in the promissory note of a person of good credit secured by a pledge of stock in a manufacturing company, which was then selling in the market at above its par value at the rate of about three-quarters its par value, was held to be made with sound discretion.

In *Harvard College v. Amory*, 9 Pick. 446, an investment was made by trustees under a will, of a fund, the profits and income of which were to be paid to the testator's widow for her life, and after her decease the fund was to be distributed. It was held that the trustees were authorized to invest in the capital stock of an incorporated manufacturing company, and of an incorporated Insurance Company, and that the actual profits and dividends received from such investments were rightly paid to the widow. The will itself expressly empowered the trustees to invest the fund in safe and productive stock in the public funds, bank shares and other stock according to their best judgment and discretion, and enjoined attention in the choice of funds, and in the punctual collection of the dividends interest and profits thereof. A large part of the testator's property consisted of manufacturing and insurance stock.

But although in this commonwealth there are no investments regarded as so absolutely secure as to make a choice of them obligatory upon trustees, and in all cases a considerable latitude is allowed, yet it has never been held that trustees for successive takers are at liberty to disregard the security of the capital, in order to increase the income, nor where property is of a wasting nature, is an investment in it consistent with their duty in the absence of specific directions in the creation of the trust. They are equally bound to preserve the capital of the fund for the remainder-man, and to secure the usual rate of income upon safe investments for the tenant for life, and to use a sound discretion in reference to each of these objects. If there is no specific direction, and they are charged merely with the general duty to invest, they cannot postpone the yielding of income for the increase of capital, nor select a wasting or hazardous investment for the sake of greater present profit. And the rule is the same in regard to property which comes to the trustees from the testator, not specifically bequeathed, as it is in regard to making new investments. If the investment is not one which this court would sustain them in making it should not be allowed to continue, but should be converted. Its value as a fund should be ascertained as of the time when the enjoyment of the income of it is to commence, and the fund treated as if it had been at that time converted into such an invest-

ment as the court would sanction. In determining this value, it is not always practicable to settle it with exactness until the conversion is actually made, especially in cases where the capital is more or less at risk. The most just rule seems to be where reasonable care and prudence have been used by the trustees in making the conversion, to treat the whole sums received from time to time until converted as parts of the estate, and to find what sum at the time to which the conversion has reference, would be equivalent to the amount actually received, at the time it was received, and to treat that sum as capital and the remainder as income. Thus, if the residue consisted of notes or obligations payable at a future day without interest, and the tenant for life were entitled to the income from the death of the testator, when the money was received so much only of it would be treated as capital, as, if invested at the death of the testator, would have produced the whole amount at the time the notes or obligations were payable, and the rest would be income. If the property were embarked in a commercial venture, or were in the shape of a bottomry bond or other hazardous condition, the trustees would be required to use suitable skill and caution in collecting whatever could be obtained from it and the value of whatever was or ought to have been realized from it, would be fixed as of the time of the testator's death and treated as capital. And on the other hand where the property is of a wasting

nature as terminable annuities, leases, or the like, the value of the investment at the testator's death should be ascertained, and what should be regarded as income be computed upon that basis.

In applying the principles which we have stated, to the case at bar, it is conceded that the income to which the plaintiff is entitled, should commence and be computed from the death of her husband. We are of opinion that there is nothing in the will, which indicates an intention that she should enjoy the income of any particular property, which the testator possessed in specie, but the whole residue was to be alike subject to investment by the trustees. The reference to the special partnership, is only in connection with instructions to the executors as to their duty in a certain contingency. In the next place, we cannot regard the investment by a special partner in a trading partnership, as such an investment as the court would sanction. It is obviously difficult in this case, to determine what was the value of the investment at the testator's decease, by any other mode than a computation based upon the whole product ultimately realized from it. It included not merely the fifty thousand dollars contributed by the testator to the enterprise, but the interest in an established and lucrative business, with the right to the services for a fixed period of all the general partners. The whole was at risk until the partnership concerns were all settled. It somewhat resembles

property invested in a ship, or upon a whaling voyage or long commercial venture, from which returns are received from time to time, but with liability to losses which may require the whole to be refunded, and where the successful progress of the enterprise, so far, may have enhanced the value of the property far beyond its original cost. We think such returns could not be justly treated between tenant for life, and remainder-man, as the income of an investment.

We think therefore, that upon a just construction of the will, equity will require that the profits received by the executors from the special partnership, should not be regarded or treated exclusively as income, but that they be treated when received from time to time, as property belonging to the estate, a part of which is to be invested as capital, and a part distributed as income, which parts are to be ascertained by finding what sum, if received at the death of testator, would amount with interest at the rate of six per cent., and making annual rests to the sum actually received at the time it was received, and that the sum so found should be invested as principal and the remainder distributed as income."

In *Healy v. Toppan*, 45 New Hamp. 243; the court arrived at a similar result, although by a somewhat different process. The testator after giving some considerable pecuniary and specific legacies, bequeathed one-half of his real and personal estate, to his

wife absolutely, and the remaining one-half to her for life, with a bequest over, in trust to collect and pay the income thereof to his nephews and nieces, and distribute the principal when the youngest should be of age. The personal property of the testator, amounted to \$90,000, consisting for the greater part of stock in various corporations, and in shipping. During the eighteen months succeeding his death, the executors carried on the business, and the profits derived from the vessels were near \$18,000, being forty per cent. upon their appraised value; Sargeant, J., said "it is settled in accordance with *Howe v. Earl of Dartmouth*, that where perishable or wasting property is included in a general residuary legacy to one for life, with remainder over, the object of the testator which presumably is that the tenant for life and remainder-man, shall derive an equal benefit, should be carried into effect by converting the assets into money for the benefit of all concerned. This is not an inflexible rule, but must prevail, unless the will gives some indication that the property is to be held and enjoyed specifically by the legatee for life. It follows, that the vessels which form a large part of the estate, should be sold and invested in permanent securities. They may last for many years, but they are exposed to numerous casualties, and the chances are that many, if not all of them, will be destroyed, or become unserviceable during the life estate. The profits realized from the shipping,

must also be regarded as part of the principal of the estate, in which the remainder-man has an interest as well as the first taker. The widow is, nevertheless, entitled as legatee for life, to five per cent. per annum from the testator's death, on the whole value of the property as measured by what it brings when ultimately converted into money, and so much must

consequently be deducted from the profits of the shipping and placed to her credit, *ante*, 696.

In *Earp's Appeal*, 4 Casey, 368, a bequest of a residue for life, consisting in part of stock in a manufacturing company, was held to entitle the first taker to the yearly profits, although accumulated by the company and issued in the form of new or additional stock.

*HOOLEY v. HATTON.

[*346]

16 MAY, 1772 ; 6 FEBRUARY, 1773.

REPORTED 1 BRO. C. C 390, n.¹

REPETITION OF LEGACIES.]—*A larger legacy given by a codicil held not to be a repetition of a smaller legacy given by a will, it being, in the absence of internal evidence to the contrary, accumulative.*

The same specific thing or corpus cannot be given twice.

With regard to legacies of quantity, if a legacy of the same amount is given twice for the same cause, and in the same act, and totidem verbis, or only with small difference, it will not be double ; but where in different writings there is a bequest of equal, greater, or less sums, it is an augmentation.

THE Lady Isabella Finch, by her will,² bearing date the 30th of August, 1768, gave to Lydia Hooley, her woman, the plaintiff, a legacy of 500*l*. The will was executed in the presence of two witnesses

By a codicil, she gave Lydia Hooley 60*l*., to be paid to her.

¹ *S. C.*, 2 Dick. 461 ; Lofft, 122, nom. *Hatton v. Hooley*.

² In this report of *Hooley v. Hatton*, the codicils of Lady Isabella Finch are not set forth in the order in which they ought to stand. By an extract from the registry of the Prerogative Court of Canterbury, it appears that the legacy given to her maid was in these words :—"I give to my woman Lydia Hooley £500, to be paid to her within three months after my decease."

The first codicil was in these words :—"October 28th, 1769.—This codicil I add to my will. I give 1000*l*. to Lydia Hooley.—Cecilia Isabella Finch."

The second codicil was as follows :—"I Lady Cecilia Isabella Finch, do desire this paper writing may be accepted and taken as a codicil to my will. I give to my servant Lydia Hooley, over and besides what I have left her by my will, an annuity of 12*l*. per annum for her life, to be paid quarterly, on the usual days of payment ; the first of the said payments to commence on the first of the said days which shall happen after my decease. Lady Isabella Finch further orders the sum of 60*l*. to be paid to Rebecca Hooley.—Cecilia Isabella Finch."—Note by Mr. Miller, 2 Russ. 269.

She afterwards made a second codicil, dated the 28th of October, 1769, in these words:—"I add this codicil to my will: I give Lydia Hooley 1000*l*." This was in her own handwriting, but not executed before witnesses.

The plaintiff filed her bill for the said legacies and annuity. The question was, whether the last legacy alone [*347] *passed, or the legatee should have both the 1000*l*. and the 500*l*.

The Master of the Rolls (Sir Thomas Sewell) had decreed both to the plaintiff, and the defendant appealed to the Chancellor (Lord Apsley), who was assisted by the Lord Chief Baron Smythe, and Mr. Justice Aston.¹

This case after having been argued very much at large (Lofft, 122), stood over till Hilary Term, when the court gave judgment.

MR. JUSTICE ASTON.—There is in this case no internal evidence; therefore, we must refer to the general rule of law.

The counsel applied the rules laid down in the case of *The Duke of St. Albans v. Beaucherk*.² It is evident those rules are not general, but go on the particular circumstances of that case. It was contended there, that the fourth codicil was to stand in the room of the first.

There are four cases of double legacies:

First, when the same specific thing is given twice, Cujacius takes a distinction between the same *res* and the same *quantity*. In the first case, it can take place but once, at "*eadem quantitas sæpius præstari potest*:" Dig. l. 22, sit. 3, l. 12; Cuj. op. t. 4, 381, 382.

Secondly, where the like quantity is given twice, Lord Hardwicke, in *Duke of St. Albans v. Beaucherk*,³ alluding to the particular circumstances of the case, laid down, one only should be taken, unless an intention appeared to the contrary: Dig. 34, tit. 4, l. 9; but nothing can be collected from hence, as the title of the Digest must be attended to, which expressly says *animo adimendi*: Godolphin's Orphans' Legacy, pt. 3, c. 26, s. 46; Swinb. 526, 530, edit. 1728, where 100*l*. and 100*l*. [are given by different instruments], the legatee [is] entitled to both.

The doctrine from the repetition of two equal sums in one will being bad, and in a will and codicil being good, attributing the former to forgetfulness, is strange. The case of the Slaves, Dig. 34, tit. 1, l. 18, and that in 2 D'Aguesseau, Pleading the First, [*348] page 21, are upon *entirely different principles. It would be strange to suppose Lord Hardwicke applied this as a general rule, which would be inconsistent with his recognising (as he did expressly) the authority of Swinb. 526, 530; but said that the case before him was different, from the internal evidence.

¹ Sir S. S. Smythe, C. B., and Sir Richard Aston, J., had, previous to the Great Seal being delivered to Lord Apsley as Chancellor, been, with him, Lords Commissioners.

² 2 Atk. 636.

³ 2 Atk. 638.

In regard to the cases in the Roman law,—first, where equal sums are given in two distinct writings, both shall pass by the Roman law, and the decisions of this Court are agreeable thereto: Dig. 22, tit. 3, l. 12; and Gothofred's note in *Diversis Scripturis*, Dig. 30, tit. 1, l. 34; in *Eadem Scripturâ*, Cujacius, 4, 311, distinguishes between a corpus and quantity: Voet on the 31 & 32 Digest; Godolphin, pt. 3, c. 26, s. 46; Swinburne, 526; Ricard, *Traité des Donations*, Vol. 1, p. 419, 420. 421; *Wallop v. Herrett*, 2 Ch. Rep. 70; *Newport v. Kynaston*, Rep. t. Finch. 294; Menochius de *Præsumptionibus*, l. 4; 2 Ch. Rep. 58.

Thirdly, as to a less sum in the latter deed, as 100*l.* by will, and 50*l.* by the codicil, the legatee shall take both: Godolphin, pt. 3, c. 25, s. 19; *Ridout v. Payne*,¹ *Pitt v. Pidgeon*.²

Fourthly, as to a larger sum after a less, Ricard, Vol. 1, p. 451 (*Traité de Donations*), folio addition, says, where they are in the same instrument, the two sums are not blended, but the legatee has two legacies; and the heir must show that the one was meant to be blended with the other, the presumption being in favour of what is written: *Windham v. Windham*,³ *Pitt v. Pidgeon*,⁴ *Musters v. Masters*.⁵

The law seems to be, and the authorities only go to prove the legacy not to be double where it is given for the same cause in the same act, and totidem verbis, or only with small difference; but where in different writings there is a bequest of equal, greater, or less sums, it is an augmentation, and therefore Lydia Hooley is entitled to both the sums of 500*l.* and 1000*l.*

LORD CHIEF BARON SMYTHE.—I am clearly of the same opinion, and therefore shall be very short.

*The intention is the clearest rule; but it is admitted [*349] on all hands, here is no internal evidence; we therefore must refer to the rule of law. The rule of law is different with respect to a corpus and to quantities.

On the other side was quoted *The Mayor of London v. Russell*, Rep. t. Finch, 290, where the words were satisfied by some goods. In *The Duke of St. Albans v. Beauclerk*, the last codicil was evidently the same as the first.

LORD CHANCELLOR APSLEY.⁶—It would be sufficient for me to say, I am of the same opinion, if Mr. Justice Aston had not referred to me with respect to some of the cases.

By the civil law, where two pecuniary legacies were given by the same will, the legatee must prove it was to be doubled; but where the two bequests are in different writings, there the presumption shall be in favour of the legatee.

No argument can be drawn, in the present case, from internal evidence; we must therefore refer to the rule of the civil law.

In the case of *The Duke of St. Albans v. Beauclerk*, Lord Hard

¹ 1 Ves. 10.

² 1 Ch. Ca. 301.

³ Rep. t. Finch, 267.

⁴ 1 Ch. Ca. 301.

⁵ 1 P. Wms. 421, 423; and see *Curry v. Pile*, 2 Bro. C. C. 225.

⁶ Lord Apsley was afterwards Earl of Bathurst.

wicke laid down the rule as applicable to that case, and notes a general rule. "This question," said Lord Hardwicke, "divides itself into different parts. I am of opinion, that, upon the reason of the thing, and according to the best writers, these legacies being in *different* writings will make no difference in this case." Neither was it put upon being *one* instrument. Certainly, they are different: "And as the will and codicil make but one will." Lord Hardwicke quoted Gothofred, "*immo hæres priorem probare inanem esse non tenetur*," but did not speak of proving both will and codicil, as he is represented to do in the report. Then Lord Hardwicke considered the internal evidence, and added, "by the power reserved in her will, she has shown her intent to make them *one* instrument,"¹ which words are omitted in the report.

Lord Hardwicke probably thought that Sir Joseph Jekyll, in [*350] *Masters v. Masters*, gave two reasons, where he *seems to give only one. I will hazard a conjecture upon the pointing of the report, 1 P. Wms. 424; the semicolon in the passage "should not be taken as a satisfaction unless so expressed; that it was," &c., was wrongly placed, and should be after the words "that it was;" by which means the passage would stand, "should not be taken as a satisfaction, unless so expressed that it was; as if both legacies had been given by the same will," &c. This case, therefore, is an authority in point, because there are two distinct writings.

So in *Wallop v. Hewett*, 2 Ch. Rep. 70. The Registrar's book shows that the case went upon the general doctrine of the civil law, and not on any internal evidence.

His Lordship further cited *Windham v. Windham*,² *Mayor of London v. Russell*,³ *Newport v. Kynaston*,⁴ *Pitt v. Pidgeon*,⁵ 3 Huber Prælectiones Leg. Civ. 122, and *Stirling's Case*, in Scotland, 2 Fountainhall, 231; and concluded with saying, I have therefore the satisfaction to think we confirm Lord Hardwicke's opinion.

The decree of the Master of the Rolls affirmed.

Hooley v. Hatton, has usually been referred to as containing a sound exposition of the law as to the repetition of legacies, when the point to be determined is, whether a second legacy is to be taken as substitutitional or accumulative. See *Foy v. Foy*, 1 Cox, 164; *Ridges v. Morrison*, 1 Bro. C. C. 390; *Coote v. Boyd*, 2 Bro. C. C. 529; *Barclay v. Wainwright*, 3 Ves. 465; *Suisse v. Lowther*, 2 Hare, 432; *Wilson v. O'Leary*, 12 L. R. Eq. 531; 7 L. R. Ch. App. 448. And in the case of *Heming v. Clutterbuck*, 1 Bligh, N. S. 492, in the House of Lords,

¹ The Lord Chancellor read the words marked with inverted commas, from Lord Hardwicke's original note.

² Rep. t. Finch, 267.

⁴ Rep. t. Finch, 294.

³ Rep. t. Finch, 290.

⁵ 1 Ch. Ca. 301.

Lord Eldon said, that the general principles upon which cases of this kind are to be decided, are so accurately laid down in the case of *Hooley v. Hatton*, that it was unnecessary for him to trouble their Lordships further than by stating it. The rules of the Court of Chancery, and the rules of the civil law upon the subject, were there discussed by the late Mr. Justice Aston, and afterwards applied by the Lord Chancellor.

As to the question whether successive appointments are cumulative or substitutionary, see *England v. Lavers*, 3 L. R. Eq. 63.

*Double gift of the same specific *thing.*—With regard to the first case mentioned by Mr. Justice Aston, it is clear that [*351] where the same specific thing or corpus is given, either in the *same* instrument or in *different* instruments, in the nature of the thing, it can but be a repetition; where, for instance, there are two gifts of a ruby ring, and there is no pretence that there are two ruby rings. See *Duke of St. Albans v. Beauclerk*, 2 Atk. 638; *Ridges v. Morrison*, 1 Cro. C. C. 392; *Suisse v. Lowther*, 2 Hare, 432; *Roxburgh v. Fuller*, 13 W. R. (M. R.) 39.

Legacies of quantity given by different instruments.—It is equally clear, as is laid down by Mr. Justice Aston, that where a testator, by *different* testamentary instruments, has given legacies of quantity simpliciter to the same person, the Court considering that he who has given more than once, must *primâ facie* be intended to mean more than one gift, awards to the legatee all the legacies; and it is immaterial whether any subsequent legacy is of the same amount (*Wallop v. Hewett*, 2 Ch. Rep. 70; *Newport v. Kynaston*, Rep. t Finch, 294; *Baillie v. Butterfield*, 1 Cox, 392; *Forbes v. Lawrence*, 1 Coll. 495; *Radburn v. Jervis*, 3 Beav. 450; *Lee v. Pain*, 4 Hare, 201, 216; *Roch v. Callen*, 6 Hare, 531; *Russell v. Dickson*, 4 H. & L. 304), or less (*Pitt v. Pidgeon*, 1 Ch. Ca. 301; *Hurst v. Beach*, 5 Madd. 358; *Townshend v. Mostyn*, 26 Beav. 72; *Wilson v. O'Leary*, 12 L. R. Eq. 525; 7 L. R. Ch. App. 448; *Walsh v. Walsh*, 4 I. R. Eq. 396), or, as in the principal case, is larger than the first (*Suisse v. Lowther*, 2 Hare, 424; *Hertford v. Lowther*, 7 Beav. 107; *Lyon v. Colville*, 1 Coll. 449; *Brennan v. Moran*, 6 Ir. Ch. Rep. 126; *Cresswell v. Cresswell*, 6 L. R. Eq. 69, 76; *Wilson v. O'Leary*, 12 L. R. Eq. 525; 7 L. R. Ch. App. 448); à fortiori where there is any variation as to the mode or times of payment, as, where the legacy given by a will, and that given by a codicil, are payable at different times, carry interest from different dates, or are given over to different persons. (See *Hodges v. Peacock*, 3 Ves. 735; *Mackensie v. Mackensie*, 2 Russ. 262; *Bartlett v. Gillard*, 2 Russ. 149; *Guy v. Sharp*, 1 My. & K. 589; *Wray v. Field*, 6 Madd. 300; *S. C.*, 2 Russ. 257; *Watson v. Reid*, 5 Sim. 431; *Strong v. Ingram*, 6 Sim. 197; *Robley v. Robley*, 2 Beav. 95; *The Attorney-General v. George*, 8 Sim. 138; *Lee v. Pain*, 4 Hare, 201, 223.) Or are given

upon or for different trusts and purposes : *Sawrey v. Rumney*, 5 De G. & Sm. 698. So, where a legacy in one instrument is to the separate use of a married woman, and in another a legacy is given to her not to her separate use : *Spire v. Smith*, 1 Beav. 419. So where the gifts are not *ejusdem generis, see *Masters v. Masters*, 1 P. Wms. 421, [*352] 423 ; in which case an annuity, though of greater value, was held not to be a substitution for a legacy.

It will be observed, that, in the second codicil of Lady Isabella Finch (as taken from Mr. Miller's note), a legacy was expressed to be given to Lydia Hooley, "over and besides" what the testatrix had left her by her will ; it does not, however, appear that any conclusion was drawn from those words, to the effect, that, as the testatrix, when she wished to give anything in addition, knew how to express herself, that therefore, when she did not so express herself on conferring a gift, it ought to be taken as substitutional and not accumulative. Some weight, however, seems occasionally to have been given to such words : *Moggridge v. Thackwell*, 1 Ves. Jun. 464 ; *Barclay v. Wainwright*, 3 Ves. 466 ; *Mackensie v. Mackensie*, 2 Russ. 273 ; *Townshend v. Mostyn*, 26 Beav. 72. And in *Allen v. Callow*, 3 Ves. 289, Lord Alvanley, referring to the circumstance that one legacy was expressly given *in addition* to another, said, "That is not an insignificant circumstance, but it is not decisive, for the same thing was done in *Hooley v. Hatton* ; but it does strengthen the argument of those who contend that one of those dispositions was substituted for the other." In *Russell v. Dickson*, 2 D. & War. 133, with reference to this subject, Lord Chancellor Sugden says, "I assent to the argument, that if a testator expressly declares one gift to be in addition to another (and for this purpose the Court is entitled to look at other parts of the same instrument, or at gifts in other testamentary instruments), and in another instance makes a gift without any such declaration, this is a circumstance to show that the latter was intended not to be additional, but in substitution. But, still, too much weight must not be attached to the variation. To hold that it is conclusive, would be going too far. It is a circumstance, no doubt, important to show, that where the testator meant addition, he knew how to express his meaning ; and a party is entitled to rely on it to that extent." See *S. C.* affirmed Dom. Proc. 4 H. L. Cas. 293. And in *Lee v. Pain*, 4 Hare, 201, 221, Sir J. Wigram, V. C., after examining all the authorities, and observing that the Lord Chancellor Sugden had stated, with great accuracy, all that could be said upon the subject, adds : "Upon these authorities it is that I found the observation, that it may well be doubted whether the words in question can safely be relied upon, except in corroboration of an argument arising from other circumstances,—whether the use of superfluous words in one part of a will is alone sufficient to reduce the proper effect of words

in *another part of the same instrument,—whether, in such a case, the rule *expressio eorum quæ tacitè insunt nihil operatur*, [*353] ought not to be applied.” But, in *Lee v. Pain*, the argument founded upon the words “in addition” was fairly met by the observation, that in other cases, in the first codicil, some of the legacies given thereby were expressed to be given *in lieu* of those given by the will: and the answer to the question, why the testatrix did not, in the case of a particular legatee, as in other cases, say that her legacy was in *addition* to that given by the will, was by way of retort, why did she not in that, as in the case of other legacies given in the same codicil, say that substitution was intended, if such were her intention? See 4 Hare, 221, 233.

But although the legacies are in *different* instruments, if they are not given simpliciter, but the motive of the gift is expressed, and in such instruments the *same motive* is expressed, and the *same sum* is given, the Court considers these two coincidences as raising a presumption that the testator did not by a subsequent instrument mean another gift, but meant only a repetition of the former gift: *Hurst v. Beach*, 5 Madd. 358; *Benyon v. Benyon*, 17 Ves. 34.

But the Court raises this presumption only where the double coincidence occurs, of the *same motive* and the *same sum* in both instruments. It will not raise it if in either instrument there be *no motive*, or a *different* or *additional motive*, expressed, although the sums be the *same*. Thus, in *Roch v. Callen*, 6 Hare, 531, where a testatrix bequeathed an annuity to her “servant” E. H., and by a codicil three years afterwards, bequeathed an annuity of the same amount to her “servant” E. H., Vice-Chancellor Wigram, held the latter annuity to be cumulative, as the word “servant” did not express the motive, but was only descriptive. So in *Ridges v. Morrison*, 1 Bro. C. C. 388, the testator by his will gave several legacies, and among the rest, to Nicholas and Mary Layton, the children of his nephew Isaac Layton, 500*l.* each; and by a codicil written under his will, he gave to T. Ashley, 20*l.*; and “to Nicholas Layton, that I put apprentice to a grocer, near Cripplegate, 500*l.* ;” Lord Thurlow held, that Nicholas Layton was entitled to both legacies. “Where,” said his Lordship, “the *same quantity* is given, with any additional cause assigned for it, or any implication to show that the testator meant that the same thing, *primâ facie* should accumulate, the Court has decided in favour of the accumulation. In the present case it happens that an additional cause or mark of favour has been mentioned in the codicil, which proves that the testator meant and intended an accumulative legacy, Considering *the slight [*354] inferences made in former cases (and which, I must own, have [*354] tended to throw property into jeopardy and uncertainty), such an inference as arises in this case is sufficient to turn it the other way, and to induce the Court to say, that it operates as an accumulation. In

the will, the legacy of 500*l.* is given to Nicholas Layton (the testator enumerating him among the other children of Isaac Layton), upon the general consideration of favour which the testator bore towards the family; the other legacy of 500*l.* in the codicil is given with this additional mode of description adjoined to it: 'To Nicholas Layton, the child whom I have put out an apprentice;' which circumstance marks the legatee as a peculiar object of favour, and, consequently, such an inference of the testator's intention as to induce the Court to say it is an additional legacy." And see *Mackinnon v. Peach*, 2 Kee. 555. It ought, however, to be mentioned, that Lord Thurlow, in *Ridges v. Morrison*, though professing to adhere to the case of *Hooley v. Hatton*, yet says, that where the same quantity has been given, and *no additional reason* is assigned for a repetition of the gift, the Court has inferred the testator's intention to be the same, and has rejected the accumulation: 1 Bro. C. C. 393; and see *Moggridge v. Thackwell*, 1 Ves. Jun. 473, and the remarks of Sir W. Grant, in *Benyon v. Benyon*, 17 Ves. 42, upon what Lord Thurlow said in those cases, which has probably been misreported; for it has been clearly settled, as was laid down in the principle case, that the mere fact of the gift of equal legacies, by *different* instruments, will not indicate an intention against accumulation. See also *Lobley v. Stocks*, 19 Beav. 392.

Nor will the presumption that repetition only, and not accumulation was intended, arise, although the *same* motive be expressed in different instruments, if the *sums are different*. Thus in *Hurst v. Beach*, 5 Madd. 352, the testatrix by her will, after giving several legacies, adds, "I also give and bequeath to John Bach (meaning John Beach), now living with me, the sum of 300*l.*; all which said legacies I direct and desire may be paid immediately after my decease, and bear legal interest from my death till paid." By a codicil, after giving several legacies of 500*l.* each, the testatrix adds, "To my man-servant John Beach, a like legacy or sum of 500*l.*" The testatrix then gives a like sum of 500*l.* to her maid-servant; and all these legacies she directed to be paid at the end of six months after her decease. Sir J. Leach, M. R., held that John Beach was entitled to both legacies. "The presumption," said his Honour, "cannot be raised in this case, although it be admitted that the motives are **the same*, inasmuch as the sums [*355] are different; and upon the face of these instruments the defendant is entitled to both sums." And see *Lord v. Sutcliffe*, 2 Sim. 273.

Where, in different testamentary instruments, the effect of the first gift would depend in some measure on the events which should happen amongst the legatees, repeated bequests have been construed as substitutionary, from changes among the legatees, or alterations in their position, which had occurred between the dates of the several instruments. Thus, in *Allen v. Callow*, 3 Ves. 289, the testatrix, by will,

dated in April, 1774, gave 500*l.* in trust for E. B. for life, with remainder to her children living at her death. E. B. died in July, 1782, leaving four children. In December, 1782, one child died. By a codicil of May, 1785, the testatrix gave to the three surviving children, by name, the sum of 500*l.* in certain specified proportions, and directed that the 500*l.* should be vested in the name of one of the trustees in the will. Lord Alvanley, after noticing that in one instance, where the testatrix intended a second legacy to be additional, she had so expressed herself in terms, drew his conclusion, that the 500*l.* given by the codicil was a substitution for that given by the will, in consequence of the altered state of the family. In *Osborne v. The Duke of Leeds*, 5 Ves. 369, the testator gave 10,000*l.* to a son named, and 10,000*l.* each to after-born children. By a codicil, he afterwards gave 10,000*l.* to a child by name, born after the date of his will, and a few weeks before the date of the codicil. Lord Alvanley, after adverting to the leaning of the Court against double portions, relied upon the birth of the child after the will as explanatory of the reason why the codicil was made. With reference to these cases, it has been observed by Sir J. Wigram, V. C., in *Lee v. Pain*, 4 Hare, 243, "that the disposition by the first instrument was in a sense contingent, or at least dependent for its results upon future events affecting the class of persons existing, or to exist, in whose favour the gift was made; and between the original and the later instrument, circumstances occurred which enabled the testator to provide with certainty for that which, at the time of making the will, was necessarily contingent. The Court thought the inference irresistible, that a testamentary disposition, adapted only to the altered circumstances of the case, must necessarily have been intended to supercede the earlier bequest."

Where a second instrument expressly refers to the first, although the legacies given in each to the same person may be of different amounts, it may appear, from intrinsic evidence, upon the true *construction of the words in the second instrument, that the [*356] latter gift was intended to be substitutional: *The Mayor of London v. Russell*, Rep. t. Finch, 290; *Martin v. Drinkwater*, 2 Beav. 215; *Bristow v. Bristow*, 5 Beav. 289; *Currie v. Pye*, 17 Ves. 462.

So, where a codicil furnishes intrinsic evidence that the testator is thereby revising, explaining, and qualifying his will, legacies may be construed to be substitutional: *Moggridge v. Thackwell*, 1 Ves. Jun. 464; 3 Bro. C. C. 517; *Fraser v. Byng*, 1 Russ. & My. 90.

Where a later instrument, as to the legacies, appears to be a mere copy of the former, it will so far be held substitutional. Thus in *Coote v. Boyd*, 2 Bro. C. C. 521, Belt's edit., Sir Eyre Coote by his will had disposed of several real estates, and of his personal estate. Afterwards going to India, he made a codicil to his will, dated 9th October, 1780, beginning with the words, "This is a codicil to the will," &c.; by this

codicil he ratified his will, and gave a legacy to his wife of 10,000*l.*; he gave several other legacies, and made his brother, the Dean of Killfenora, residuary legatee. He afterwards went to a different part of India, and then made another codicil, in December, 1780, in nearly the same words with the former, and the residuary legatee the same: it contained only one alteration,—a legacy to a Miss Monkton. It was insisted by the legatees, that these were duplicated legacies. But Lord Thurlow held, that the last codicil alone should stand, it being evidently intended to be substituted for the first. “All the cases,” said his Lordship, “were gone through in argument, from the civil, the canon, and our own law. I do not repeat them, because I refer entirely to the argument of Mr. Justice Aston, in *Hooley v. Hatton*, who went through the doctrine of them all with a particularity, method, and sufficiency, seldom to be met with; and from that argument, I take it, was the result, that when the same legacy is given in a will and a codicil, the Court generally takes it as accumulative, but that the Court has not considered the presumption as very strong, but slight circumstances have been held to control it. Where it is evident the testator meant to repeat the legacies, they are not duplicated. I think here the testator meant to leave but one codicil, and only to add the legacy to Miss Monkton. It would be extraordinary he should repeat exactly the same legacies to persons standing in so different degrees of relationship to him as the several legatees, and that the residuary clause should be exactly the same in both.” And see *Barclay v. Wainwright*, 3 Ves.

[*357] 462; *Attorney-General v. *Harley*, 4 Madd. 263; *Hemming v. Gurrey*, 2 S. & S. 311; 1 Bligh N. S. 479; *Gillespie v. Alexander*, 2 S. & S. 145; *Campbell v. Lord Radnor*, 1 Bro. C. C. 271; *Tuckey v. Henderson*, 33 Beav. 174; *Hinchcliffe v. Hinchcliffe*, 2 Drew. & Sm. 96; *Roxburgh v. Fuller*, 13 W. R. (M. R.) 39. And see *Duke of St. Albans v. Beaucherk*, 2 Atk. 636, some remarks in which cannot be reconciled with the more modern authorities.

The principle, however, of these cases does not appear to be applicable, where a sum is given by way of appointment by will, out of a particular fund, and a sum of similar amount is bequeathed to the same person by a codicil out of the general assets, for in such a case the gifts will be cumulative: *Truckey v. Henderson*, 33 Beav. 174.

In the class of cases within which *Coote v. Boyd* falls, all the legatees mentioned in the will, except such as afterwards died, or such servants as had quitted their service, were provided for in the codicil; it might, therefore, be argued, that it may have been intended to substitute the codicil for that integral part of the will by which the legacies are given. If, however, the codicil does not extend to all the legacies in the will, and no explanation can be offered why some are named in the codicil, and others omitted, the case will be different. See *Lee v. Pain*, 4 Hare, 201, 246.

It is observed in a note to 1 Russ. & My. 102, that if different instruments are *exactly* co-extensive in their provisions, and in other respects are so nearly identical as to satisfy the Judge that they could never be intended to exist together, probate will be granted only of the latest in date, and the others will be held to be virtually revoked: *Methuen v. Methuen*, 2 Phillim. 416. And parol evidence will be resorted to, if necessary, to assist in determining the intention: *Ibid.* But where testamentary papers, very similar in form, and embracing the same general range of objects, still present such discrepancies that one cannot amount to more than a partial revocation or repetition of the rest, the Prerogative Court allows all of them to be proved, and leaves it to the Courts of equity to exercise their own judgment on the question of addition or substitution, whenever those Courts are called upon to construe their effect for the purpose of determining the rights of legatees.

Legacies of quantity given by the same instrument.—Where legacies of quantity in the *same* instrument, whether a will or a codicil, are given to the same person simpliciter, and are of *equal* amount, one only will be good, the repetition, according to the doctrine *of the civil law, being considered, though strangely, in Mr. Justice [*358] Aston's opinion, to arise from forgetfulness; nor will small differences in the way in which the gifts are conferred afford internal evidence that the testator intended that they should be cumulative. Thus, in *Greenwood v. Greenwood*, 1 Bro. C. C. 31, n. the testatrix gave "to her niece Mary Cook, the wife of John Cook, 500*l.*," and afterwards in the same will, amongst many other legacies, "to her cousin Mary Cook 500*l.* for her own use and disposal, notwithstanding her coverture." Lord Apsley declared, that Mary Cook was entitled to one legacy only of 500*l.*, and that the same was for her separate use. In *Garth v. Meyrick*, 1 Bro. C. C. 30, the first bequest was, "I give to A. 1000*l.* Old South Sea Annuities, to be transferred into her own name; and then, towards the close of the will, "I give to A. 1000*l.* Old South Sea Annuities as aforesaid;" it was endeavoured to support them as separate legacies, but A. was held only entitled to one. In *Holford v. Wood*, 4 Ves. 76, the testator, after disposing of copyholds, leaseholds, and giving a legacy, adds, "To Thomas Newman I give an annuity of 30*l.* for his life payable quarterly at the usual quarter-days, the first payment to be made on such of the same days as shall first happen after my death;" and after giving some specific and pecuniary legacies and an annuity, the testator says, "I give to Thomas Newman, the butler, 30*l.* a year for his life." Lord Alvanley, M. R., held, that the second annuity of 30*l.* given to the defendant Thomas Newman, was not to be considered as accumulative, but as the same annuity of 30*l.* given to him in the prior part of the will.

So, in *Manning v. Thesiger*, 3 My. & K. 29, the will of Mary Wels-

ford, made in execution of a power, contained the following bequests:—“I give to my brother, C. T., of London, from and immediately after the decease of my husband R. W., and in default of issue of our marriage, 100*l.* sterling; also to my said brother C. T. an annuity of 50*l.* sterling for life, to commence from the day of the death of my husband R. W., and such default of issue as aforesaid, and to be paid to him half-yearly; also to my brother C. T., of or near the city of London, the sum of 100*l.* sterling.” The testatrix concluded her will by directing, that all and every the legacies and sums of money given by her will, wherein no time was specified as to the payment thereof, were to be paid within three months after her husband’s decease and such default of issue as aforesaid, There was no issue of the marriage. Lord Cottenham, then Master of the Rolls, was of opinion that the testatrix [359] intended only to give a single legacy of *100*l.* to C. T. And see *Brine v. Ferrier*, 7 Sim. 549; *Early v. Benbow*, 2 Coll. 342; *Early v. Middleton*, 14 Beav. 453.

Where, however, the legacies given by the *same* instrument are of *unequal* amount, and not merely, as might be inferred from Mr. Justice Anson’s remarks, where a larger sum is given after a less, they will be considered accumulative. See *Yockney v. Hansard*, 3 Hare, 622. In *Curry v. Pile*, 2 Bro. C. C. 225, the testator made his will as follows:—“I give to her (E. C.’s) son J. C. 1000*l.*, when he arrives at the age of twenty-one years, the interest of which to be paid to his mother till he arrives at the age of ten years; and then I desire my executors will take him and put him to a proper school for his education; and when he arrives at that age, I desire they will expend out of my estate 100*l.* a year till he arrives at the age of twenty-one years, and then I give him 5000*l.*” The question was, whether John Curry should take both legacies or only one; and Mr. Madocks, for J. C., cited the fourth case put in Mr. Justice Aston’s judgment in *Hooley v. Hatton*: As to a larger sum after a less, where they are in the same instrument, the two sums are not blended, but the legatee has two legacies; and the heir must show that the one was meant to be blended with the other, the presumption being in favour of what is written.” But Lord Thurlow held, that J. C. was entitled to both legacies. See also *Windham v. Windham*, Rep. t. Finch, 267; *Baylee v. Quinn*, 2 D. & War. 116; *Adnam v. Cole*, 6 Beav. 353. And see *Hartly v. Ostler*, 22 Beav. 449; *Brennan v. Moran*, 6 Ir. Ch. Rep. 126.

Internal evidence of intention.—The intention of the testator, when it can be collected from the instrument containing two legacies, will, of course, override any presumption which might be raised in the absence of such intention: *Yockney v. Hansard*, 3 Hare, 620. And although legacies given by different instruments are equal, if they were intended by the testator to be cumulative (*Lobley v. Stocks*, 19 Beav. 392,) or if though differing in amount the latter was intended to be substitutional

(*Russell v. Dickson*, 4 H. L. C. 293; 4 Ir. Eq. Rep. 339,) the intention will be carried into effect.

It may here be observed, that if a testamentary paper, incomplete of itself (but being made before the 1st of January, 1838, and admitted to probate,) contains internal evidence of an intention to make an entirely new disposition, and for that purpose to undo all that had been done by a previous complete will, effect will be given to the new disposition, as far as it goes, in substitution for the former; but the former one *will be treated as operative so far as no substituted disposition is provided in its place: *Kidd v. North*, 14 Sim. 463; [*360] S. C., 2 Ph. 91; *Jackson v. Jackson*, 2 Cox, 35. But as far as the question depends upon the latter instrument being incomplete, it cannot arise upon any instrument made after the 1st of January, 1838.

If probate be granted in the Ecclesiastical Court to two writings, as a will and codicil, it will be conclusive to show that they must be considered as *distinct* instruments, although they are both written on the same paper: *Baillie v. Butterfield*, 1 Cox, 392; *Campbell v. Lord Radnor*, 1 Bro. C. C. 272; *Walsh v. Gladstone*, 1 Ph. 294; but see *Martin v. Drinkwater*, 2 Beav. 215. So, if two instruments have been admitted to probate as one testament, they must for all purposes be considered as one instrument only: *Heming v. Clutterbuck*, 1 Bligh, N. S. 491, 492; *Brine v. Ferrier*, 7 Sim. 549. In *The Duke of St. Albans v. Beauclerk*, 2 Atk. 636, were a testatrix, at the commencement of her codicils, declared that they should be part of her will, Lord Hardwicke held, that they were to receive the same construction as if they were incorporated in the will, and formed only one instrument. See *Brennan v. Moran*, 6 Ir. Ch. Rep. 126.

With regard to the present tendency of the decisions upon the doctrine of the repetition of legacies, it has been said, that "there is always a difficulty pressing upon the mind of the Judge in determining what the real meaning of the testator is, within the rule of law, and how far he can, consistently with settled principles, effectuate the intention. In later times, there certainly has been a disposition to get rid of this difficulty, and to hold legacies to be cumulative. The inclination of the Court has been rather to cut the knot than untie it." Per Lord Chancellor Sugden, in *Russell v. Dickson*, 2 D. & War. 137; and see *Lee v. Pain*, 4 Hare, 218, 236.

Where a legacy is given by a codicil in substitution for a legacy given by a previous instrument, upon a revocation of the last legacy, the former will not be set up again. *Boulcott v. Boulcott*, 2 Drew. 25.

As to the admission of extrinsic evidence.—Sir John Leach, M. R., in *Hurst v. Beach*, 5 Madd. 351, where a legacy of 300*l.* was given by the will, and a legacy of 500*l.* by the codicil, has very fully considered the question, how far parol evidence is admissible to prove whether a testator intended a legacy to be a substitutional or accumulative.

"Upon the question," said his Honor, "whether evidence is admissible to prove that the testatrix did not mean that the defendant should take both sums, *there are no decisions in Courts of equity. [*361] There are obiter dicta for the admission of such testimony; but, in *Osborne v. The Duke of Leeds* (5 Ves. 369,) the point was fully argued, and Lord Alvanley appears to have inclined against receiving it. It did not, however, become necessary there, to decide the question. It is to be collected from the Digest, that it was admitted by the civil law.

"This Court has no original jurisdiction in testamentary matters; it acts with respect to them only upon the ground of administering a trust, and is bound to adopt, in questions of legacy, the principles and rules of the Ecclesiastical Court. I found it necessary, therefore, to direct inquiry to be made in that Court upon this point, and the answer that I have received is, that no decision has taken place there upon this question, and that no settled opinion is formed upon it.

"It remains then to be considered upon the principles of evidence which are received in our own law. Our primary principle is, that evidence is not admissible to contradict a written instrument. In some cases Courts of equity raise a presumption against the apparent intention of a testamentary instrument. And there they will receive evidence to repel that presumption; for the effect of such testimony is not to show that the testator did not mean what he has said, but on the contrary, to prove that he did mean what he has expressed.

"Thus, where the Court raises the presumption against the intention of a double gift, by reason that the sums and the motive are the same in both instruments, it will receive evidence that the testator actually intended the double gift he has expressed. In like manner, evidence is received to repel the presumption raised against an executor's title to the residue, from the circumstance of a legacy given to him, and to repel the presumption that a portion is satisfied by a legacy.

"In all these cases the evidence is received in support of the apparent effect of the instrument, and not against it.

"Here the evidence tendered is not in support of the apparent effect of the instrument, but directly against it. This codicil leaves unrevoked the former legacy of 300*l.* to the defendant, and makes to him a further substantive gift of 500*l.* The evidence tendered is, that the testatrix did not mean this as a further gift of 500*l.*, but meant to substitute the 500*l.* in the place of the former 300*l.*

"I am of opinion, therefore, that such evidence cannot be received without breaking in upon the primary rule, that parol evidence is not admissible against the expressed effect of a written instrument." See also *Guy v. Sharp*, 1 My. & K. 589, and *Hall v. Hill*, 1 D. & War. 94, 116.

[*362] *The same view is taken by the Vice-Chancellor Wigram, in the important case of *Lee v. Pain*, 4 Hare, 216. "If," said his

Honor, "each of the instruments simply gives a legacy to the same individual, it would manifestly contradict the effect of one or other instrument, if the legatee were not allowed to claim both legacies, and accordingly he would in that simple case be entitled to both; and, as the right to both legacies in such cases is found in the construction and effect of the instruments, no extrinsic evidence is admissible to prove that the legatee was intended to take one legacy only. In support of this, it will be sufficient to refer to the cases of *Hurst v. Beach* (5 Madd. 351) and *Hall v. Hill*, 1 D. & War. 94). I have noticed this point, because it was argued that the rule, which, in the simple case of two legacies given by two different instruments, awards both to the legatee, was a mere legal presumption, and, it was said, a presumption lightly considered. That is not a correct view of the case. If the right of the legatee in such cases to both legacies depended upon a legal presumption only, evidence would be admissible to rebut it; which, according to the cases I have referred to, is not permitted. To admit such evidence in such a case, would be to construe a writing by parol evidence. I do not deny that cases may be found in which the right of the legatee in such cases to both legacies is spoken of as depending upon presumption; but I believe it will be found that the word 'presumption' has in some at least of such cases been used not in a very strict and accurate sense, not as meaning an inference raised by Courts of law, independently of or against the words of an instrument, but that the word has been used to denote an inference in favour of a given construction of particular words. Thus, for instance, in *Coote v. Boyd* (2 Bro. C. C. 527), Lord Thurlow says, when the presumption arises from the construction of words simply qua words, no evidence can be admitted as to the consequence of giving effect to this rule of law."

We may conclude, from these authorities, that where the Court itself raises the presumption against double legacies,—where, for instance, two legacies of equal amount are given by one instrument,—parol evidence is admissible to show that the testator intended the legatee to take both, for that is in support of the apparent intention of the will; but where the Court does not raise the presumption,—where, for instance, legacies of equal amount are given simpliciter by different instruments,—parol evidence is not admissible to show that the testator intended the legatee to take one only, for that is in opposition to the will. See *Hall v. Hill*, 1 D. & War. 116.

*Extrinsic evidence is admissible to show the circumstances of the testator at the time of making his will, so as to enable [*363] the Court to place itself in the position of the testator: *Martin v. Drinkwater*, 2 Beav. 215; *Guy v. Sharp*, 1 My. & K. 589.

How far a substitutional or additional Legacy is liable to the Incidents or Conditions of the original Legacy.—As a general rule, where one legacy is given merely in substitution for another, it will, in the

absence of any expression of a contrary intention on the part of the testator, be liable to the same incidents as the legacy for which it is substituted (*Cooper v. Day*, 3 Mer. 154; *Shaftesbury v. Marlborough*, 7 Sim. 237; *Bristow v. Bristow*, 5 Beav. 289; *Cookson v. Hancock*, 1 Keen, 817, 2 My. & Cr. 606; *Johnstone v. Lord Harrowby*, 1 De G. F. & Jo. 183, reversing *S. C.*, 1 Johns. 425; *Duffield v. Currie*, 29 Beav. 284); but that will not be the result where the second legacy is a distinct and substantive bequest: *Chatteris v. Young*, 2 Russ. 183; also *Leacroft v. Maynard*, 3 Bro. C. C. 233; 1 Ves. Jun. 279; *Crowder v. Clowes*, 2 Ves. Jun. 449, 450; *Alexander v. Alexander*, 5 Beav. 518; *Haley v. Bannister*, 23 Beav. 336; *King v. Tootel*, 25 Beav. 23.

An additional legacy, although not so expressed, will in general be held subject to the same incidents and conditions as the first legacy. Thus, if after a legacy given by will to a married woman to her separate use, an additional legacy is given to her by a codicil, she will take it to her separate use. *Day v. Croft*, 4 Beav. 561; and see *Warwick v. Hawkins*, 5 De G. & Sm. 481.

In no case, however, has it been held, that the latter gift is to go to the parties entitled under the subsequent limitations of the former gift. "I quite concur," observes Sir W. Page Wood, V. C., in what was said by the Lord Justice Turner in the case of *More's Trust* (10 Hare, 171), that where there is a gift by will to A. for life, and after his decease to B., and then another gift to A., in addition to what was before given, there is no authority for carrying on the series of limitations to the latter gift, so as to convert it into a gift to A. for life, and then to the party who was named in the former gift to take after A.'s death. It would be more plausible to say, that a life interest only was given to A. in the second case, but that would be inconsistent with the words of the will." *Mann v. Fuller*, Kay, 624, 626.

The cases, however, have not gone further than this, where the first gift is given absolutely to the party, or is made defeasible; the second gift has been held to be given upon similar terms; for example, if the former gift were *absolute and free of legacy duty, the additional gift has been held to have all the same incidents; so, if the former gift is to be lost on a certain event, the additional gift is to be defeated on the same condition. Per Sir W. Page Wood, V. C., 1 Kay, 626. See also *Overend v. Gurney*, 7 Sim. 128.

In *Dewitt v. Yates*, 10 Johnson, 156, the testator bequeathed two hundred and fifty pounds to the children of his daughter Maria, payable in sums of fifty pounds to each, on coming of age, or marry-

ing. By a subsequent clause of the same will, he devised one-half of a farm to his son-in-law, Philip Vanderbergh, and directed the devisee, in consideration of the devise, to pay the children of his

daughter Maria, two hundred and fifty pounds, with a similiar provision as to the time of payment, but with the omission of a provision contained in the first bequest, that the shares of those who died without issue should go to the survivors. The court held that the second legacy was a mere repetition of the first, and that payment by the devisee, was a defence to a suit against the executors. "This," said Kent, C. J., "is the case of a sum of money given twice in the same instrument to the same legatee. The general rule on this subject, from a review of the numerous cases, appears evidently to be, that where the sum is repeated, *in the same writing*, the legatee can take only one of the sums bequeathed. The latter sum is held to be a substitution, and they are not taken cumulatively, unless there be some evident intention that they should be so considered, and it lays with the legatee to show that intention, and rebut the contrary presumption. But where the two bequests are in *different instruments*, as by will in the one case, and by a codicil in the other, the presumption is in favor of the legatee, and the burden of contesting that presumption is cast upon the executor. The presumption either way, whether against the cumulation, because the legacy is repeated in the same instrument, or whether in favor of it, because the legacy is by different instruments, is liable to be controlled and repelled by internal evidence, and the circumstances of the case (Godolphin's Orphan

Legacy, part 3, c. 26, s. 46; Swinb. part 7, c. 21, s. 13; *Duke of St. Albans v. Beaulcerk*, 2 Atk. 636; *Garth v. Meyrick*, 1 Bro. 30; *Ridges v. Morrison*, Ib. 389; *Hooley v. Hatton*, Ib. 390, n.; *Wallop v. Hewitt*, 2 Ch. Rep. 37; *Newport v. Kinaston*, Ib. 58; *James v. Semmes*, 2 H. Bl. 214; *Allen v. Callen*, 3 Vesey, Jun. 289; *Barclay v. Wainwright*, Ib. 462; *Osborne v. Duke of Leeds*, 5 Vesey, 369). This question which appears to have arisen so often, and to have been so learnedly and ably discussed, in the *English* courts, was equally familiar to the civil law. The same rule existed there, and subject to the same control. (Dig. 30, l. 34, Dig. 22, 3, 12, and the notes of Gothofrede, Ib. Voet, Com. ad Pand. tom. 2, 408, s. 34.) And Chancellor D'Aguesseau, in his Pleadings in the case of the *Heirs of Vaugermain* (Œuvres, tom. 2, 21), adopts and applies the same rule to a case arising under the *French* law. The civil law puts the case altogether upon the point of the testator's intention; but then if the legacy was repeated in the same instrument, it required the highest and strongest proof to accumulate it. *Evidentissimis probationibus ostendatur testatorem multiplicasse legatum voluisse.*

"In the present case, what are the intrinsic circumstances to show a manifest intent of the testator to multiply the legacy? The only material variation in the two bequests is, that in the latter instance, the legacy was charged upon Philip Vanderberg, in respect of the real estate to him devised. But

this affords no evidence of an intention to accumulate. The inference is the other way. It was only strengthening the security of the legacy by means of the charge. There was no specified object; there was no assigned reason, or cause, *as respected the legatees*, for repeating the bequest. Courts have required some new or additional cause, for enlarging the bounty, before they have held it accumulative, unless the words of the will clearly show the intent. In a will, the testator gave double legacies to his daughters, but he added, in those cases, that they were 'in addition' to what he had before given; and the master of rolls, in *Barclay v. Wainwright*, said that he laid considerable stress upon this, that where the testator meant addition, he expressed it. The whole will denotes throughout, a careful and studied apportionment of the testator's estate among his children, according to his opinion of their wants and circumstances; and he imposed several trusts and charges, probably with a view to greater accuracy in the partition of his estate. He appoints four sons executors, but he charges his funeral expenses upon three, and his debts upon two of them. A small variation in the direction as to payment will not alter the construction. In *Halford v. Wood* (4 Ves. 76), the legacy was an annuity of thirty pounds for life, and in the one instance it was declared to be payable quarterly, and in the other instance, the will was silent as to the payment, and yet it was not held ac-

cumulative. So also in *Greenwood v. Greenwood* (1 Bro. 31, n.), the one legacy was simply to *Mary Cook*, 'for her own use and disposing, notwithstanding her coverture;' and yet Lord Bathurst decreed that she was entitled to one legacy only.

"As, then, the substituted legacy, in this case, has been paid by the devisee, on whom it was charged, the defendant is entitled to judgment."

The point arose in *Jones v. Creveling Ex'ors*, 4 Harrison, 127; 1 Zabriskie, 573, where the will was as follows: "I do give and bequeath unto my two granddaughters, Christina Jones and Deborah Jones, each four hundred dollars, to be paid to them by my executors. If they are not of age at my decease, I order my executors to pay each of them yearly, and every year, the interest of four hundred dollars, until they arrive of age. I further order my executors to pay out of my estate to Christina Jones, four hundred dollars, one year after my decease; and to pay Deborah Jones, four hundred dollars, two years after my decease, in full of their legacies bequeathed to them." The legacies were held to be cumulative by a divided court; but the judgment was reversed by the court of appeals, on the ground that when legacies of the same kind and to the same person, meet in the same instrument, the presumption is that one is a mere repetition of the other, unless it appears expressly, or by a necessary inference that the testator's

intention was that both should take effect.

The following reasons were assigned for the reversal.

“Upon a question, whether two legacies shall be construed to be cumulative or not, a fair and forcible argument in support of the increase may be drawn, from the fact that they are for different sums; or the sums are stated in different sections of the will; or one in the will and another in a codicil; or the sums are made payable at different times, or out of different funds. But these matters must appear on the face of the will itself, or will and codicil, as the act of the testator himself, and not by a mere implication of law or construction, for this would be settling the intention of the testator in a doubtful clause, by other doubtful clauses. These legacies are for the same sums, given in the same section which also provides for their payment. And the addition of the words, “out of my estate,” in the third clause, can have little weight, for all the legacies are charged on his estate. Whether the granddaughters were to have a legacy of \$400 each, or two legacies of \$400 each, all agree is a question of intention; and occupying, as the entire bequest does, but ten consecutive lines, the testator must be presumed to have understood what that intention was, and whether he was carrying it out. No inference of forgetfulness or confusion can arise, as there might, if the sums were in different parts of the will, or will and codicil, or

involved with other bequests or devises. If the intention of the testator then was to give \$800 to each of his granddaughters, that intention must have existed either when he commenced drafting or dictating the 8th section, or been an after-thought—if the former, he would have said at once, I give to my two granddaughters each \$800, and would never have attempted indirectly, obscurely, and by halves, to express a settled, direct, plain and entire determination. If, on the other hand, it was an after-thought, and the testator concluded to give a further sum of \$400 to each of his granddaughters, knowing, as he must, what he had just done, and what he had then concluded further to do, he would have expressed himself explicitly, and so clearly as to have left no doubt that his last intention would have been understood and carried into effect; he would have used some word or phrase, directly indicating that the last \$400 was an addition to the first \$400, or at least to show that it was not the same; he would have begun the clause with directing his executors to make an additional or further payment, or the payment of a further sum, not with a mere “further order” to pay, and he would not have concluded it with the sentence, “in full of the legacies bequeathed to them.”

But for the wording of the second bequest we might incline to the opinion of the court below. There is no rule of law which forbids, or even discountenances, the gift of two sums of a like kind, to

the same person, and by the same will. The presumption against accumulation, is designed to guard against the errors that may arise from misapprehension or forgetfulness, in an instrument which is not unfrequently executed *in extremis*, sometimes by one *inops consilii*, at others without having been carefully read or examined. It does not therefore apply where there is no sufficient reason for imputing mistake or oversight. It is certainly easier and more natural to say I leave J. S. the sum of \$200, than to say I leave J. S. \$100, and also the further sum of \$100, but this is matter for argument rather than conclusive. If that which might be made the subject of a single gift, is deliberately bestowed as two, the courts will carry both donations into effect. Had the testator, in *Jones v. Creveling*, bequeathed \$800, one-half at the expiration of two years from his death and the residue with interest when the legatee came of age, his design could not have been pronounced repugnant or contradictory. What he might have expressed in the same breath, he might express in two distinct clauses or sentences, by bequeathing \$400 payable at one period, and \$400 to be paid at another. If the second bequest had been worded as a gift, this argument would probably have prevailed. What the testator did, was to direct that \$400 should be paid to Christina Jones one year after his decease, and a like sum to Deborah Jones at the end of two years, "in full of their lega-

cies bequeathed to them;" and it was therefore reasonable to infer, that his purpose was not to make an additional gift, but to substitute a different time of payment, for that which he had originally prescribed.

In *Edwards v. Rainier's Ex'ors*, 17 Ohio, N. S. 597, the testator devised real estate to some of his children, and gave pecuniary legacies to others. The third item of his will was a bequest to his daughter Sarah Edwards, "of all the notes which he held against her husband," and also fifteen hundred dollars in cash. The fifth clause of the will contained a devise to his daughter Hestor Adel, of a tract of land subject to the payment of one thousand dollars "to my said daughter Sarah Edwards, in sums of one hundred dollars per year." By the last clause of his will, "all the above legacies were to be paid in two years after his decease." The court in delivering judgment recognized the general rule, that "where the sum is repeated in the same writing, the presumption is against the legatee," and "in his favor, where the two bequests are in different instruments;" but held, that the case did not admit of its application, because the legacies were not payable at the same time or by the same person. One was a general pecuniary bequest, which it was incumbent on the executors to satisfy, the other a burden imposed on Mrs. Adel, in consideration of the land devised to her, and with which the executors were not concerned. It followed that

the presumption against the intention to multiply or accumulate the bequests, did not arise, or was repelled.

It was held in like manner in *Cunningham v. Spickler*, 4 Gill, 280, in accordance with the doctrine of the principal case, that legacies differing materially as to time, mode of payment and amount, are to be regarded as cumulative and not substitutional, although given by different clauses of the same instrument.

Where the testator makes an unqualified bequest, and afterwards bequeathes the same thing conditionally, both clauses will be read as one, and the quali-

fication of the second will attach to and control the first; *Minor v. Ferris*, 22 Conn. 371. The court said that the intention finally expressed in a will must prevail; and hence if a bequest which has been made absolutely, is reiterated with a condition, the presumption is that the testator has changed his mind and means to limit or qualify the gift. The bequest in this instance was of all the testator's personal estate; and where an absolute pecuniary bequest is followed by a conditional gift of a like kind, the latter will be presumed to be accumulative and not a repetition of what has been already given.

* PYE, *Ex parte*.

[*365]

DUPOST, *Ex parte*.

APRIL 26, 29, MAY 27, JUNE 13, 28, 1811.

REPORTED 18 VES. 140.

SATISFACTION OF A LEGACY BY A PORTION.—ADEMPTION.]—*As a general rule, where a parent gives a legacy to a child, not stating the purpose with reference to which he gives it, he is understood to give a portion; and, in consequence of the leaning against double portions, if the parent afterwards advances a portion on the marriage of the child, the presumption arises that it was intended to be a satisfaction of the legacy, either wholly or in part; and the rule is applicable where a person puts himself in loco parentis.*

No such presumption arises in the case of a stranger, or of a natural child, where the donor has not put himself in loco parentis, if the subsequent advance is not proved to be for the very purpose of satisfying the legacy; and, therefore, the legatee will be entitled to both.

WILLIAM MOWBRAY, by his will, dated the 10th of April, 1806, giving his wife the residue of his property after payment of his debts, except the sum after-mentioned, among other legacies gave as follows:—"I give and bequeath the sum of 4000*l*. sterling to Louisa Hortensia Garos, daughter of John Louis Garos,

formerly of Berwick-street, Westminster; the like sum of 4000*l.* to Emily Garos, her sister, and 4000*l.* to Julia Garos, her other sister; and in case of the death of one of the three, I desire that the legacy may be divided equally betwixt the two surviving sisters; and in case of the death of two of them, I desire the whole 12,000*l.* may be paid to the surviving sister."

[*366] *The testator also gave to John Louis Garos 600*l.*, and "to Marie Genevieve Garos, his wife, the sum of 2500*l.* sterling, for her own use, and over which her husband is not to have any power, he having lived abroad for many years, and she in this country, and no correspondence having passed between them during that time. Her own receipt shall be a sufficient authority to my executors for paying her the above legacy."

The testator died on the 8th of June, 1809. His widow became a lunatic. The petitioner Pye was the committee under the commission, and upon her death took out administration to her, and administration de bonis non to the testator.

The Master's report stated, from the examination of the petitioner Pye, that Louisa Hortensia, Emily, and Julia Garos, were the three natural daughters of the testator by Marie Genevieve Garos, the wife of John Louis Garos; and that, since the date of the will, Louisa Hortensia Garos married Christopher Dubost; and the testator *advanced as a marriage portion for her*, which by the settlement appeared to have been received by Christopher Dubost, the sum of 3000*l.*; and it being contended, *that the said sum of 3000*l.* ought to be considered as an advancement and in part satisfaction of the legacy of 4000*l.** and the whole legacy being claimed on the part of Christopher Dubost and his wife (who were both represented to be residing abroad), the Master did not allow the claim.

As to the legacy of 2500*l.* to Marie Genevieve Garos, the report stated, from the same examination, that since the date and execution of the will the testator caused an annuity to be purchased in France, to which country she had retired for her life, and laid out in such purchase 1500*l.*; and, it being contended by the petitioner Pye, that the said sum of 1500*l.* ought to be deducted from the legacy of 2500*l.* *as being an advancement and in part satisfaction*, and the whole legacy being claimed by the legatee, then resident abroad, the Master had not allowed such claim, but left it open to the party to prosecute, when in a situation to do so.

[*367] *By a further report the Master found, as to the French annuity, that, by a letter written by the testator to Christopher Dubost in Paris, on the 25th of November, 1807, the testator authorized him to purchase in France an annuity of 100*l.*, for the benefit of the said Marie Genevieve Garos for her life, and to draw on him for 1500*l.* on account of such purchase. And under that authority Dubost purchased an annuity of that value; but that, as she was married at the time, and also deranged, the annuity was purchased in the name of the testator; and the testator sent to Dubost, by his desire, a power of attorney author-

ising him to transfer to Marie Genevieve Garos the said annuity, dated the 10th of June, 1808.

The report further found, upon the affidavit of Dubost and the copy of the deed, that the first intimation he received of the death of the testator, who died in June, 1809, was in November, 1809; and that, in ignorance of such death, Dubost, on the 21st of October, 1809, exercised the power vested in him, by executing to Marie Genevieve Garos (her late husband being then dead, and she of sound mind) a deed of gift of the said annuity; and the Master found, that by the law of France,¹ if an attorney be ignorant of the death of the party who has given the power of attorney, whatever he has done, while ignorant of such death, is valid. The Master therefore stated his opinion, that the annuity was no part of the personal estate of William Mowbray.

The first petition prayed, that so much of the report as certifies the French annuity to be no part of the testator's personal estate may be set aside; and that it may be declared, that the said annuity is part of his personal estate.

The other petition, by Dubost and his wife, prayed a transfer of Three per Cent. Bank Annuities in satisfaction of 1000*l.* of the legacy; and that so much of the Bank Annuities as will be sufficient to raise 3177*l.* 3*s.* 6*d.*, the residue of the said legacy and interest, may be sold, &c.

An affidavit was offered by Dubost, that upon the *treaty of marriage, the testator assured him, that, independent of [*368] the 3000*l.*, he had already bequethed her 4000*l.*, and Dubost might depend upon his not altering it. A letter was also produced to the testator from Dubost, previous to the marriage, that he would not believe the information he had received, that the testator, being asked whether he would remember the young ladies in his will, answered, "You cannot expect that;" that he had said to Mrs. Dubost, that he did not see why there should be a difference between the sisters; and asking if, according to the custom in France, he would give, besides the portion, 100*l.* to be laid out in jewels, &c. This letter was found after the testator's death among his papers.

Sir *Arthur Piggott*, Mr. *Richards*, Mr. *Wingfield*, Mr. *Horne*, and Mr. *Wear*, for different parties, in support of the first petition.

The French annuity being purchased in the testator's name, and no third person interposed as a trustee, the interest could not be transferred from him without certain acts, which were not done at the time of his death. It was therefore competent to him during his life to change his purpose, and to make some other provision for this lady by funds in this country, conceiving, perhaps, that she might return here. The authority given to pur-

¹ By the Code Napoleon, Art. 2003, "Le mandat finit par la mort naturelle . . . soit du mandant, soit du mandataire." But an exception is introduced in the following article, Art. 2008, "Si le mandataire ignore la mort du mandant, . . . ce qu'il a fait dans cette ignorance est valide."

chase this annuity could not have been enforced against him during his life by a person claiming as a volunteer; nor can it be established against his estate after his death, the act which would have given the benefit of it against the personal representative not having been completed. Where a question is to be decided by a foreign law, the first step is an inquiry by the Master to ascertain what is the law of that country.

With regard to the other petition, and the objection to the letter offered as evidence, the circumstances resemble those of *Shudal v. Jekyll*,¹ before Lord Hardwicke, *Powell v. Cleaver*,² before Lord Thurlow, and *Trimmer v. Bayne*,³ before your Lordship; and the conclusion is *that the evidence is admissible. [*369] Lord Hardwicke's opinion was, that this rule, as to satisfaction, is not confined to the case of a parent. It is true it does not apply to a mere stranger, standing in no relation, natural or civil, either as a legitimate, adopted, or natural child; but it applies to any person standing in loco parentis equally as to the parent. The presumption was repelled in *Shudal v. Jekyll* by the evidence, which was held to be admissible, and proved that the testator had no intention of limiting his bounty to the portion he had given on the plaintiff's marriage; declaring that he would leave her something by his will, but would not be put under any obligation to do it; the evidence therefore contradicting the supposed intention to substitute the portion for the legacy.

The case of *Powell v. Cleaver*,⁴ certainly had strong circumstances, admitting argument; and Lord Thurlow, finding the legatee a mere stranger to the testator, who, though undoubtedly he provided a portion for her on marriage, stood in no relation to her, and could not be considered as having taken upon him the character of parent, determined against her claim of a double provision.

Trimmer v. Bayne,⁵ was the case of a provision for a natural daughter, which has been considered as a solid distinction; and your Lordship decided that case with great attention, and upon a full review of the authorities. Upon the evidence, it is impossible to deny the intention to make a provision at least for an adopted child, whom the testator had educated; and that there was an ulterior purpose in his mind. This is the same species of case as *Shudal v. Jekyll*;⁶ in which the provision by the will, accompanied with the declared intention of the testator to do something more for his niece, justified Lord Hardwicke's decision; and the same principle that governed that case and *Trimmer v. Bayne*, though with a different effect, must be applied to this: the case of a person, treated by the testator as a child, adopted and educated by him, standing upon the evidence of this letter in loco parentis and filiæ, having, from the infancy in these

¹ 2 Atk. 516.⁴ 2 Bro. C. C. 499.² 2 Bro. C. C. 499.⁵ 7 Ves. 508.³ 7 Ves. 508.⁶ 2 Atk. 516.

*children, acted as their parent, and therefore as much within the rule as the actual relation of parent and child; [*370] and the circumstance, that the legacy is given over upon the contingency from one child to another, cannot prevent its application. The letter of Dubost, which is clearly evidence, is decisive. It is the letter of a person treating upon the subject of his proposed marriage with the testator, as her parent, and also as having made a provision for her by his will. The circumstance, that this letter, which came out of the testator's papers after his death, had been kept by him, the settlement following immediately upon it, is remarkable. The Master's report, therefore, is right; and the second petition must be dismissed.

Sir Samuel Romilly and Mr. Bell, in support of the second petition (referring, in opposition to the other petition, to the present law of France, declaring, that if the mandatory is unacquainted with the death of the mandant, or any other cause, which put an end to the mandate, whatever he has done while he was so unacquainted, is valid).

It cannot be disputed, that the advance of a portion by a parent on the marriage of his child, is a satisfaction of a legacy, either the whole or part; and that, if the testator, though not the natural or legitimate father, has placed himself in loco parentis, the same consequence will follow. The difference consists in the application of that principle; and the question is, whether the testator gave this legacy as to his child; which must be made out, otherwise the presumption of satisfaction cannot arise. In no case has the Court proceeded on any other supposition than that the legacy was given to the legatee as a child. If a legacy was bequeathed to a child, with whom the testator had then no connection, but afterwards married the mother, took that child as his adopted child, and gave it a portion as such, the legacy not being given in the same character, the portion would not be a satisfaction; the clear conclusion from all the authorities being, that they must be given in the same character.

*In this case the legacy clearly is not given to the legatee as the child of the testator; and no evidence can [*371] be received to show that it was given to her in that character, the will containing an express statement, by way of description certainly, that she is the child of another man. The objection to the letter as evidence is, that it is produced directly to contradict the will, which declares her to be the daughter of another. If, however, it can be received, the fair inference is, that she was to have both the legacy and the portion. It is a letter from the proposed husband, suggesting to the testator, that he ought, besides the portion, to give this lady a legacy, and representing that he could not believe, as it was said, that he intended the contrary. The testator leaves the legacy standing, keeping the letter, which must have drawn to his attention, that, besides the portion, he had given her a legacy. The fair inference is, that the letter had its effect, inducing him to make no alteration in

the will, but to leave the legacy standing. How is that to be otherwise accounted for? Can it be conceived that this testator was acquainted with these decisions, and thence collected, that, upon this doctrine of satisfaction, it was unnecessary for him to make the alteration? The case of *Grave v. Lord Salisbury*,¹ the decision certainly turning upon particular circumstances, is material as showing Lord Thurlow's reluctance to extend this rule, of which he evidently disapproved.

LORD CHANCELLOR ELDON.—I recollect that Lord Thurlow, in that case, though the decision did not turn upon it, remarked that as the law will not acknowledge the relation of a natural child, the doctrine of this Court, on whatever principle founded, is, that if a portion is given to a child, by will, or a gift so constituted as to acknowledge the legal relation, and afterwards an advancement is made on marriage, that is *primâ facie* an ademption of the whole, or *pro tanto*; but if the legacy is given to a person standing in the relation of a natural child to the testator, [*372] and he afterwards gives that child a sum of *money on marriage, the law does not admit the conclusion *primâ facie* that the testator, at the time of making the will, recognised that relation. The natural child, therefore, is in so much better a situation, that, in his case, the advancement is not *primâ facie* an ademption, as it is in the case of a legitimate child; the effect of which is, that the presumption is to be formed consistently with the notion, that the testator has less affection for his legitimate child than even for a stranger, as Lord Thurlow used to express it.

His Lordship also made another observation, of great weight, that ought to check any disposition to carry this further; that, having raised the presumption from the fact, you beat it down by declarations, which, from the very nature of mankind, deserve little credit, viz., what a man has done, or will do, by his will; how much shall stand, and how much shall not: declarations generally intended to mislead; but the *primâ facie* presumption is established beyond controversy.

The question is certainly of great consequence, whether this class of cases does or does not require evidence that at the time the legacy was constituted, the legatee, not standing in the relation of child to the testator, was regarded by him quasi in that relation, conceiving the purpose of placing himself in *loco parentis*; and if it is necessary that such a relation must then exist, it is very difficult to conclude that this particular case falls under that description. His purpose, whatever was his opinion with regard to these children, seems to have been, that no one should consider him as standing in the place of father. His expressions seem particularly selectel with the view to avoid the description of a portion, and to denote, that, not he, but some other person, stood in the situation of parent.

¹ 1 Bro. C. C. 425.

In *Shudal v. Jekyll*,¹ and the subsequent case before Lord Thurlow, upon the same principle, holding, that, by such a declaration, that he might leave something, but would not specify what, or be bound, the legacy could not be partly cut down, a natural interpretation was, that *taking 500*l.* from the legacy, [*373] and leaving 500*l.*, he did leave something more beyond what he had advanced; but Lord Hardwicke correctly said he had no means of collecting what was that something more; and the will giving 1000*l.* was better evidence than any conjecture he could form. If this letter can be considered as fair evidence that he did not mean to disturb the will, and that this fortune, as it is called in the letter, should be an ademption of that fortune, the doctrine of *Shudal v. Jekyll*, must be applied to this case. This is a very important question; and I wish to read the cases, particularly *Trimmer v. Bayne*,² upon which occasion I gave the subject considerable attention.

The other question involves, not only the construction of the French law, and the point whether that has been sufficiently investigated, but farther *whether the power of attorney amounts here to a declaration of trust. It is clear that this Court will not assist a volunteer; yet if the act is completed, though voluntary, the Court will act upon it. It has been decided, that upon an agreement to transfer stock, this Court will not interpose; but if the party had declared himself to be the trustee of that stock, it becomes the property of the cestui que trust without more; and the Court will act upon it.*

LORD CHANCELLOR ELDON (June 13th).—These petitions call for the decision of points of more importance and difficulty than I should wish to decide in this way, if the case was not pressed upon the Court.

With regard to the French annuity, the Master has stated his opinion as to the French law, perhaps without sufficient authority or sufficient inquiry into the effect of it, as applicable to the precise circumstances of this case; but it is not necessary to pursue that; as, upon the documents³ before me, it does appear that, though in one sense this may be represented as the testator's personal estate, yet he has committed to what seems *to me [*374] a sufficient declaration that he held this part of the estate in trust for the annuitant.

The other question is one of great difficulty; whether a sum of money, advanced upon the marriage of one of these young ladies, when a settlement was executed, is to be taken to be a satisfaction of a legacy, not given upon the face of the will as a portion, not given to a person stated upon the will to be an adopted child of the testator, or described merely by name, but given to an individual, a stranger, described in the will as the child of another

¹ 2 Atk. 516.

² 7 Ves. 508.

³ See 2 Spence Eq. Jur. 53, n. (d), where other documents not set forth by the reporter, and which may materially have influenced the mind of Lord Eldon in coming to this conclusion, are given.

person, who is designated as the father of that child. It not only does not appear that the testator represented himself as in loco parentis, but he has designated another individual as being the parent; and, therefore, according to Lord Thurlow's opinion, in *Grave v. Lord Salisbury*,¹ the testator has expressed himself in terms anxiously calculated to conceal the fact, that he was the reputed father of that child, if he was so.

Without going through all the cases that were cited and those referred to in them, having compared the case in *Atkins*² with manuscript notes of that case, and looked into some other cases, one in *Ambler*³ and some earlier, I may state, as the unquestionable doctrine of the Court, that where a parent gives a legacy to a child, not stating the purpose with reference to which he gives it, the Court understands him as giving a portion; and by a sort of artificial rule, in the application of which legitimate children have been very harshly treated, upon an artificial notion that the father is paying a debt of nature, and a sort of feeling upon what is called leaning against double portions, if the father afterwards advances a portion on the marriage of that child, though of less amount, it is a satisfaction of the whole, or in part; and in some cases it has gone a length, consistent with the principle, but showing the fallacy of much of the reasoning, that the portion, though much less than the legacy, has been held a satisfaction in some instances upon this ground, that the father, owing what is called a debt of nature, is the judge of that provision by which he means [*375] to satisfy it; and *though at the time of making the will, he thought he could not discharge that debt with less than 10,000*l.*, yet by a change of his circumstances, and of his sentiments upon that moral obligation, it may be satisfied by the advance of a portion of 5000*l.*⁴

The Court seems, in the older cases, to have met with some difficulty in determining whether this rule should be confined to those who stood in the actual relation of parent and child; and it has accordingly been urged in argument, but not supported by decision, except where accounted for by evidence of declarations, that the Court have said they did not mean to confine this doctrine to persons standing in that actual relation; but, perhaps, it might apply to a person placing himself in loco parentis, undertaking the care of an orphan. But what is to be the evidence of that, whether written evidence in the will and settlement, or the conduct observed at the marriage, or to be derived from mere declarations, is left so much afloat, that there is considerable difficulty in making a judicial decision upon it.

In *Grave v. Lord Salisbury*,⁵ the first case before Lord Thur-

¹ 1 Bro. C. C. 425.

² *Shudal v. Jekyll*, 2 Atk. 516.

³ *Watson v. The Earl of Lincoln*, Amb. 325.

⁴ See, however, *Pym v. Lockyer*, 5 My. & Cr. 29, and *Kirk v. Eddowes*, 3 Hare, 509, which establish that a portion of less amount than the provision by will is a satisfaction pro tanto only, overruling, therefore, the cases alluded to by Lord Eldon.

⁵ 1 Bro. C. C. 425.

low, Lord Salisbury had several natural children, to whom he had given legacies by his will, making afterwards a provision for them during his life, not ejusdem generis; giving the living of Hatfield to one; a farm and stock to another; upon which the question arose. It was contended that this was a satisfaction; that he intended by the legacy to make a provision, or, in other words, to discharge the obligation he owed to that child; and he had the same intention, advancing the portion, and the farm and stock. Lord Thurlow felt the extreme hardship, as it is evidently, that, in the case of children, whose relation, as such, the law recognises, the doctrine of presumption is, that a subsequent advancement is a satisfaction of a legacy to such a child; but, as the laws does not recognise the relation between the putative father and illegitimate child, as imposing this debt of nature, the father in that case stands as a stranger; and no such presumption arises, in that case, where the *subsequent advance is not proved to have been for the very purpose of satisfying the [*376] legacy, and therefore the legatee is entitled to both. Lord Thurlow directed a reference to the Master to inquire into the circumstances, who did not report the relation which the testator had to those children; and his Lordship, being pressed to send it back on that account, refused to do so; observing, that the object might have been to conceal the circumstance of that relation; and, therefore, the Court would not make the inquiry; but without deciding what would have been the case if that relation appeared, it was enough that it stood as the case of a stranger; and therefore the other provision was not a satisfaction.

In the subsequent case of *Powel v. Cleaver*,¹ where the provision made was described as a portion, Lord Thurlow stated expressly, that, if the legacy is given, not as a portion, by a stranger, who advances money on the marriage of the legatee, denominating that advance a portion, that denomination will not have the same effect in the case of a stranger, as it would in the case of parent and child; and Lord Thurlow asserts that there is no authority contradicting that.

If that is right, it comes to this: that, where a father gives a legacy to a child, the legacy coming from a father to a child must be understood as a portion, though it is not so described in the will; and afterwards advancing a portion for that child, though there may be slight circumstances of difference between that advance and the portion, and a difference in amount, yet the father will be intended to have the same purpose in each instance; and the advance is therefore an ademption of the legacy;² but a stranger, giving a legacy, is understood as giving a bounty, not as paying a debt: he must, therefore, be proved to mean it as a portion, or provision, either upon the face of the will, or, if it may be, and it seems that it may, by evidence applying directly to the gift pro-

¹ 2 Bro. C. C. 499.

² But pro tanto only if of less amount; *Pym v. Lockyer*, 5 M. & C. 29 *Kirk v. Eddowes*, 3 Hare, 509.

posed by that will; and, recollecting how artificial the rules are, where a person has educated a child through life, considering him-
 [*377] self as standing in the relation of putative father to *that child, having a father acknowledged, describing that child as the child of a mother named, and a father named, and also making a provision for that father and mother, it would be too much, upon such a will to say, this is the case of a person meaning to pay, not what the Court calls a debt of nature, but a debt he meant to contract: in other words, meaning to put himself in loco parentis,¹ in the situation of the person described as the lawful father of that child.

That brings the question to this—whether this advance of a portion of 3000*l.* is an ademption of the legacy between strangers, on the ground that this subsequent advance is treated as a portion or fortune? and whether the testator, having given that legacy of 4000*l.*, and afterwards giving to that legatee a portion on marriage, the mere circumstance of giving that as a portion or fortune is to be taken as evidence, that when the will was made, it was meant as paying a debt of nature? or whether it was not to be understood, as in the first instance giving a bounty, and in the other making an addition to that bounty? In this case, as in *Shudal v. Sekyll*, more was intended to be given, but in the case of a stranger no authority says the advance of a less sum shall be an ademption of the whole. This letter, if it is to be admitted in evidence, shows how little such evidence can be trusted, as no one would have supposed, upon the correspondence, that the testator had such a will in his desk. Upon the authority of *Powel v. Cleaver*, unless you can show, that, at the time of making the will, the testator meant to give a portion as a parent, or as standing in loco parentis, and meant to satisfy that, in the whole or in part, by the subsequent advance the Court is not authorised by the artificial rules of equity to hold it as a satisfaction.

I am not much impressed by the objection, that he had not altered his will. The answer is, that the subsequent advance operates a revocation, and, therefore, actual revocation was unnecessary; but it is too much to say, upon such circumstances as are before me, that this advance of 3000*l.* is an ademption of the
 [*378] legacy of 4000*l.* and the *contingent interest; and though I believe I am disappointing the actual intention, and that this lady will get more than was intended, I am bound by the rule of the Court to say, that this is not a satisfaction.

² Under this judgment the order was pronounced, dismissing the first petition, and directing a transfer and sale of the Bank Annuities according to the prayer of the other; upon which it was contended, that this should be considered as an appropri-

¹ This definition of a person putting himself in loco parentis is approved of and adopted by Lord Cottenham, in *Powys v. Mansfield*, 3 My. & Cr. 366, 367.

² June 28th, 1811.

ation of the stock to this legacy at the date of the Master's report; and the funds having since fallen, the legatee was entitled only to so much stock as would at that time have produced what remained due on account of the legacy.

The LORD CHANCELLOR said:—The broad principle of the Court is, that no attention whatever is paid to the rise or fall of the stock; and upon that ground it is considered equal, whether the appropriation is in one way or another. The party takes the rise or fall as it happens; and therefore the petitioners are entitled to have the sum reported due to them now raised.

*SIR JOHN TALBOT *v.* THE DUKE OF SHREWSBURY. [*379]

DE TERM. S. MICH. 1714.

REPORTED PREC. CH. 394.

SATISFACTION OF A DEBT BY A LEGACY.]—*A debtor without taking notice of the debt, bequeaths a sum as great as, or greater than, the debt, to his creditor: this shall be a satisfaction; secus, if it were bequeathed on a contingency, or if it were less than the debt.*

IN this case it was said by Mr. Vernon, and agreed to by Sir J. Trevor, M. R., that if one being indebted to another in a sum of money, does, by his will, give him a sum of money as great as, or greater than, the debt, without taking any notice at all of the debt, that this shall nevertheless, be in satisfaction of the debt, so as that he shall not have both the debt and the legacy; but if such a legacy¹ were given upon a contingency, which if it should not happen, the legacy would not take place, in that case, though the contingency does actually happen, and the legacy thereby became due, yet it shall not go in satisfaction of the debt; because a debt which is certain, shall not be merged or lost by an uncertain and contingent recompense; for whatever is to be a satisfaction of a debt, ought to be so in its creation, and at the very time it is given, which such contingent provision is not; and cited the case of one Pollexfen to be so adjudged by the Lord Harcourt, and affirmed on an appeal in the House of Lords. And as it is in the case of a will, so it will be likewise if the provision were by a deed; if the provision be absolute and certain, it shall go in satisfaction of the debt; but if it be uncertain and contingent, it can be no satisfaction, because it could not be so in its creation, and the happening of the contingency afterwards will not alter the nature of it.

¹ "Debt" in the text, evidently by mistake.

*CHANCEY'S CASE.¹

[*380]

DE TERM. S. HIL. 1717. TRIN. 1725.

REPORTED 1 P. WMS. 408.

SATISFACTION OF A DEBT BY A LEGACY.]—*Although it is a general rule, that if a legacy from a debtor to his creditor be equal to or greater than the debt, it will be presumed to be a satisfaction of it, slight evidence of the intention will take the case out of the rule. Thus, where one being indebted to his servant for wages, in 100*l.*, had given her a bond for that sum, as due for wages, and afterwards by will, gave her 500*l.* for her long and faithful services, and directed that all his debts and legacies should be paid, it was held, that the legacy was not a satisfaction for the debt due on the bond.*

ONE being indebted for wages to a maid-servant, who had lived with him a considerable time, gave her a bond for 100*l.*, and in the condition of the bond, it appeared to be *for wages*. Afterwards, the testator by his will, among other things, gave a legacy of 500*l.* to his maid-servant; and it was mentioned in the will to be given to her *for long and faithful services*; [and he directed that *all his debts and legacies should be paid.*]²

The maid servant having, on her master's death, possessed herself of divers goods that were his, the plaintiff, Chancey, who was the executor, brought his bill against her for an account, but paid her the 100*l.* and interest secured to her by the bond.

For the defendant it was objected, that she should have both the money due on the bond and also the legacy; for the legacy was a further reward for her services, and intended to be a gift in toto: whereas, if the bond were to be taken out of it, it would [*381] be only a gift of *400*l.*; and as to the old notion, that the testator must be just before he is bountiful, that was nothing where the testator had wherewithal to be both just and bountiful.³

Besides, that this was not insisted upon by the bill; so that the defendant had no notice or warning, to prove that the testator intended to give her the full legacy of 500*l.* over and above the bond; which proof, though by parol only, had yet been frequently admitted.

Also, for that, it appeared, the executor himself had paid the bond, and taken a receipt for it.

¹ Chancey v. Wootton, and è contra, Reg. Lib. A. Fol. 449; Sel. Ch. Ca. 44 2 Eq. Ca. Ab. 354, pl. 18.

² See the judgment of Lord King, post, 382.

³ Salk. 155.

¹Sir J. TREVOR, M. R.—It is sufficient that it appears the creditor has a greater legacy given her, and the plaintiff, the executor, prays relief, which is as much as if he had prayed that he might not be compelled to pay both the debt and legacy.

This is stronger than the usual case; for the bond is *for service*, and the 500*l.* legacy is *also for service*; so that it is a greater reward and satisfaction for the same thing. Neither is it material that the executor has paid it, for he was bound to pay the bond at law, and his only method is to stop it out of the legacy; but clearly, such a legacy is not a satisfaction for service done to the testator² after the making of the will.

³LORD CHANCELLOR KING afterwards reversed this decree, upon which occasion his Lordship said, he was not for breaking in upon any general rule,⁴ though he did not see any great reason why, if one owed 100*l.* to A. by bond, and should afterwards give him a legacy of 500*l.* this legacy must go in satisfaction of the debt; for, if so, the whole 500*l.* would not be *given* in regard to 100*l.* of it would be *paid* towards a just debt, which the testator could not help paying; and therefore the whole 500*l.* would not be *given*, against the express declaration of the testator, who says he *gives* the same; and though it seemed to have obtained as a rule *that a man should be *just before he is bountiful*, yet, [*382] when a man left such an estate and fund for his debts and legacies,⁵ as that he might thereout be both just and bountiful, and especially when there seemed to be not only *an intention*, but also *express words* to that purpose; in such case, his Lordship did not see but it would not be as reasonable that the whole legacy should take effect as a legacy, and that the debt should be paid besides.

And it was said at the bar, by Mr. Talbot, to have been a strange resolution, that if I owe a man 100*l.* and give him a 100*l.* legacy, then I give him nothing, but only pay him what I am bound to do; but if the legacy be twenty shillings less, viz., 99*l.*, here it is a good gift and legacy, exclusive of the debt.

However, the Court said, they were not by this resolution overturning the general rule; but that this case was attended with particular circumstances varying it from the common case, viz., that the testator, by the express words of his will, had devised "*that all his debts and legacies should be paid*;" and this 100*l.* bond being *then a debt*, and the 500*l.* being a *legacy*, it was as strong as if he had directed that both the bond and the legacy should be paid; that, when the testator gave a bond for the 100*l.* arrear of wages, it was the same thing as paying it; and as, if he had actually paid it and had afterwards given the legacy of 500*l.*, the executor could not have fetched back the 100*l.* and made the de-

¹ Hil. Term, 1717.

² Vide Salk. 508; 2 P. Wms. 343; 3 P. Wms. 355.

³ Trin. Term, 1725.

⁴ See the rule stated in Talbot v. Duke of Shrewsbury, ante, p. 379.

fendant refund; so neither should the bond, in this case, be satisfied by the bequest of the legacy.

His Lordship also observed, that the executor (the plaintiff Mr. Chancey) did not himself take this 500*l.* legacy to be a satisfaction for the bond, as appeared by his having voluntarily paid the 100*l.* to the defendant, and that his Lordship was of the same opinion.

So the decree at the Rolls was reversed, and the respondent (the maid-servant) had both her debt and legacy.

[*383] **"Satisfaction"* (the doctrine of which is discussed in the cases to which this note is appended) may be defined to be the donation of a thing, with the intention, either expressed or implied, that it is to be taken, either wholly or in part, in extinguishment of some prior claim of the donee. See *Lord Chichester v. Coventry*, 2 L. R. Ho. Lo. 95.

With regard to these cases where the intention is expressly declared, it is unnecessary to say anything; for it is clear, that, if any person expressly declares that a subsequent gift is to be in satisfaction of a prior demand, the donee cannot claim both. See *Hardingham v. Thomas*, 2 Drew. 353.

Those cases, however, where from the mere fact that the parties stand in a certain relation to each other, the presumption arises, that a subsequent donation is intended to be in satisfaction of a prior claim, are well worth examining. They may be divided into three classes.

1st. The satisfaction of legacies by portions, which is commonly called the *ademption* of legacies; 2d, the satisfaction of portions by legacies; and, 3d, the satisfaction of debts by legacies. Since, however, the doctrine of satisfaction is not applied in the same manner to each of these classes of cases, they may more conveniently be considered separately.

1st. As to the satisfaction or *ademption* of a legacy by a portion.

The rule is well laid down by Lord Eldon, in the principal case of *Ex parte Pye*, "that where a parent gives a legacy to a child, not stating the purpose with reference to which he gives it, the Court understands him as giving a portion; and, by a sort of artificial rule—upon an artificial notion, and a sort of feeling upon what is called a leaning against double portions—if the father afterwards advances a portion on the marriage of that child, though of less amount, it is a satisfaction of the whole, or in part." Lord Eldon, however, in that case, in accordance with what was then the general opinion (1 *Rop. on Legacies*, 366, 4th edit.), seems to have thought that the gift of a portion of less amount than a legacy, might be a total *ademption* of it; but in the very important case of *Pym v. Lockyer*, 5 *My. & Cr.* 29, decided by Lord Cot-

tenham, after an elaborate examination of all the authorities, it was determined that such a portion would be merely an ademption of the legacy pro tanto. See also *Kirk v. Eddows*, 3 Hare, 509; *Montague v. Montague*, 15 Beav. 565; *Hopwood v. Hopwood*, 7 Ho. Lo. Ca. 728.

The rule or presumption against double portions is equally applicable in cases where a person has placed himself in loco parentis: **Booker v. Allen*, 2 Russ. & My. 270; *Powys v. Mansfield*, 3 My. & Cr. 359; *Watson v. Watson*, 33 Beav. 574. [*384]

And so strong is the leaning or presumption against double portions, that it will not, as observed by Lord Eldon, in *Ex parte Pye*, *Ex parte Dubost*, be repelled, "though there may be slight circumstances of difference between the advance and the portion." Thus, the presumption will not be repelled by the circumstance of the portion or legacy being payable at different times (*Hartopp v. Hartopp*, 17 Ves. 184); nor by the circumstance that the limitations of the portion under the will are very different from the limitations in the settlement. See *Trimmer v. Bayne*, 7 Ves. 508; *Monck v. Monck*, 1 Ball & B. 298; *Sheffield v. Coventry*, 2 Russ. & My. 317; *Platt v. Platt*, 3 Sim. 503; *Days v. Boucher*, 3 Y. & C. Exch. Ca. 411; *Powys v. Mansfield*, 3 My. & Cr. 359, 374. In *Lord Durham v. Wharton*, 3 C. & F. 146; 10 Bligh, N. S. 526, L. being seised of real estates (devised to him by his brother, charged with 5000*l.* for his daughter—afterwards Mrs. W.,—the interest to be raised for her maintenance, if L. should so direct), by his will, in 1788 bequeathed 10,000*l.* to trustees, one half to be paid at the end of three years, and the other half at the end of six years after his death, with 4*l.* per cent. interest from his decease, in trust for his daughter for life, and after her decease in trust for her children, as she should appoint by deed or will, and, in default of appointment, for all the children equally; the shares of sons to be vested at twenty-one, of daughters at twenty-one or marriage; and if his daughter should have no child, or her sons should die under twenty-one, and her daughters under twenty-one and unmarried, the 10,000*l.* was to fall into the residue of his personal estate; and he declared that the sum of 10,000*l.* was over and above the 5000*l.* devised to her by the will of his brother. On the marriage of the daughter, in 1790, L. agreed to give 15,000*l.* to his daughter as a marriage portion, to be paid to the intended husband upon his securing by settlement, according to his covenant, pin-money and a jointure for his wife, and portions for the younger children of the marriage, and interest in the meantime; and then declare that the 15,000*l.* was in full satisfaction and discharge of all and every sum and sums of money which the daughter could claim under her uncle's will. The settlement was executed, and the 15,000*l.* paid to the husband. L. died in 1794. It was held in the House of Lords, reversing the decisions of Sir L. Shadwell, V. C., and Lord Brougham, C. (reported 5 Sim. 297, 3 My. & K. 427), that the legacy of 10,000*l.*

[*385] was adeemed by the portion *advanced by L. on the marriage of his daughter.

It has been observed by Lord St. Leonards, in his important Treatise on the Law of Property, that there could be no fair doubt of the intention in this case to adeem the legacy under the father's will; but the difficulties in law were of great weight. The 15,000*l.* was paid to the husband, and, in truth, was not settled at all on the children, although, in consideration of it, pin-money and a jointure, and portions for the *younger* children, were provided; and even the trusts in the will of the 10,000*l.* for the children, and the trusts in the settlement to raise portions for the *younger* children, were dissimilar. These difficulties were overcome, and the substance of the case was regarded. The daughter was *entitled* to 5000*l.*, and the father had by his will provided an additional 10,000*l.*; he therefore intended her portion to be 15,000*l.* Upon her marriage he accordingly advanced 15,000*l.* for her portion, declaring it to be in satisfaction of the debt of 5000*l.* This certainty did not prevent the advancement from operating also as an ademption of the 10,000*l.* legacy under the father's will. "It would be found difficult," he adds, "to reconcile the decisions on this head previously to the decision in the Lords, and I do not think that the latter has been always kept in view by the Courts since it was pronounced. *It is, of course, a binding authority, and, as the principles upon which it was decided are plain, and highly favourable to the real intention in such cases, it ought to be strictly followed. Having now a clear rule, we ought not lightly to depart from it.*" Sugd. Prop. 128. And see *Montefiore v. Guadalla*, 1 De G. F. & Jo. 93; *Phillips v. Phillips*, 34 Beav. 19; *Dawson v. Dawson*, 4 L. R. Eq. 504.

So, in *Kirk v. Eddowes*, 3 Hare, 509, it was held that the gift by a father of a promissory note to his daughter Mrs. Kirk and her husband, was an ademption pro tanto of a legacy bequeathed by the father in his will, to his daughter for her separate use for life, with remainder to her children, as she should appoint, and in default of appointment to them equally; the Vice-Chancellor Wigram observing: "I do not mean to decide that a legacy to A. can be adeemed by a mere advance to another person than A. That might be a simple revocation, and not ademption; nor do I mean to decide, that, if in this case the bequest had been made to Mrs. Kirk for life, remainder to children living at the time, and named in the will, the bequest to the children could have been affected by the advance in question. I give no opinion upon that case. But here I find a legacy to Mrs. Kirk for her *separate use, with

[*386] remainder to her children *as a class*; that, I think, is in the nature of a portion to the daughter herself." See also *Carver v. Bowles*, 2 Russ. & My. 301; *Delacour v. Freeman*, 2 Ir. Ch. Rep. 633, 640.

her father simpliciter, after the marriage, and not in consequence of any promise made previous to the marriage taking place, will not be an ademption of a legacy given by the father to his daughter: *Ravenscroft v. Jones*, 32 Beav. 669, 670; 4 De G. J. & S. 224; and see *M'Clure v. Evans*, 29 Beav. 422; but see *Ferris v. Goodburn*, 27 L. J. Ch. N. S. 574.

There is no presumption of law that the payment of a sum of money to a child (even by a father) before the date of the will, is to go against a legacy to that child: per Wickens, V. C., in *Taylor v. Cartwright*, 26 L. T. Rep. 573; 14 L. R. Eq. 167, 176.

But if there be a contract by the child that it shall do so, the contract may be valid. Thus, in *Upton v. Prince*, Ca. t. Talb. 71, a father having two sons, A. and B., advanced them 1500*l.* a-piece, and took from each of them receipts in the following words: "Received of my father William Prince the sum of 1500*l.*, which I do hereby acknowledge to be on account and in part of what he has given, or shall in or by his last will give unto me his son." The father afterwards made his will, whereby, after reciting that he had advanced to his children A., C., and D. the sum of 1500*l.* a-piece, he thereby in like manner bequeathed unto his three other children B., F., and G. the several sums of 1500*l.* a-piece, and then gave the residue equally amongst all his children. It was held by Lord Chancellor Talbot that the 1500*l.* received by B. in his father's lifetime was a satisfaction for what his father gave him by his will, and that he should not have another 1500*l.*

But it seems that a gift by the will of a father to a child for life *with remainder to the issue* of such child, would not be adeemed by an advance to the child made long before the will, although the testator, when he made the advance, verbally intimated that his intention was that it should have that effect: *Taylor v. Cartwright*, 26 L. T. Rep. N. S. 571, 573; 14 L. R. Eq. 167, 176; 20 W. R. (V. C. W.) 603.

It may be here mentioned, that a legacy which has been adeemed by a settlement or advancement, will not be revived or set up by a codicil made after such settlement or advancement, although it confirms the will and all the bequests therein contained. "It is very true," says Lord Cottenham, in *Powys v. Mansfield*, 3 My. & Cr. 376, "that a codicil, republishing a will, makes the will speak as from its own date, for the purpose of passing after-purchased lands, *but not for the purpose of reviving a legacy revoked, adeemed, or satisfied. [*387] The codicil can only act upon the will as it existed at the time; and, at the time, the legacy revoked, adeemed, or satisfied, formed no part of it. Any other rule would make a codicil, merely republishing a will, operate as a new bequest, and so revoke any codicil by which a legacy given by the will had been revoked, and undo every act by which it may have been adeemed or satisfied. The cases are consistent with this, as *Drinkwater v. Falconer*, (2 Ves. 623); *Monck v. Monck* (1 Ball

& B. 298); *Booker v. Allen*, (2 Russ. & My. 270); and the case of *Roome v. Roome* (3 Atk. 181), is not an authority against these decisions, because the codicil was not considered in that case as reviving an adeeming legacy, it having been decided that there was no ademption." Nor is the codicil, in such a case, any evidence or additional proof that no ademption was intended. See *Powys v. Mansfield*, 3 My. & Cr. 376; *Roome v. Roome*, 3 Atk. 181; *Montague v. Montague*, 15 Beav. 565, 571; *Alsop's Appeal*, 9 Barr, 374; *Langdon v. Astor's Ex'ors*, 16 New York, 9, 37; see notes to *Ashburner v. Maguire*, ante.

The presumption, however, of satisfaction being intended, may be repelled by the intrinsic evidence furnished by the different nature of the gifts; where, for instance, the testamentary portion and subsequent advancement are not ejusdem generis. See *Holmes v. Holmes*, 1 Bro. C. C. 555, where a legacy to a son of 500*l.* was held not to be adeemed by a subsequent gift of one-half of the testator's stock in trade, valued at 1500*l.*; and see *Davys v. Boucher*, 3 Y. & C. Exch. Ca. 411; but see the remarks of Lord Cottenham on *Holmes v. Holmes*, in *Pym v. Lockyer*, 5 My. & Cr. 48. And a legacy of a sum of money will not be adeemed by an allowance of an annuity: *Watson v. Watson*, 33 Beav. 574. So, also, where the testamentary portion is certain, and the subsequent advancement depends upon a contingency, the presumption of satisfaction will be repelled: *Spinks v. Robins*, 2 Atk. 493; *Crompton v. Sale*, 2 P. Wms. 553.

But where the advancement was voidable only upon a remote contingency, and which was considered by the party putting himself in loco parentis and by all the other parties as equal to an absolute estate, Lord Cottenham held, that the presumption against double portions arose: *Powys v. Mansfield*, 3 My. & Cr. 359, 374.

It was formerly held, that where the bequest was of an uncertain amount, as a bequest of a residue or part of a residue, the presumption would not arise, as the idea of a portion ex vi termini was a definite sum: *Freemantle v. Bankes*, 5 Ves. 85. And see *Farnham v. Phillips*, 2 Atk. 215; *Smith v. Strong*, 4 Bro. C. C. 493; *Watson v. The Earl of Lincoln*, Amb. 327; *Davys v. Boucher*, *3 Y. & C. [388] Exch. Ca. 397. But it has since been decided that a portion by settlement or otherwise, will be a satisfaction according to the amount, either in full or pro tanto, of a previous bequest of a residue: *Schofield v. Heap*, 27 Beav. 93; *Becton v. Barton*, 27 Beav. 99; *Montefiore v. Guadalla*, 1 De G. F. & Jo. 93; and see *Lady Thynne v. The Earl of Glengall*, 2 Ho. Lo. Ca. 131; *Meinertzhagen v. Walters*, 20 W. R. (V. C. B.) 505; 7 L. R. Ch. App. 670; *Ib.* (L. J.) 918.

A person to whom a testator has left a share of his residue, will not be entitled to have the residue augmented by bringing into account advancements made to children, and which are taken by them in part satisfac-

on of their share of the residue: *Meinertzhagen v. Walters*, 20 W. R. V. C. B.) 505; *Ib.* (L. J.) 918.

Although a legacy given to a child is limited over upon a contingency, it may be adeemed by a subsequent advancement to the child alone, so as to deprive the person entitled under the limitation over of all benefit. Thus; in *Twining v. Powell*, 2 Coll. 262, a testatrix in loco parentis to Lydia Mosse, bequeathed to her as her adopted child 10,000*l.* in money, with a limitation over to a charity in case Lydia Mosse died without children. The testatrix afterwards transferred 2,000*l.* Consols into the joint names of herself and Lydia Mosse. It was held by the Vice-Chancellor Knight Bruce, not only that the legacy was adeemed as to Lydia Mosse, but was also extinguished as to the charity. "The claim of the Attorney-General," said his Honor, "in respect of the 10,000*l.* is one that created some difficulty in my mind. As to Miss Mosse, that legacy was adeemed or satisfied, and I think that Miss Mosse, surviving the testatrix, was intended by her to become, and accordingly is, absolutely entitled to the stock by means of which it was adeemed or satisfied. The question is, whether the stock, being exempt from any provision in favour of charity, and Miss Mosse being barred of any interest or claim under the will in respect of the 10,000*l.*, there is still an effectual testamentary provision in favour of charity as to that sum, in the possible event of her dying without leaving a child, as I think there would have been had there been no ademption—no satisfaction. This question, I repeat, has appeared to me one of some embarrassment; but I have come to the conclusion, that the testatrix cannot be held to have intended, that, in the event of the legacy of 10,000*l.* being in her lifetime adeemed or satisfied as to Miss Mosse by the testatrix (who, it is plain, had placed herself before the will, and considered herself, at the date of the will, in loco parentis towards Miss Mosse), it should not be held extinguished for every purpose, and should not, therefore, be considered as falling absolutely into the residue. I think that I decide in conformity with the intention of the testatrix, and am not contravening any rule of law, in saying that the legacy of 10,000*l.*, as a legacy, is extinguished, and has fallen into the residue." [*389]

An advancement may be made to a child as a portion, at other times than that of marriage, and the presumption against double portions will then arise. For instance, if a subsequent gift be described in a writing as a portion, or if an advancement be made not evidenced by writing, evidence, as will hereafter be more fully shown, is admissible to show the nature of the transaction; but the Court will not add up small sums which a parent may give to a child, to show they were intended as a portion: see *Suisse v. Lowther*, 2 Hare, 434; *Scholfield v. Heap*, 27 Beav. 93; *Nevin v. Drysdale*, 4 L. R. Eq. 517.

A legacy by a parent or a person in loco parentis is not satisfied by

occasional small gifts in the testator's lifetime: *Watson v. Watson*, 33 Beav. 574; but see *Ferris v. Goodburn*, 27 L. J. (Ch.) N. S. 574, and a sum of money given by a father to his daughter for a wedding outfit and a wedding trip has been held not to be an ademption of a legacy: *Ravenscroft v. Jones*, 32 Beav. 669; 33 L. J. Ch. (N. S.) 482; 4 De G. Jo. & S. 224.

Where a legacy was held pro tanto satisfied by a gift of stock, it was held that the value of the stock must be ascertained as at the time of the gift: *Watson v. Watson*, 33 Beav. 574.

2nd. With respect to the satisfaction of a portion by a legacy (upon which subject the case of *Hinchcliffe v. Hinchcliffe*, Ves. 516, is a leading authority), the rule is, that wherever a legacy given by a parent, or a person standing in loco parentis, is as great as, or greater than, a portion or provision previously secured to the legatee upon marriage or otherwise, then, from the strong inclination of Courts of equity against double portions, a presumption arises that the legacy was intended by the testator as a complete satisfaction: (*Bruen v. Bruen*, 2 Verm. 439; *Moulson v. Moulson*, 1 Bro. C. C. 82; *Copley v. Copley*, 1 P. Wms. 147; *Ackworth v. Ackworth*, 1 Bro. C. C. 307, n.; *Byde v. Byde*, 1 Bro. C. C. 308, n.; *S. C.*, 2 Eden, 19; 1 Cox, 44; *Duke of Somerset v. Duchess of Somerset*, 1 Bro. C. C. 309, n.; *Finch v. Finch*, 1 Ves. Jun. 534; *Hinchcliffe v. Hinchcliffe*, 3 Ves. 516; *Sparkes v. Cator*, 3 Ves. 530; *Pole v. Lord Somers*, 6 Ves. 309; *Bengough v. Walker*, 15 Ves. 507; and see *Lethbridge v. Thurlow*, 15 Beav. 334; *Ferris v. Goodburn*, 27 L. J. N. S. (Ch. 574;) if the legacy is not so great as the portion or provision, a presumption arises that it was *intended [*390] as a satisfaction pro tanto: (*Warren v. Warren*, 1 Bro. C. C. 305; 1 Cox, 41;) and the bequest of the whole or part of a residue will, according to its amount, be presumed either a satisfaction of a portion in full, or pro tanto: *Lady Thynne v. The Earl of Glengall*, 2 H. L. Ca. 131; in that case a farther having, upon the marriage of one of his two daughters, agreed to give her a portion of 100,000*l.* 3*l.* per cent. Consols, transferred one-third part thereof in stock to the four trustees of the marriage settlement, and gave them his bond for the transfer of the remainder in like stock upon his death, the latter stock to be held by them in trust for the daughter's separate use for life, and after her death for the children of the marriage, as the husband and she should jointly appoint. The father afterwards, by his will, gave to two of the trustees a moiety of the residue of his personal estate, in trust for his daughter's separate use for life, remainder for her children generally, as she should by deed or will appoint; it was held in the House of Lords, affirming the decision of Lord Langdale, M. R. (reported 1 Kee. 769), that the moiety of the residue given by the will was in satisfaction of the sum of stock secured by the bond notwithstanding the difference of the trusts; and it being found to be for the benefit of the daughter

and her children, if she should have any, to take under the will, she was bound to elect so to take; and see *Richman v. Morgan*, 1 Bro. C. C. 63; 2 Bro. C. C. 394; *Bengough v. Walker*, 15 Ves. 507; *Campbell v. Campbell*, 1 Law Rep. Eq. 383.

And since Courts of equity lean strongly against double portions, as in the preceding class of cases, considerable differences only between the settlement and the will are considered sufficient to repel the presumption of satisfaction; slight variations, for instance, between the settlement and the will, as to the times of the payment of the portion or legacy, or between the limitations in the settlement and the will, are not sufficient for that purpose. See *Sparkes v. Cator*, 3 Ves. 530; *Weall v. Rice*, 2 Russ. & My. 251; *Earl of Glengall v. Barnard*, 1 Kee. 769; *S. C.*, nom. *Lady Thynne v. Earl of Glengall*, 2 H. L. Ca. 131.

The presumption, however, of satisfaction being intended, may, as in the former class of cases, be repelled by intrinsic evidence, showing the intention of the parent in favour of double portions (*Lethbridge v. Thurlow*, 15 Beav. 334), which may also be sufficiently indicated from the different nature of the gifts. For instance, where the portion is vested and the legacy is contingent, the presumption will be repelled: for it would be hard to say, that a mere contingency should take away a *portion absolutely vested: *Bellasis v. Uthwatt*, 1 Atk. 426; *Hanbury v. Hanbury*, 2 Bro. C. C. 352. And see *Pierce v. Locke*, 2 Ir. Ch. Rep. 205, 215); or where the husband and children of the marriage take an interest under the settlement, but nothing under the will: *Lord Chichester v. Coventry*, 2 L. R. Ho. Lo. 71,

The presumption against double portions may also be repelled by a charge of debts before the gift in the will, under which charge a sum covenanted to be paid in a previous settlement might be included. *Ib.*

And according to recent authorities, it appears, that the presumption against double portions will be more easily repelled, in the present class of cases, where the settlement precedes the will, than in the former class of cases, where the will precedes the settlement. Thus, in *Lord Chichester v. Coventry*, 2 L. R. Ho. Lo. 71, the father of the intended wife (Lady John Chichester), on her marriage in 1844, covenanted with trustees to pay them 10,000*l.* three months after their demand in writing, and in the meantime, to pay interest on the principal sum by half-yearly payments. The trusts of the 10,000*l.* were, during the joint lives of the husband and wife, to pay the wife 200*l.* part of the income as pin-money, and the residue to the husband, to pay the whole income to the survivor of the husband and wife for life, and after the decease of the survivor, the fund to be in trust for the issue of the marriage, as the husband and wife, or the survivor, should appoint, and in default of appointment, to the children of the marriage who should attain twenty-one or marry, and in default of children attaining a vested interest, for the wife if she survived her husband, but if she died in his

life, as she should appoint by will, and in default of appointment in trust for her next of kin. The father by his will, dated the 3d of December, 1859, gave his residuary real and personal estate, to trustees in trust to convert it into money, *to pay thereout his debts* and legacies, and stand possessed of the residue as to one moiety upon trust to pay the income to his daughter, Lady Chichester, for life for her separate use, and after her death, then if she died in her husband's lifetime, upon trust for such persons *other than her husband*, as she should by will appoint, but if she survived him, for such persons as she should by deed or will appoint, and in default of appointment, upon precisely similar trusts for his daughter, Mrs. Paul, with an ultimate limitation to his nephew. And as to the other moiety upon precisely similar trusts, except that the disposition in favour of Mrs. Paul preceded those in favour of Lady Chichester. The 10,000*l.* was not paid by the *tes-
 [*392] tator in his lifetime. It was held by the House of Lords (reversing the decision of the Lords Justices, dissentiente Lord Justice Turner in the case of *Coventry v. Chichester*, 2 De G. Jo. & Sm. 336; which affirmed the decision of Sir W. Page Wood, V. C. reported 2 Hem. & Mill. 149); that the great difference between the limitations of the 10,000*l.* in the settlement and in the will, and the direction in the will for the payment of debts (which would include the debt under the covenant) were sufficient to overcome any presumption against double portions. "In the first place," said Lord Cranworth, "The rule against double portions, is but a rule of presumption, and there is much less difficulty in supposing that it was not intended to prevail where the person to whose dispositions it is to be applied, had not the power to enforce it without the consent of others, than in a case where the whole was under his absolute control. When the will precedes the settlement it is only necessary to read the settlement as if the person making the provision had said, 'I mean this to be in lieu of what I have given by my will.' But if the settlement precedes the will, the testator must be understood as saying, 'I give this in lieu of what I am already bound to give, if those to whom I am so bound will accept it.' It requires much less to rebut the latter than the former presumption. Add to which, the necessity for making such a declaration in express terms would be much more obvious to a testator making a will whereby he desired to affect rights already acquired, than to a settlor making an absolute provision by deed for one who had acquired no previous rights whatever. It has been truly said, that no positive rule has been, or can be laid down, as to what is sufficient to rebut the *primâ facie* presumption against double portions. That is a matter which from the nature of things, must be left, in each particular case, to the judgment of the tribunal which has to decide it. But one great question always has been, whether that which has been given by the latter, is given to be enjoyed in the same or nearly the same manner as that which is given by the

former instrument. When a parent has by his will given a portion to his daughter absolutely, and has, by a settlement on her marriage, after the date of his will, secured a sum of like amount for the benefit of her and of her husband and issue, the mere circumstance that she would have taken under the will an absolute interest, whereas, under the deed, she takes only a life interest, raises no difficulty. The parent may reasonably suppose the two gifts to be the same. If the daughter had received the sum under the will, she would *probably have settled it in the way in which, by the hypothesis, it was settled in [*393] her parent's lifetime. It would not occur to the parent to think that the interest taken by her was substantially different in the one case and in the other. But there must be some limit in such cases, and more especially where, as in the case now before the House, the settlement precedes the will; and looking at the two instruments now before us, I have come to the same conclusion as my noble and learned friend on the Woolsack, namely, that the differences between the gift by the will and the benefits secured by the covenant are so great as to prevent the application of the general rule. In the first place, what is here given is a moiety of the residue of the testator's real and personal estate, after payment of debts and legacies. I do not doubt that a share of residue may be treated as a portion within the rule against double portions; but the residue cannot be ascertained till after the debts are paid. Here the testator was a man of great wealth, and does not seem to have had any debt except that arising on the covenant on his daughter's marriage. It is natural to suppose, that if he meant the residue to be ascertained, as if no such covenant had been entered into, he would have adverted to that in his will. He would have naturally expressed what we are called on to presume; that the share of residue that was given to his daughter Lady John Chichester, was to be accepted by her in lieu of what she was entitled to under his covenant.

“But even if that difficulty could be overcome, the enjoyment of the residue was to be in a mode so entirely different from that secured by the covenant, as to exclude, without express declaration, the notion that the one could have been intended as a substitute for the other. Under the covenant the husband has a life interest in the 10,000*l.*, subject to his wife's pin-money; he has no interest whatever in the residue under the will. Upon the covenant, the children of the marriage, if there had been any, would have been entitled. There is no mention of children in the will. In default of children, Lady John Chichester, if she should die in her husband's lifetime, has, by the covenant, an absolute power of appointment by will over the 10,000*l.*; but by the testator's will she is precluded from giving anything to her husband. There are other minor differences; but those which I have pointed out are sufficient to show, not only that the limitations in the two instru-

ments are substantially different, but that the testator was anxious to make them so.

"Now, the rule of the Court on which the respondents rely is [*394] *founded on the assumption, that, in making the second instrument, the maker of it supposes himself to be substantially satisfying the obligations of the first. It is impossible to put such a construction on this will. No doubt it was open to the testator to impose on his daughter, by express terms, the duty of accepting the moiety of the residue, guarded, as it is, with respect to her disposal of it, in full satisfaction of her claims under the settlement; but he has not done this, and I can see no reason for presuming any such intention which has not been expressed. I am, therefore, of opinion that the decree ought to be reversed, and the case sent back to the Court of Chancery, with a declaration that the gift of the moiety of the residue was not intended to be in substitution of the rights acquired under the covenant."

See the remarks on this case in *Dawson v. Dawson*, 4 L. R. Eq. 504; see also *M'Carogher v. Whieldon*, 3 L. R. Eq. 236; *Paget v. Grenfell*, 6 L. R. Eq. 7.

So, also, where the gift by the will and the portion are not ejusdem generis, the presumption will be repelled. Thus, land will not be presumed to be intended as a satisfaction for money, nor money for land: *Bellasis v. Uthwatt*, 1 Atk. 428; *Goodfellow v. Burchett*, 2 Vern. 298; *Ray v. Stanhope*, 2 Ch. Rep. 159; *Savile v. Savile*, 2 Atk. 458; *Grave v. Earl of Salisbury*, 1 Bro. C. C. 425. However, in *Bengough v. Walker*, 15 Ves. 507, it was held by Sir W. Grant, M. R., that a bequest by a testator to his son of a share in powder works, to be made up in value to 10,000*l.* charged with an annuity for the life of another person, was a satisfaction of a portion of 2000*l.* to which the son was entitled under the testator's marriage settlement.

Sometimes a settlement contains a declaration that an advancement by the parent, in his lifetime, shall be considered in part or full satisfaction of the portion, unless the contrary is expressly declared by some writing. In such cases a question may arise, whether a legacy by will shall be considered as an advancement in the lifetime of the parent. It has been decided that it will be so considered, and that a legacy of a particular sum, or of a residue, for it appears immaterial which, will be held a satisfaction in full, or pro tanto of the portion (*Onslow v. Michell*, 18 Ves. 490; *Leake v. Leake*, 10 Ves. 489; *Golding v. Haverfield*, M'Cl. 345; *Noel v. Lord Walsingham*, 2 S. & S. 99; *Frazakerly v. Gillibrand*, 6 Sim. 591; *Papillon v. Papillon*, 11 Sim. 642; sed vide *Douglas v. Willis*, 7 Hare, 310); but the share of a parent's property under his intestacy, will not be considered as an advancement in his lifetime: *Twisden v. Twisden*, 9 Ves. 413.

[*395] *It seems that where a parent, or person in loco parentis, makes a provision by a settlement for his children equal to or

greater than a provision contained in a former settlement, it may be considered as a satisfaction ; as, for instance, where, by a will executed contemporaneously with the second settlement, he declares that a provision contained in it is to be taken as a satisfaction : *Davis v. Chambers*, 7 De G. Mac. & G. 386 ; 3 Jur. N. S. 297. But no presumption will arise where there are those distinctions between the nature of the two gifts, which the Court has relied upon in cases of satisfaction upon wills, to shew that the presumption does not arise : see *Palmer v. Newell*, 20 Beav. 32, 40, where Sir John Romilly, M. R., was of opinion that the presumption less readily arises in the instance of gifts by two deeds, than in cases where the second gift is by a will, in which latter case a testator is supposed to be disposing of the whole of his property, and distributing it amongst the different objects of his bounty. *Ib.* 40. This case, on appeal, was affirmed by the Lords Justices : 8 De G. Mac. & G. 74.

Where a father, having power to appoint to a child out of a portion fund, himself advances the money, the presumption is that he does so for the benefit of the children interested in the portion fund and not for his own benefit or for that of the estate : *Ford v. Tynte*, 2 Hem. & Mill. 324 ; *Lee v. Head*, 1 K. & J. 620 ; *Noblett v. Litchfield*, 7 Ir. Ch. 575.

This presumption, however, may be rebutted by evidence of a different intention, as, for example, that the advance was made in substitution for an appointment out of the portion fund for the purpose of giving a sum in cash in lieu of a mere charge : *Ford v. Tynte*, 2 Hem. & Mill. 324.

All the contemporary circumstances are admissible in evidence of such intention, but subsequent declarations are not admissible : *Ford v. Tynte*, 2 Hem. & Mill. 324.

Although according to the law of Scotland the presumption of satisfaction of a portion by a legacy from a father to his child does not arise, it will do so, although the deed by which the portion is covenanted to be paid is Scotch, if the will by which the legacy is given is that of a domiciled Englishman. See *Campbell v. Campbell*, 1 Law Rep. Eq. 383 ; there by a settlement made in the Scotch form upon the marriage of his daughter with a domiciled Scotsman, A., a domiciled Englishman, covenanted to pay the trustees 4000*l.* as a provision for the benefit of his daughter and her husband and the younger children of the marriage. The 4000*l.* was not paid by A. during his lifetime, but by his will made *after the death of his daughter, A. gave 16,000*l.* between the younger children of the marriage. It was [*396] held by Sir W. Page Wood, V. C., that the will being an English disposition, the English doctrine of presumption against double portions was applicable, and that the provisions made by the testator's will in

favor of his grandchildren operated as a satisfaction of the provisions made for them by the settlement.

Election.—Where, as in the former class of cases, the first provision is by a will, it being a voluntary and revocable instrument, a subsequent advance will be a satisfaction, either wholly or in part, without reference to the wishes of the person advanced; if, however, as in the latter class of cases, the first provision is by settlement or other contract, a subsequent legacy, considered as an advancement, will raise a case of election,—that is to say, the legatee may, at his option, take either the first or last provision: see 2 Ves. Jun. 465, n. (a); *Copley v. Copley*, 1 P. Wms. 147; *Finch v. Finch*, 1 Ves. Jun. 534; *Hinchcliffe v. Hinchcliffe*, 3 Ves. 516; *Pole v. Lord Somers*, 6 Ves. 309.

A provision for a son by will may be held a satisfaction for the interest he may take under a covenant by his father on his marriage, and he will consequently be put to his election, although the provisions in the will may not be held a satisfaction to the wife and children for what they take under the covenant. Thus in *M'Carogher v. Whieldon*, 3 L. R. Eq. 236, a father, upon the marriage of his son, covenanted, by will, or otherwise in his lifetime, to give or assure one-fifth part of the real and personal estate to which he might be entitled at or immediately before his death (subject to the payment thereof of one-fifth of his debts, funeral and testamentary expenses and legacies) to trustees upon trust to pay the income to the son until (among other things) some event should occur whereby the income would (if the same were thereby to be made payable to the son absolutely (become vested in some other person or persons; and then upon trusts for the benefit of the son's wife and the issue of the marriage, with a discretionary trust for the benefit of the son after his wife's death. By his will, the father directed his debts to be paid by his executors, and charged them, as far as the law permitted, on his real and personal estate to trustees in trust for all and every his children who should be living at the time of his death. The father died leaving five children. It was held by Lord Romilly, M. R., that the gift in the will did not operate as a satisfaction of the covenant in the settlement so far as the wife and children of the son [397] were concerned; that the trustees were *entitled to one-fifth part of the testator's real and personal estate, after payment of his debts, legacies and funeral and testamentary expenses; that the gift in the will did operate as a satisfaction of all the interests of the son under the settlement, and that the son must therefore elect between his life interest under the settlement and the one-fifth of the residue which would remain after satisfaction of the covenant. And the son electing to take under the will his Lordship also held, that such election determined his life interest under the settlement, and that the income became payable to his wife.

As to election by a married woman, see *Lady Thynne v. Earl of*

Glengall, 2 H. L. Ca. 118; and as to the doctrine generally, see ante, vol. I., pp. 341, 376.

As to the admission of Extrinsic Evidence.—Although extrinsic evidence cannot be admitted to alter, add to, or vary a written instrument, or to prove with what intention it was executed, it seems to be clear that, where a transaction takes place, not evidenced by writing, which, if so evidenced, would raise a presumption that satisfaction of a former gift by will was intended, parol evidence is admissible to prove what the transaction really was. Thus, in *Hoskins v. Hoskins*, Prec. Ch. 263, the father, after giving 750*l.* to his son by will, purchased a cornetcy for him for 650*l.* Evidence was admitted to show that this was intended as a satisfaction pro tanto.

This subject was much discussed by the Vice-Chancellor Wigram, in *Kirk v. Eddowes*, 3 Hare, 509. There, a father by will gave 3000*l.* to the separate use of his daughter for life, with remainder to her children; and after the date of the will, he gave to his daughter and her husband a promissory note for 500*l.* then due to him. Parol evidence was tendered to show that, after the date of the will, the testator was requested by his daughter to confer some benefit on her husband, and that thereupon the testator gave her the promissory note, declaring that it was to be in part satisfaction of the legacy of 3000*l.*; and that the testator was advised by his solicitor that it was not necessary to alter his will to give it that effect: it was held, that this evidence was admissible, as constituting an essential part of a transaction subsequent to and independant of the will, of which subsequent transaction there was no evidence in writing. His Honor, after noticing the rule of law against admitting parol evidence to add to or explain a written instrument, says, "In this case, the advance of the 500*l.* was after the date of the will. This, the second transaction, however, is not evidenced by any writing: and the technical rule to which I *have referred, against admitting evidence to prove what was the intention of the parties to that transaction, does not there-fore apply. The question is, whether any other rule applies which shall exclude the evidence. In order fully to try this question, I will first suppose the 3000*l.* to have been given absolutely to Mrs. Kirk for her separate use. The defendant's evidence was not objected to, nor could it have been successfully objected to, so far as it went to show the gift of the note, its amount, and the other circumstances attending it, with the exception of the testator's declarations accompanying the gift; for the Court, which has to decide whether the transaction has effected a partial ademption of the legacy, must know what the transaction was; but the declarations of the testator, accompanying the transactions, were objected to. Why should those accompanying declarations not be admissible? They are of the essence of the transaction, and the truth of the transaction itself cannot be known to the Court without them. The rule which would exclude the evidence, if the intention of the

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parties had been expressed in writing, does not apply. I assume that, if the intention of the parties, as proved by the evidence, had been in writing, it could not be contended, on the part of Mrs. Kirk, to whom the legacy was given for her separate use absolutely, that a payment to her husband of the amount of her legacy, at her instance and at her request, would not have precluded her from claiming it under her father's will; or, in other words, that the advance made under such circumstances would not have adeemed the legacy. If that be not so, the argument must be, that an advance made by a testator to one of his legatees, under an agreement in writing that the legatee shall accept the advance in full satisfaction of his legacy, would leave the legatee at liberty to claim the legacy, notwithstanding the agreement; and if such an argument be not admissible, the declarations of the testator must be admissible in the case I am now supposing, unless there be some rule of law which hinders a transaction, like that which the defendant relies upon, from being valid, unless it is evidenced by writing. This, however, cannot be successfully contended for. The evidence does not touch the will; it proves only, that a given transaction took place after the will was made, and proves what that transaction was, and calls upon the Court to decide, whether the legacy given by the will is not thereby adeemed. Ademption of the legacy, and not revocation of the will, is the consequence for which the defendant contends—a distinction which is marked by Lord Hardwicke, in the case of

[*399] *Rosewell v. Bennett* (3 Atk. 77). The defendant does not say the will is invoked; he says, the legatee has received his legacy by anticipation. In principle, therefore, I cannot see my way to reject the evidence in question. How, then, does the case stand upon authority? The cases of *Monck v. Lord Monck* (1 Ball & B. 298); *Rosewell v. Bennett* (3 Atk. 77); *Thelluson v. Woodford* (4 Madd. 420); *Bell v. Coleman* (5 Madd. 22); *Biggleston v. Grubb* (2 Atk. 48); *Hoskins v. Hoskins* (Prec. Ch. 263); *Chapman v. Salt* (2 Vern. 646); *Powell v. Cleaver* (2 Bro. C. C. 499); *Grave v. Lord Salisbury* (1 Bro. C. C. 425); *Ex Parte Dubost* (18 Ves. 140); *Shuddal v. Jekyll* (2 Atk. 516), are all authorities in favour of admitting the evidence. In *Hall v. Hill* (1 D. & War. 118), the Lord Chancellor of Ireland refers, with marked approbation to the cases of *Rosewell v. Bennett*, *Biggleston v. Grubb*, and *Monck v. Lord Monck*, upon this point. I am aware that an argument may be raised as to how far the admission of the evidence, in the cases I have cited, or the greater part of them, may be referred to the principle to which I have before adverted—that of applying it to a presumption first raised by the Court. Such an argument, however, will be found, upon examination, not to be sustainable; for if the law would in those cases have raised the presumption, the evidence which was objected to was unnecessary, there being no evidence to counter-vail the presumption. But, the evidence, though objected to in some

of the cases, was received, and therefore must have been read, to prove what the transaction was. And it is remarkable that, in *Thelluson v. Woodford*, although the exception to the Master's report raised the question, whether the evidence was admissible, the eminent counsel who argued against the ademption barely threw out a question, whether the evidence was admissible, without arguing against its admissibility; and Sir John Leach said, 'This is not a case of implication, but of express declaration.' Admitting, therefore, in the fullest manner, that parol evidence is inadmissible to prove that a will or other written instrument was intended to have an effect not expressed in it, still, with the opinion of the Lord Chancellor of Ireland, so recently expressed, upon the point, and the other authorities I have referred to, supporting the opinion which I individually entertain, that the evidence is admissible, I shall receive it.

"The subject has been very elaborately considered by Mr. Roper (Tr. on Leg., Vol. I., p. 341 et seq.). I cannot but think the learned writer has not sufficiently kept in mind the distinction between ademption and revocation, nor between the cases in which the intention of the parties has been *reduced into writing, and those in which the Court has had to ascertain, by parol evidence only, what the [*400] parties had done. It was said that there was a distinction in this case, inasmuch as the advance was made, not, as in the cases cited, to the legatee herself, but to the husband of the legatee. That circumstance might be material upon the question of implied ademption; but it cannot affect the question of admitting or rejecting the evidence to prove what the transaction was. In more than one of the cases cited, the same circumstance occurred." See *Twining v. Powell*, 2 Coll. 263.

Where, however, there are two written instruments, and from the relationship between the author of the instruments and the party claiming under them (as in the actual or assumed relation of parent and child), the law raises the presumption that a gift contained in the second instrument is intended to be in satisfaction of a gift by an instrument of earlier date, evidence may be gone into to show that such presumption is not in accordance with the intention of the author of the gift: and where evidence is admissible for that purpose, counter evidence is also admissible. See *Debeze v. Mann*, 2 Bro. C. C. 165, 519; *Ellison v. Cookson*, 3 Bro. C. C. 61; *Trimmer v. Bayne*, 7 Ves. 508, 615.

But in such cases, it is well observed by Sir J. Wigram, V. C., "The evidence is not admitted on either side, for the purpose of proving, in the first instance, with what intent either writing was made, but for the purpose only of ascertaining whether the presumption which the law has raised be well or ill founded:" 3 Hare, 517. See *Palmer v. Newell*, 20 Beav. 39.

There is, however, a dictum of Sir J. Leach, in the case of *Weall v.*

Rice, 2 Russ. & My. 251, 263, which seems inconsistent with the law upon this subject, as it is at present understood. "The rule of this Court," said his Honor, "is, as ought to be, that if a father makes a provision for a child by settlement on marriage, and afterwards makes a provision for the same child by his will, it is *primâ facie* to be presumed that he does not mean a double provision; but this presumption may be repelled or fortified by intrinsic evidence derived from the nature of the two provisions, or by extrinsic evidence. Where the two provisions are of the same nature, or there are but slight differences, the two instruments afford intrinsic evidence against a double provision. Where the two provisions are of a different nature, the two instruments afford *intrinsic evidence* in favour of a double provision. But in either case, *extrinsic evidence is admissible of the real intention of the testator*. It is not *possible to define what are to be con- [*401] sidered as slight differences between two provisions. Slight differences are such as, in the opinion of the judge, leave the two provisions substantially of the same nature; and every judge must decide that question for himself." In this case the settlement was first and the will last. And see *Lloyd v. Hervey* 2 Russ. & My. 310, 316, and Lord Langdale's remark, in *Lord Gengall v. Barnard*, 1 Kee. 769. In the case of *Booker v. Allen*, 2 Russ. & My. 370, where the will was before the settlement, Sir J. Leach admitted parol evidence to prove that the testator, who had put himself in loco parentis towards the donee, intended the provision made by the settlement to be in lieu of a legacy given by the will; and held, that the gift by the settlement was a satisfaction of the legacy, though the two provisions differ so much from each other, that they could not be considered substantially the same.

It is, however, submitted that the parol evidence in *Booker v. Allen*, ought not to have been admitted, as it was in contradiction to a written instrument. See *Hall v. Hill*, C. & L. 120; 1 D. & War. 94.

Where a person is considered to have placed himself in loco parentis.—Where a person who has made two gifts to another, in such manner as, according to the rules laid down in considering the two classes of cases before discussed, would, in case he stood towards the donee in the relation of parent, raise the presumption that the latter gift was intended to be a satisfaction of the former, the question often arises, and it is one by no means always easy of solution, whether the donor, although not standing to the donee in that relation, has not, by his conduct, placed himself in it, or, as it is usually termed, put himself in loco parentis; in which case, as before observed, the presumption will arise equally as in the case of a parent.

In the case of *Powys v. Mansfield*, 3 My. & Ca. 359, Lord Cottenham enters most elaborately into this somewhat obscure question—what is sufficient to put a person in loco parentis? Sir L. Shadwell, V. C., in that case (reported 6 Sim. 528), had held, that no person can be deemed

to stand in loco parentis to a child whose father is living and who resides with and is maintained by his father according to his means. Lord Cottenham, however, reversed the decision of the Vice-Chancellor. "No doubt," observed his Lordship, "the authorities leave in some obscurity the question as to what is considered as meant by the expression universally adopted, of one in loco parentis. Lord Eldon, however, in *Ex parte Pye*, has given to it a definition which I readily adopt, *not only because it proceeds from his high authority, [*402] but because it seems to me to embrace all that is necessary to work out and carry into effect the object and the meaning of the rule. Lord Eldon says, it is a person '*meaning to put himself in loco parentis; in the situation of the person described as the lawful father of the child.*' But this definition must, I conceive, be considered as applicable to those parental offices and duties to which the subject in question has reference, namely, *to the office and duty of the parent to make provision for the child.* The offices and duties of a parent are infinitely various, some having no connection whatever with making a provision for a child: and it would be most illogical, from the mere exercise of any such offices or duties by one not the father, to infer any intention in such person to assume also the duty of *providing* for the child. The relative situation of the friend and of the father may make this unnecessary, and the other benefits most essential.

"Sir William Grant's definition (see 19 Ves. 412) is, 'A person assuming the parental character, or discharging parental duties,' which may not seem to differ much from Lord Eldon's; but it wants that which, to my mind, constitutes the principal value of Lord Eldon's definition, namely, the referring to the *intention* rather than to the *act* of the party. The Vice-Chancellor says (6 Sim. 556), it must be a person who has so acted towards the child as that he has thereby imposed upon himself a moral obligation to provide for it; and that the designation will not hold, where the child has a father with whom it resides, and by whom it is maintained. This seems to infer that the locus parentis assumed by the stranger must have reference to the pecuniary wants of the child, and that Lord Eldon's definition is to be so understood; and so far I agree with it; but I think the other circumstances required are not necessary to work out the principle of the rule or to effectuate its object. The rule, both as applied to a father, and to one in loco parentis, is founded upon the *presumed intention*. A father is supposed to *intend* to do what he is in duty bound to do, namely, to provide for his child according to his means. So, one who has assumed that part of the office of a father, is supposed to *intend* to do what he has assumed to himself the office of doing. If the assumption of the character be established, the same inference and presumption must follow. The having so acted towards a child as to raise a moral obligation to provide for it, affords a strong inference in favour

of the fact of the assumption of the character: and the child having a father with whom it resides, and by whom it is maintained affords some inference against it; but neither are conclusive.

[*403] *‘‘ If, indeed, the Vice Chancellor’s definition were to be adopted it would still be to be considered, whether in this case, Sir John Barrington had not subjected himself to a moral obligation to provide for his brother’s children, and whether such children can be said to have been maintained by their father. A rich unmarried uncle, taking under his protection the family of a brother, who has not the means of adequately providing for them, and furnishing, through their father, to the children, the means of their maintenance and education, may surely be said to *intend* to put himself for the purpose in question, in loco parentis to the children, although they never leave their father’s roof. An uncle so taking such a family under his care, will have all the feelings, intentions, and objects, as to *providing* for the children, which would influence him if they were orphans. For the purpose in question, namely *providing* for them, the existence of the father can make no difference. If, then, it shall appear, from an examination of the evidence, that Sir John Barrington did afford to his brother the means of maintaining, educating, and bringing up his children according to their condition of life; and that the father had no means of his own at all adequate to that purpose; that this assistance was regular and systematic, and not confined to casual presents, the repetition of which could not be relied upon; that he held out to his brother and his family, that they were to look to him for their future provision; it will surely follow, if that were material, that Sir John Barrington had so acted towards the children as to impose upon himself a moral obligation to provide for them, and that the children were, in fact, maintained by him, and not by their father. But, it has been said that Sir John Barrington would not have been guilty of any breach of moral duty, if he had permitted the property to descend to his brother. Undoubtedly he would not, because that would have been a very rational mode of providing for the children; but if he had reason to suppose that his brother would act so unnaturally as to leave the property away from his children, Sir John Barrington would have been guilty of a breach of moral duty towards the children in leaving the property absolutely to their father. I should, therefore, feel great difficulty in coming to a conclusion that Sir John Barrington had not placed himself in loco parentis to these children, even if I thought everything necessary for that purpose, which the Vice-Chancellor has thought to be so.

‘‘ Adopting, however, as I do, the definition of Lord Eldon, I proceed to consider whether Sir John Barrington did *mean* to put *him-
 [*404] self in loco parentis to the children, so far as related to their future provision. Parol evidence has been offered upon two points: first, to prove the affirmative of this proposition: secondly, to prove.

by declarations and acts of Sir John Barrington, that he intended the provision made by the settlement should be in substitution of that made by the will. That such evidence is admissible for the first of these purposes, appears to me necessarily to flow from the rule of presumption. If the acts of a party standing in loco parentis raise in equity a presumption which could not arise from the same acts of another person not standing in that situation, evidence must be admissible to prove or disprove the facts upon which the presumption is to depend; namely, whether, in the language of Lord Eldon, he had *meant* to put himself in loco parentis; and as the fact to be tried is the intention of the party, his declarations, as well as his acts, must be admissible for that purpose; and if the evidence established the fact that Sir John Barrington did *mean* to place himself in loco parentis, it will not be material to consider, whether his declarations of intention as to the particular provision in question be admissible per se, because the presumption against the double portions, which in that case will arise, being attempted to be rebutted by parol testimony, may be supported by evidence of the same kind."

From Lord Cottenham's judgment, therefore, we may conclude, that the question, whether a person has or not put himself in loco parentis, must be decided with reference to his *meaning* to put himself in that position, by assuming the office and duty of the parent to make *provision* for the child, and that parol evidence is admissible to prove that a person means to put himself in loco parentis, and upon proof of his *meaning* to do so, parol evidence of his acts and declarations is admissible also to rebut and then to strengthen the presumption of satisfaction.

Any relation, or even a mere stranger in no way related to another person, may be held to have meant to put himself in loco parentis towards him; but mere relationship, however near, is not of itself sufficient to show that a person means to put himself in loco parentis towards another. Thus, neither a great uncle, uncle, grandfather, or putative father, is from his mere relationship, to be considered as in loco parentis, unless it can be shown that he meant to put himself in loco parentis with reference to the parent's office and duty of making a provision for his child; *Shudal v. Jekyll*, 2 Atk. 516, 518; *Powel v. Cleaver*, 2 Bro. C. C. 517, 518; *Roome v. Roome*, 3 Atk. 183; *Perry v. Whitehead*, 6 Ves. 547; *Grave v. Salisbury*, 1 Bro. C. C. 425; *Ellis v. Ellis*, 1 S. & L. 1; *Twining v. Powell*, 2 Coll. 262; and *Lydon v. Ellison*, 19 Beav. 565, 572. [*405]

When satisfaction or ademption will take place of a legacy given by a person not being in the natural or assumed relation of parent towards the legatee.—Where a person, not being in the natural or assumed relation of parent towards the legatee, gives a legacy for a *particular purpose*, and afterwards advances money for the *same purpose*, a pre-

sumption arises that it was intended as, and it will accordingly be held to be, an ademption of it. "Suppose," asked Lord Manners, "A. bequeathed to his brother 5000*l.* to buy a house in Merrion-square; and that afterwards A. bought one, which he gave to his brother, are there two houses to be bought?" *Monck v. Monck*, 1 Ball & B. 303; see also *Rosewell v. Bennet*, 3 Atk. 77, and the observations of Lord Cottenham, 2 My. & Cr. 377. From the cases of *Debeze v. Mann*, 2 Bro. C. C. 166, 519, 521, and *Trimmer v. Rayne*, 7 Ves. 516, it appears that parol evidence is admissible to rebut or strengthen the presumption.

Where, however, the purpose for which a legacy is given by such person does not correspond with the purpose for which the advancement is made, the legacy, as is laid down by Lord Eldon, in *Ex parte Pye*, will not be adeemed: *Debeze v. Mann*, 2 Bro. C. C. 165, 519; *Robinson v. Whitley*, 9 Ves. 577; *Roome v. Roome*, 3 Atk. 181; nor where the legacy and advancement are given upon different contingencies: *Spinks v. Robins*, 2 Atk. 491.

In the recent case of *Pankhurst v. Howell*, 6 L. R. Ch. App. 136, a testator by his will, dated the 17th of December, 1862, gave to his wife a legacy of 200*l.*, to be paid within ten days after his decease. On the 28th of November, 1867, during his last illness, he, at the request of his wife, who did not know the contents of his will, gave her a cheque for 200*l.*, that she might have a sum of money which she could control immediately on his death without the interference of the executors. She had the cheque cashed on the same day, and gave the proceeds to a friend to keep for her. The testator died on the 8th of December, 1867. It was held by Lord Justice James, affirming the decision of Lord Romilly, M. R., that the legacy of 200*l.* was not adeemed or satisfied by the gift of the 200*l.* "The rule," said his Lordship, "is, that where the testator stands neither in the natural nor assumed relation of a parent to the legatee, the legacy will be considered as a bounty, and will not be adeemed by a subsequent advancement, unless the legacy is given for a particular purpose, and the testator advances money for the same purpose, or unless the intention otherwise legally appear of making the advancement with a view to *ademption. . . . Here the legacy does not appear to me to have been given for a particular purpose within the meaning of the rule."

3rd. With respect to the satisfaction of a debt by a legacy, the general rule, as laid down in *Talbot v. Duke of Shrewsbury*, is, "that if one being indebted to another in a sum of money, does by his will give him a sum of money as great as, or greater than, the debt, without taking any notice at all of the debt, this shall, nevertheless, be in satisfaction of the debt, so that he shall not have both the debt and the legacy." See also *Brown v. Dawson*, Prec. Ch. 240; *Fowler v. Fowler*, 3 P. Wms. 353; *Richardson v. Greese*, 3 Atk. 68; *Gaynon*

v. *Wood*, 1 Dick. 331; *Bensusan v. Nehemias*, 4 De Gex & Sm. 381; *Shadbolt v. Vanderplank*, 29 Beav. 405.

This rule or presumption is founded upon the maxim *Debitor non presumitur donare*. It has also been urged, in support of this presumed satisfaction, that a man ought to be just before he is bountiful; but this observation has been well answered by Lord Chancellor King in *Chancey's Case*, that, when a man had left such an estate and fund for his debts and legacies, as that he might thereout be both just and bountiful, he did not see but it would be as reasonable that the whole legacy should take effect as a legacy, and that the debt should be paid likewise: *Fowler v. Fowler*, 3 P. Wms. 354.

The rule as to the presumption of the satisfaction of a debt by a legacy is founded upon reasoning alike artificial and unsatisfactory, and it has consequently met with the censure of the most eminent judges, who, although they would not break the rule, have at the same time said they would not go one jot further, and have always endeavoured to lay hold of trifling circumstances in order to take cases out of it: *Lady Thynne v. Earl of Glengall*, 2 H. L. Ca. 153; *Richardson v. Greese*, 3 Atk. 65.

There is, in fact, in this class of cases a leaning *against*, as in the two former classes of cases a leaning *favour* of, the presumption of satisfaction. Thus, where the legacy is of less amount than the debt, the presumption is, that it was not intended to be given in lieu of it; it will, therefore, not be considered a satisfaction, even pro tanto, as in the two former classes of cases of satisfaction: *Cranmer's case*, 2 Salk. 508; *Atkinson v. Webb*, 2 Vern. 478; *Eastwood v. Vinke*, 2 P. Wms 614, 617; *Minuel v. Sarazine*, Mos. 295; *Graham v. Graham* 1 Ves. 263. A legacy, however, by a debtor to a creditor has been held to be pro tanto a discharge of debt where it appeared that a testatrix had made a proposal to that effect *to her creditor, and that he had not objected to the arrangement: *Hammond v. Smith*, 33 Beav. [*407] 452.

So, also, the presumption of satisfaction being intended, will be repelled where the legacy, though in amount equal to or greater than the debt, is payable at different times, so as not to be equally advantageous to the legatee as the payment of the debt: (*Atkinson v. Webb*, Prec. Ch. 236; *Nicholls v. Judson*, 2 Atk. 300; *Hales v. Darell*, 3 Beav. 324, 332; *Charlton v. West*, 30 Beav. 124, 127), and perhaps even where the legacy is payable to different trustees, *Pinchin v. Simms*, 30 Beav. 119, 120; and see *Mathews v. Mathews*, 2 Ves. 635; where Sir Thomas Clarke, M. R., observes, that the Court dislikes the rule so much, as to lay hold of any minute circumstance to take the case out of it; as, that the thing given in satisfaction should be as certain as to the duration and commencement of it as the debt, otherwise, though a sum ten times larger be given by the will, it would not be held a satisfaction. "I

myself," said his Honor, "remember a case, before the Lord Chancellor (Hardwicke), where an old lady, indebted to a servant for wages, by will gave ten times as much as she owed, or was likely to owe; yet because made payable in a month after her own death, so that the servant might not outlive the month, although great odds the other way, the Court laid hold of that." See also, *Clarke v. Sewell*, 3 Atk. 96; *Haynes v. Mico*, 1 Bro. C. C. 129; *Jeacock v. Falkener*, 1 Bro. C. C. 295; *S. C.* 1 Cox, 37; *Adams v. Lavender*, 1 M'Cl. & Y., Exch. 41; *Hales v. Darell*, 3 Beav. 324, and cases there cited.

The presumption will also be repelled where the legacy and debt are of a different nature, either with reference to the subjects themselves, or with respect to the interest given: see *Eastwood v. Vinke*, 2 P. Wms. 614, where it was held, that as money and lands were things of a different nature, the one should not be taken in satisfaction of the other. See also *Forsight v. Grant*, 1 Ves. jun. 298; *Richardson v. Elphinstone*, 2 Ves. jun. 463; *Byde v. Byde*, 1 Cox, 49; *Bartlett v. Gillard*, 3 Russ. 149; *Fourdrin v. Gowdey*, 3 My. & K. 409; *Rowe v. Rowe*, 2 De G. & Sm. 294; *Edmunds v. Low*, 3 K. & J. 318. So, also, where the interest given is of a different nature or not co-extensive with the debt. Thus, a gift of a residue of real and personal estate for life was held not to be a satisfaction for a sum of money to be laid out in lands and conveyed to a person in fee: *Alleyn v. Alleyn*, 2 Ves. 37.

So, also, where there is a particular motive assigned for the gift, it will not be presumed to *be a satisfaction for a debt: *Mathews* [*408] *v. Mathews*, 2 Ves. 635; *Charlton v. West*, 30 Beav. 124, 127.

The presumption will not be raised where the debt of the testator was contracted *subsequently* to the making of the will; for he could have had no intention of making any satisfaction for that which was not in existence: *Cranmer's case*, 2 Salk. 508; *Thomas v. Bennet*, 2 P. Wms. 343; *Plunkett v. Lewis*, 3 Hare, 330.

Where the legacy is contingent or uncertain, whether it be given upon the happening of a contingency, as in *Crompton v. Sale*, 2 P. Wms. 553; or is in itself of an uncertain or fluctuating nature, as a gift of the whole or a part of the testator's residuary estate, even though it should prove greater in amount than the debt, it will not be held to be a satisfaction of it: *Devese v. Pontet*, 1 Cox, 188; *Barret v. Beckford* 1 Ves. 519; *Lady Thynne v. The Earl of Glengall*, 2 H. L. Ca. 154.

The result will be the same, if the debt itself is contingent or uncertain, as a debt upon an open and running account,—for it might not be known to the testator, whether he owed any money to the legatee or not; and therefore, it could not reasonably be held that he intended a legacy to be in satisfaction of a debt which he did not know that he owed any more than a legacy could be held a satisfaction of a debt contracted after the making of the will; *Rawlins v. Powell*, 1 P. Wms. 297; and in *Carr v. Eastabrooke*, 3 Ves. 561, Lord Alvanley, M. R.

held that a legacy was not a satisfaction for a negotiable bill of exchange, on the ground that it was not to be presumed that the testator could know whether the legatee had not, the moment she received the bill, indorsed it over to another person, in which case no debt would be due to the legatee.

But the presumption that a debt is intended to be satisfied by a legacy will not be rebutted by the circumstance that the debt is liable to variation in amount. Where for instance, the debt was in respect of deposits made with the testator, the creditor drawing on him from time to time in respect of such deposits; *Edmunds v. Low*, 3 K. & J. 318. So in *Smith v. Smith*, 3 Giff. 263, where a testator who had advanced moneys to his son, and paid large sums on his account, bequeathed to him a legacy without making mention of the debt, it was held by Sir John Stewart, V. C., that the loan and unascertained balance must be set off against the legacy.

Upon the same principle it was also held in the same case that the assignees of a firm indebted to the testator were not entitled to receive a legacy bequeathed by the testator to a member of the firm. *Ib.* 270.

*Where a debt by the marriage of the creditor becomes payable to her husband, the presumption of satisfaction by a legacy [*409] to a larger amount having been bequeathed to her by the debtor, will not be rebutted as being intended for a person to whom the debt was not due, because the legacy, subject to the wife's equity to a settlement would be payable to the husband. See *Edmunds v. Low*, 3 K. & J. 318. The remark, however, of his Honor that as the legacy in that case was only 100*l.* the wife had no equity to a settlement, is not in accordance with the authorities. See ante, vol. 1, p. 470.

Where, as in *Chancey's Case*, selected as a leading authority upon this subject, there is an express direction in the will for payment of debts and legacies, the Court will infer that it was the intention of the testator that both the debt and the legacy should be paid to the creditor; *Richardson v. Greese*, 3 Atk. 65; *Field v. Mostin*, Dick. 543; *Hales v. Darell*, 3 Beav. 324, 332; *Jefferies v. Michell*, 20 Beav. 15; *Hassell v. Hawkins*, 4 Drew. 468. See also *Lord Chichester v. Coventry*, 2 L. R. Ho. Lo. 71.

But a direction to pay debts alone has been held by Sir W. Page Wood, V. C., not to be sufficient to rebut the presumption of satisfaction (*Edmunds v. Low*, 3 K. & J. 318, 321). Sir J. Lewis Knight Bruce, V. C., has held that it may be looked upon as an ingredient coupled with other circumstances to have that effect: *Rowe v. Rowe*, 2 De G. & Sm. 297, 298. Other judges, however, have held that a charge of debts standing alone, is of equal force on the question of rebutting the presumption of satisfaction as if it were accompanied by a charge of legacies: *Hales v. Darell*, 3 Beav. 324; *Jefferies v. Michell*, 20 Beav. 15; *Cole v. Willard*, 25 Beav. 568, 573; *Pinchin v. Sims*, 30

Beav. 119; *Churlton v. West*, *Ib.* 124. See also Lord *Chichester v. Coventry*, 2 L. R. Ho. Lo. 71, and the remarks thereon in *Dawson v. Dawson*, 4 L. R. Eq. 504.

A question has been raised whether a testator in a charge of "debts," includes his liabilities on a bond or covenant to pay a sum of money after his decease. In the case of *Wathen v. Smith*, 4 Madd. 325, a husband covenanted on marriage to pay to his wife 1000*l.* six months after his death. By his will he gave her 1000*l.* payable three months after his decease, and after giving certain specific legacies, he directed his residue to be applied in payment of *all* his just *debts and legacies*. Sir John Leach V. C., held that the legacy must be considered as a performance of the covenant. "Undoubtedly," observed his Honor, [*410] "these are questions of intention; but the intention to *perform the covenant is to be presumed, unless there be special circumstances to repel that presumption. In *Chancey's Case*, it was held that the direction in the will, that the testator's just debts should be paid, repelled the presumption that a legacy to the creditor was intended as a satisfaction of the debt. I think *Chancey's Case* does not apply here; and that this provision for the wife by the settlement is not a debt within the sense in which the testator must be understood to use the word "debts" in his will.

In the case, however, of *Cole v. Willard*, 25 Beav. 568, the authority of *Wathen v. Smith*, is impugned. There the testator, on his marriage, covenanted that his representatives should, within three months after his decease, pay 2000*l.* to trustees, to be held for his wife for life. By his will, after directing all his debts to be paid, he gave his widow an annuity of 200*l.* a year payable quarterly, and other benefits. It was held by Sir John Romilly, M. R., that the provision for the wife under the settlement, was not satisfied by the provision made for her by the will. "I do not," said his Honor, "concur with Sir John Leach in his observation in *Wathen v. Smith*, that the testator must not be understood to include, under the word 'debt,' his liability on bond or covenant made on his marriage, although to be discharged after his decease." His Honor, however, decided the case upon the ground that the two provisions were not identical.

Where a parent gives a legacy to a child to whom he is indebted.—It appears that a legacy given by the will of a parent to a child, is not upon any different footing from that of a legacy by any other person as a satisfaction of a *debt* not being a portion; therefore, where a father owes a mere debt to a child, a subsequent legacy will not, in the absence of intention, express or implied, be considered as a satisfaction of the debt, unless it be either equal to, or greater than, the debt in amount, and the presumption of satisfaction be not repelled by any of those slight circumstances which will take a bequest of such amount to a

stranger out of the general rule: *Tolson v. Collins*, 4 Ves. 483; *Stocken v. Stocken*, 4 Sim. 152.

The same remarks apply to a legacy to a wife to whom the husband is indebted: *Fowler v. Fowler*, 3 P. Wms. 353; *Cole v. Willard*, 25 Beav. 568, overruling *Wathen v. Smith*, 4 Madd. 325.

Where a parent in his lifetime advances—a child to whom he is indebted.—Where, however, a parent is indebted to a child, and in his lifetime makes an *advancement to the child upon marriage, or some other occasion, of a portion equal to or exceeding the debt, [*411] it will *primâ facie* be considered a satisfaction; and it is immaterial whether the portion be given in consideration of natural love or affection, or whether property be settled by the other party in consideration of it, or whether, in the case of a portion to a daughter, the husband be ignorant of the debt. See *Wood v. Briant*, 2 Atk. 521; *Seed v. Bradford*, 1 Ves. 500; *Chave v. Farrant*, 18 Ves. 8.

In *Plunkett v. Lewis*, 3 Hare, 316, these authorities were reviewed and recognised by Sir J. Wigram, V. C. There, a trust fund to which a father was entitled for life, and his son and daughter in remainder, was sold, and the proceeds, amounting to 11,445*l.*, were received by the father. Subsequently, on the marriage of the daughter, the father settled 16,000*l.* in ready money, and 20,000*l.* payable six months after his decease, besides lands. It was held by Sir James Wigram, V. C., that the claim of the daughter against the father, in respect of her share of the proceeds of the trust fund, must be presumed to be satisfied by the settlement. "In this case," said his Honor, "the existence of a debt of ascertained amount, and the advance by the father to an amount far exceeding the amount of the debt, and that on behalf of the daughter, in a transaction to which she was a party, all concur. But it was said, first, that in the settlement by the father, distinct considerations (natural love and affection) were expressed, and that the expression of those considerations excluded the satisfaction; secondly, that the entire settlement was a purchase from the husband, and that, as he gave value for the lady's settled fortune, it would not be presumed that the whole intention of the parties was not expressed in the settlement; and, thirdly, that the husband had no notice of his wife's rights in the trust stock, and therefore could not be barred. In *Wood v. Briant* (2 Atk. 521), the father was administrator *durante minore ætate* of an estate under which his daughter was interested to an extent not exceeding 500*l.* On her marriage, the father agreed to give his daughter 800*l.* as a *portion*, and in consideration of natural love and affection; and in that case, as in this, the argument was founded, *inter alia*, upon the expression of consideration. Lord Hardwicke went fully into the law upon the broad principle of satisfaction; and, independently of some delay, to which he adverted, held it a satisfaction. He said, 'There are very few cases where a father will not be presumed to have paid the debt he owes to a

[*412] daughter, when, in his lifetime, he gives her in marriage *a greater sum than he owed her; for it is very unnatural to suppose that he would choose to leave himself a debtor to her, and subject to an account.' And he expressed his disapprobation of *Chidley v. Lee* (Prec. Ch. 228), in which Sir J. Trevor went upon the ground that the husband was ignorant of his wife's claim. The case of *Seed v. Bradford* (1 Ves. 500), contains a very clear expression of Sir John Strange's opinion upon the abstract point, although he fortified his opinion upon that point by the acquiescence to which he referred. In that case, also, the husband appears not to have known of his wife's right until after the marriage. In *Chave v. Farrant* (18 Ves. 8), the father, owing 150*l.* to his children, as executor of their grandfather, covenanted in their settlements to pay 1000*l.* each for the portions of his daughters. It did not appear that the husbands knew of the debt. Sir W. Grant was clear upon the point.

"The above cases, which bring the law down from Lord Hardwicke to the time of Sir W. Grant, have, I believe, always been considered as showing the law of the Court; they clearly decide, that neither the expression of natural love and affection as the reason of the gift, nor the ignorance of the husband of the wife's rights, will necessarily prevent the application of the doctrine of satisfaction. And if the acts and declarations of the parties, as proved in evidence, are to be taken into account in this case (as in some of the cases they have been), it is impossible to say they do not, in the clearest manner, confirm the conclusion to which, without those acts and declarations, I should come.

"I must not, however, be understood as intimating an opinion that the expression of natural love and affection, as the consideration of a portion given by a parent on the marriage of a child, may not, in any case, be entitled to weight. In the case of a portion being the exact amount of the parent's debt to his child, perhaps it might be material, at least in conjunction with other circumstances; for it might be said, that natural love and affection could not be the motive for discharging a legal or equitable obligation; but that reasoning can have little weight where the father, as in this case, gives a portion so far exceeding his liability. There is here ample to satisfy the natural love and affection, without excluding the presumption that the debt was intended to be satisfied also.

"With respect to the other point relied upon by the plaintiff, that the settlement must be construed as a purchase by the husband, I cannot comprehend how that bears upon the question. It is the advance by the father, which, by presumption of law, satisfies his liabilities; and if that *advance simpliciter would discharge him, I cannot [*413] understand the argument which supposes that the advance will lose its operation in the father's favour, because he obtains for the daughter the additional benefit of a settlement by her husband. I

should have thought the argument in favour of satisfaction rather à fortiori from such circumstances. No case was produced sanctioning such an argument; and I think the observations of the Vice Chancellor, 5 Sim. 314, 315, point strongly the other way. He says, that, where the husband, in consideration of his wife's portion, settles his own estate, that is the same thing quoad satisfaction as if her fortune were settled." And his Honor, after commenting upon *Wharton v. Lord Durham*, 5 Sim. 297, 3 My. & K. 472, 10 Bligh, N. S. 526, 3 C. & F. 146, adds, "It is the absence of expression, and that only, which raises the question in any of the cases. I consider the presumption of law to be, that the settlement would satisfy the debt, and that presumption being in this case unopposed by any evidence whatever, becomes conclusive." See also *Hardingham v. Thomas*, 2 Drew. 353.

In the same case, his Honor held, advances made by the father, to his son simpliciter, not to be a purchase or satisfaction of the claim of the son to the proceeds of a trust fund belonging to the son, possessed by the father *after* such advances. See 3 Hare, 330.

The presumption of satisfaction can only arise where the person making the payment is himself the party bound to pay, or is the owner of the estate charged with the payment: *Samuel v. Ward*, 22 Beav. 347; and see *Douglas v. Willes*, 7 Hare, 328.

A debt due to a man will not be satisfied by a legacy to his wife: *Hall v. Hill*, 1 D. & War. 94, 1 C. & L. 120. And a debt due under a covenant to the trustees of a settlement will not be satisfied by a legacy to the cestui que trusts: *Smith v. Smith*, 3 Giff. 263.

Extrinsic Evidence.—Where the presumption arises merely from the fact of a legacy to a creditor, being equal to or greater than the amount of the debt, it would appear, upon principle, that evidence ought to be admitted to rebut the presumption; and if so, evidence may, on the other hand, be admitted to fortify it: *Plunkett v. Lewis*, 3 Hare, 361. However, in *Fowler v. Fowler*, 3 P. Wms. 353, Lord Talbot refused to admit parole evidence; and this case appears to be approved of by Sir Edward Sugden, in *Hall v. Hill*. See 1 D. & W. 121, 1 C. & L. 147. It is, however, submitted, that the evidence ought to have been admitted in that case, since, as the case is reported, it would merely have been admitted for the purpose of *rebutting a presumption of law, not to contradict the intention of the testa- [*414] tor as appearing by the will. If, indeed, Lord Talbot considered that the intention of the testator appeared on the face of the will, the evidence was rightly rejected.

In *Wallace v. Pomfret*, 11 Ves. 542, Sir Samuel Romilly, rightly admitting that evidence might be received to rebut the presumption of the satisfaction of a debt by a legacy, where there was no expression in the will showing the intention, rightly argued also, that there was no instance of admitting evidence where the testator has shown his inten-

tion by words; Lord Eldon, nevertheless, admitted evidence to beat down, not a mere presumption of law, "but," as he says, "the fair inference from the written context." This decision, however, is contrary to principle, and has been strongly disapproved of in *Hall v. Hill*, 1 D. & War. 122, 1 C. & L. 147; in which case, as the presumption of satisfaction did not arise on the face of the will, Lord Chancellor Sugden refused to admit parol evidence of the testator's declaration, showing that he intended the legacy as a satisfaction.

In considering the subject of these notes, it is material to distinguish between the revocation, the ademption, and the satisfaction of a bequest. Revocation is a change of purpose authenticated as the law requires—ademption, the prevention of the purpose expressed in the will—satisfaction, the substitution of a gift with the legatee's assent. A will may be at once revoked, adeemed and satisfied, as, where stocks which have been specifically bequeathed are transferred to the legatee and accepted by him; see 2 American Leading Cases, 534, 5 ed. If the transfer were made to a third person the bequest would be adeemed and revoked, but not satisfied. The conveyance of other stocks to the legatee in lieu of the benefit conferred by the will might operate as satisfaction.

Where one does that in person which he has enjoined in his will, the purpose of the mandate is accomplished, and no obligation devolves on the executors. If a testator were to direct that his assets should be taken to build a hospital or found a college in a particular place, or according to a certain plan, and afterwards exe-

cuted the design in his lifetime, it would be futile for the executors to endeavor to repeat what had been already performed; *Monck v. Monck*, 1 Ball & Beatty, 298, 303, ante 774. The principle is the same whether the bequest is made to the executors in trust for the beneficiary, or directly to the latter, if the way in which the money is to be employed is designated in the will, and carried out by the testator during his life; *Monck v. Monck*. "Where the will expresses the purpose for which a legacy is given, as to enable the legatee to purchase a house or furniture, or to put him out as an apprentice, and the testator afterwards in his lifetime furnishes him with money for the same purpose, this is an ademption;" *Langdon v. Astor's Ex'ors*, New York, 36; *Hine v. Hine*. 39 Barb, 507, or as the rule is stated in *Sims v. Sims*, 2 Stockton Ch. 158; "if one who has given a legacy in his will for a particular purpose, afterwards executes that purpose himself in his lifetime, he is presumed to have intended to cancel the legacy, which is consequently held to be adeemed."

In *Williams' Appeal*, 23 P. F.

Smith, 249, the testator bequeathed the residue of his estate to his executor, in trust to purchase a lot of ground and erect thereon a building for the use of the Philadelphia Library Company, and afterwards, shortly before his death, purchased a lot, and directed his executors to use it as the site of the building. It was held that the executors were thereby exonerated from purchasing a lot as prescribed in the will. The court did not advert to the doctrine of ademption, but it may be thought that the case would have stood as well on that ground, as on the reasons actually assigned in delivering judgment; see vol. 1, 601.

The principle is nearly if not quite the same, where a watch or other chattel which has been specifically bequeathed, is given by the testator to the legatee. Under these circumstances the legacy is at once adeemed and satisfied—adeemed because the property is placed beyond the reach of the will, and satisfied because the legatee receives the benefit, although in a somewhat different way; see *Jones v. Mason*, 5 Randolph, 577; *Roberts v. Weatherford*, 10 Alabama, 72.

It is not easy to draw the line between such a case, and that where a chattel of a certain kind is bequeathed, and the testator subsequently procures a chattel of that kind and delivers it to the legatee. Under these circumstances it may fairly be inferred that the testator was his own executor, and did not mean that those

who came after him should repeat what he had already done.

In cases of this description, the act done by the testator is manifestly a fulfilment of the purpose indicated in his will, and satisfaction is a necessary inference. But this cannot be said where one who has made a pecuniary bequest, or other bequest of quantity, bestows the same or a greater amount, because a present gift of money is not inconsistent with an intention to make a further gift after death, and it may well be that the testator intended a double benefaction. Hence such a legacy will not be adeemed by the payment of a like amount during the testator's life, unless the purpose of both gifts is the same, or unless the gift is received in payment of the bequest, which will not be presumed without evidence appearing in the will or de hors; see *Pankhurst v. Howell*, 6 L. R. Ch. Appeals, 136.

Such evidence may be direct or presumptive. It is direct where it appears from the testator's oral or written declarations, that the gift or advancement was intended as a payment of the legacy; see *Richards v. Humphreys*, 15 Pick. 135; *Kirk v. Eddowes*, 3 Hare, 509, *ante* 768, or to fulfil the object for which that was bequeathed. It is presumptive where this is inferred from the existence of a parental obligation to provide suitably for the legatee, which makes it reasonable to infer that the bequest was an adequate performance of the duty, due regard being had to the father's means and the needs of

the child, and consequently that it was adeemed wholly or *pro tanto* by the subsequent advance.

ADEMPTION AS BETWEEN PARENT AND CHILD.—There is accordingly, a numerous class of cases where the inference that the purpose of a payment or advance is identical with that of an anterior bequest, is drawn, not from the testator's acts or declarations, nor from the language of the will, but from the pre-existence of an obligation, which both gifts conduce to fulfil. Such indeed is the ground on which the doctrine is most frequently applied, if not always, with the greatest reason. If for instance, a debtor were to bequeath to his creditor a sum equalling in amount of the debt, and afterwards paid him a like sum, it would be reasonable to presume, that the legacy was given in consideration of the debt, and that the payment satisfied both. So a father is under an obligation to maintain his offspring, and may be supposed to make his will in view of what that duty requires; and if he, after executing a testamentary provision for a child, makes an advance to the same child of a like kind, the inference is that the legatee has received the amount of the bequest by anticipation, and has no claim on the executors; *Timberlake v. Parrish's Exor's*, 5 Dana, 346; *Gill's Estate*, 1 Parson's Eq. 139; *Langdon v. Astor's Exor's*, 3 Duer; 16 New York, 9.

The doctrine may be found, in the following extract from the judgment of the Court of Appeals

in the case last cited. "General legacies may be adeemed by advancements made by the testator in his lifetime, and the question whether a particular advancement should or should not be an ademption, or in satisfaction of what the testator had bequeathed to the person so advanced, is a question of fact to be determined only by reference to the intention of the donor (1 *Roper on Legacies*, 365). The soundness of this position will be apparent from a reference to certain well settled doctrines in the English courts of equity. For instance, when a parent, or other person *in loco parentis*, bequeaths a legacy to a child or grandchild, and afterwards, in his lifetime, gives a portion, or makes a provision for the same child or grandchild, without expressing it to be in lieu of the legacy, it will, in general, be deemed a satisfaction or ademption of the legacy. This is upon the ground that the legacy is considered a portion, and if the testator afterwards advances the same sum upon the child's marriage, or any other occasion, he does it to accomplish his original object in giving a portion. Under such circumstances, it is held to be intended by the testator as a satisfaction, and not a double portion (*Story's Eq. Jur.*, §§ 1111, 1112). The relationship between the testator and the legatee creates a presumption of fact, that the advancement was in the nature of payment, and was so intended (*Powell v. Cleaver*, 1789, 2 Brown's Ch. 499.) In this case, Lord Thurlow said: "With re-

spect to the question of ademption, the case of parent and child is a presumption of evidence only, and not a presumption of law." The case before him was, that of a legacy to a stranger, and it was claimed to be satisfied from circumstances. The lord chancellor said he had gone through all the cases, "and it appears," he said, "to be the result of them that where a stranger gives a legacy by will, and afterwards a sum *without any evidence* that it is intended for the same purposes, it is not taken as a satisfaction. To make it so, it must appear at the time of the gift *to be meant* as an ademption of the legacy." Without going over the cases, which may be found collected in any systematic treatise on legacies, it may be safely laid down, that the whole doctrine which declares that an advancement to a child is a satisfaction of a legacy in a will antecedently executed, proceeds upon the presumption that payment, and not a fresh gift, was intended by the testator. This presumption may be overcome by evidence that such was not the intention, and when such evidence is offered it may be answered by other evidence of the same character. "The whole question" said Lord Chancellor Cottenham, "is one of intention;" thus re-affirming a position which Lord Thurlow had laid down nearly fifty years before (*Powys v. Mansfield*, 1837, 3 Myl. & Craig, 359).

The defendants in this case rely upon evidence of the actual intention of the testator. and such evi-

dence being of the most authentic character and entirely satisfactory, it is unnecessary, either, to examine the ground upon which that doctrine, the policy of which has been sometimes questioned, stands. It has never been denied that the intention of the testator, that a gift *inter vivos* should satisfy a legacy, when once established, must prevail; though it has been doubted upon plausible grounds whether the reasoning, by which the doctrine of presumed satisfaction arising out of the relation of parent and child has been supported, was not too artificial and refined (*Ex parte Pye*, 18 Ves. 151; Story's Eq. Jur. § 1118). But I have not met with any case, English or American, in which the existence of the doctrine has been denied.

The same principle was laid down in *Sims v. Sims*, 2 Stockton's Ch. 158, and *Clendenning v. Clymer*, 17 Indiana, 175, 179, and is as well established under the American decisions as it is in England; *Miner v. Atherton's Exor's*, 11 Casey, 528; *Gill's Estate*, 1 Parson's Eq. 139. In *Roberts v. Weatherford*, 10 Alabama, 72, a father bequeathed ten slaves to his daughter, and all the rest to his wife. These bequests were of quantity, and not specific. He afterwards, on his daughter's marriage, conveyed ten slaves by deed, in trust for her separate use. Goldthwaite, J., said, that the case was manifestly one for the application of the rule, that where a parent bequeathes a legacy to a child, and afterwards in his life-time gives

a portion, or makes a provision for the same child, it will be presumed to be in view of the legacy, although it be not so expressed, wherever it is equal to, or exceeds the amount of the legacy, is certain and not contingent, and is of the same nature. The presumption was corroborated in the case under consideration by the testator's declarations, but would arise independently of these from the substantial identity of the gifts.

Slight differences between the bequest and the gift or advance, will not exclude the presumption, or even those which are material, if it appears that the benefit which the testator conferred in his lifetime, was intended as a portion or advancement, and was therefore presumably a fulfilment of the purpose expressed in the will. Thus, an advance to a husband may satisfy a legacy to a wife, or a settlement on a married woman and her children preclude her from enforcing a previous bequest to herself, *ante*, 756; see *Lloyd v. Harvey*, 2 Russell & Mylne, 310; *Paine v. Parsons*, 14 Pick. 103. It is, nevertheless, observable that these decisions were made at a time when the personal property of a *feme covert* vested absolutely in her husband, or might be reduced to possession by him, and they would not necessarily be followed now that her rights are not less distinct than his.

It also has been held that a limitation over on a bequest for life, is satisfied if the amount be advanced to the first taker, because the ademption of the foundation in-

volves that of the superstructure; *Garrett's Appeal*, 3 Harris, 212; but this argument is questionable, and goes beyond the ground taken in *Kirk v. Eddowes*, 3 Hare, 509; *ante*, 756.

It seems, nevertheless, that where the gift over is contingent, or to the descendants of the first taker as a class, it may be adeemed by an advance to him during the testator's life; see *Hine v. Hine*, 39 Barb. 507; *Kirk v. Eddowes*, *post*, 790.

In *Hopwood v. Hopwood*, 22 Beavan, 728, a father made his will, giving to each of his three younger children 5000*l.* One of his younger sons, F., married. On that marriage the father entered into a covenant that he would cause the sum of 5000*l.*; with interest, to be paid to the trustees of the marriage settlement within twelve months after his death. By a codicil made after the date of this settlement, the testator recited what he had given by his will to each of his two younger sons, and directed his trustees to raise "a further sum of 7000*l.* for each of them, and to hold such further sum on the same trusts as those of the 5000*l.*" The testator afterwards raised a sum of 5000*l.* with which he purchased a lieutenant colonelcy in the Guards for his other younger son, H., and he then made a codicil declaring that this sum, so laid out, was to be taken by H., in satisfaction of the legacy given him by the will. The court held, reversing the decree of the Master of the Rolls, that the circumstances did not rebut

the presumption that the covenant was in satisfaction of the 5000*l.* given by the will to F. Lord Kingsdown said in delivering his opinion in the House of Lords, "that a covenant to settle a sum of money upon a child, is as much an ademption of a prior bequest as if the amount were actually paid. By providing a portion for the child in a different form, the father indicates his intention that the child shall not receive the portion which has already been bequeathed. It is not merely that the child shall not take both; he has no option which he shall take. The father is presumed to have substituted the provision by deed for the provision by will, and from that time the legacy is at an end. It is not necessary that the legacy should be paid in order that it may be adeemed. It is sufficient that if the testator has done that which in the opinion of the court shows an intention that it shall not be paid."

These remarks were cited and approved in *Miner v. Atherton's Ex'ors*, 11 Casey, 528. It would, nevertheless, be erroneous to infer that the ademption results from a change of purpose. The bequest is not adeemed because the testator has changed his purpose, but because the gift fulfils the purpose of the bequest.

In *Miner v. Atherton's Ex'ors*, 11 Casey, 528, a father gave a legacy of \$1400 to a minor daughter, and afterwards executed a bond to a trustee conditioned for the payment of \$30 annually for her use during his lifetime, and the sum of \$1400 after his de-

cease. It appeared that the bond was voluntary, but there was no evidence that the testator had expressed an intention to adeem the legacy. The court held that payment was not requisite to the ademption of the legacy; it was enough that the testator entered into a covenant to afford a benefit of a like kind and equally beneficial, after his death. Slight differences would not prevent the presumption from attaching, especially where, as in the case in hand, the change was in favor of the legatee, and consisted in the substitution of an absolute or irrevocable undertaking for a testamentary provision. Read, J., said: "A legacy by a father to a child is understood as a portion, because it is a provision by a parent for his child. If the father afterwards advances a portion for that child, it will be an ademption of the legacy, in whole or in part, as the advancements are larger, or equal to, or less, than the testamentary portion. And this may be the case, although there is a wide difference between the limitations of the portion under the will, and the limitations of the portion under the settlement;" *Lord Durham v. Wharton*, 3 Clark and Finnelly, 146. * * * "There is no doubt on the face of the will that the legacy to his daughter is a portion, and it seems equally clear that the bond securing the payment of exactly the same amount, with interest, within one year after his decease, was substituted for the testamentary provision, and of course the latter was adeemed."

The case stands simply on the like effect of the will, and the bond, without parol evidence to rebut the presumption, which must consequently prevail."

In *Lloyd v. Harvey*, 2 Russell & Mylne, 310, the testator on the marriage of his daughter Louisa, settled the sum of 5,000*l.* in trust on her husband for life, and after his decease, if she should survive him and there should be issue of the marriage, the trustees were to pay one thousand pounds to her, and apply the remainder to the use of the children of the marriage, but if there were no children, they were to pay the widow £2,000, and the residue of the £5,000 to the husband's executors and administrators. The testator subsequently bequeathed £5,000 to his daughter in addition to the sum which had been secured when she married; and five years afterwards, by indenture, covenanted to pay £5,000 to the persons designated as trustees in the settlement, for the trusts therein declared.

The only question was whether the £5,000 mentioned in this indenture, was a satisfaction of the same sum given by the will. It was proved that the testator stated in a conversation with a third person, who was called as a witness, that it was his intention to distribute his property equally among his children; that he entertained the same affection for each of them, and meant that they should all take alike. The Master of the Rolls said it had been insisted that as the testator's daughter Louisa, or her husband in her

right, would have taken the legacy of £5,000, unfettered by the trusts of the settlement, it could not be adeemed by the £5,000 given by the indenture, subject to those trusts. The soundness of this argument was questionable, because both sums were additions to the daughter's portion, and designed to provide for the family of which she was a part, and it was doubtful, under *Trimmer v. Bayne*, 7 Vesey, 508, whether the difference between her interest in the two gifts was such as to exclude the presumption against double portions. If, however, that presumption did not attach, there was still enough to show that it was not the testator's intention to give both amounts. The will itself indicated that he intended that all his children should partake alike, and his declarations to that effect were admissible, not on the ground of fortifying or repelling a presumption, but as extrinsic evidence that he did not mean to make a twofold provision for his daughter Louisa.

In *Paine v. Parsons*, 14 Pick. 313, a father bequeathed the sum of \$268 to his daughter, "to be paid at her marriage in money or such articles of personal estate, at cash price, as she may choose." The daughter married one Childs, when the testator gave her certain articles and money, and charged her with that amount in his books. He afterwards paid her \$50, and took a receipt from her husband as for so much received on account of her portion, and also accepted and paid an order drawn on him by Childs for a small amount, and

pinned the draft in his receipt book. The testator subsequently executed a codicil containing the following bequest, "I further give my daughter Sallie \$100, in addition to what I have before given her," and declared not long afterwards that he had paid all the legacies in his will except that to "Sallie," on which he still owed \$150. It did not appear that Childs or his wife was present when this was said, or that it was communicated to them; but Childs received \$150 from the testator shortly before his death. The court said, that it appeared from the charge in the testator's books, and the other evidence, that the money paid to the daughter on her marriage, was by way of portion or advancement, and if so, it necessarily operated as a satisfaction *pro tanto*. The same remark applied to the money for which the testator had taken a receipt. There might be more doubt as to the order, but as the testator fastened it in his account book among other vouchers, it was evidence of his intention to treat it as an advancement, and it must be so considered. The constructive republication of the will by the codicil, did not rebut the inference in favor of ademption, and merely showed that the testator intended to add \$100 to the previous bequest, and not that he meant to disturb or invalidate the payments which had been already made to the legatee. Judgment was then entered against the legatee, without adverting to the question whether the \$150 paid to

Childs after the execution of the codicil, did or did not operate as satisfaction.

An advancement may operate as an ademption of a bequest, although it is put in the form of a loan, and the note or bond of the legatee taken for the amount; *Hine v. Hine*, 39 Barb. 507; *Richards v. Humphreys*, 15 Pick. 133; *Garrett's Appeal*, 3 Harris, 212. In *Hine v. Hine* the testator bequeathed to his executors \$1600 in trust, to purchase a farm for the benefit of his son, Orlando Hine; the title to be held by the executors for three years, and then conveyed to Orlando, or in the event of his death to his heirs. The testator had several children, and the will contained a recital that each of them was to have \$2,000 as his share of the estate, and that Orlando had already received \$400 on account. He subsequently advanced \$1500 to his son, to aid him in paying for a farm, and took a receipt in these words: "Received of Elkanah Hine, \$1500 to make payment of the farm I got of Norman Baker, which money I am to account for without interest (signed) Orlando Hine." It appeared in evidence that Orlando applied for the \$1500 on account of his portion, that the testator gave it to him at such, and that they both spoke of it subsequently as part of the amount bequeathed in the will. Allen, J., said: "Where a legacy is given for a particular purpose specified in the will, and the testator, during his life, accomplishes the same

purpose, or furnishes the intended legatee and beneficiary with money for that purpose, the legacy is satisfied. (1 *Roper*, 365; *Debeze v. Mann*, *supra*; *Rosewell v. Bennett*, 3 Atk. 77; *Carver v. Bolles*, 2 R. & M. 301; *Trimmer v. Bayne*, 7 Vesey, 508.) In this case the purpose and object of the legacy, as expressed in the will, and the purposes for which the money was given by the testator, in his lifetime, were the same, to wit: to do for his son Orlando what he had done for each of his other sons, aid him to the amount of two thousand dollars in the purchase of a farm. The provision for the family or heirs of Orlando was incidental and contingent, and gave to the plaintiffs no vested right in the portion. The reference to the heirs of Orlando in the will, and in the provisional arrangement for a conveyance of the farm to them by the executors, in case of the death of Orlando before he should become entitled to the conveyance, is no evidence of an intent on the part of testator to give to Orlando the sixteen hundred dollars as a bounty, in addition to his portion. In *Carver v. Bolles* (*supra*), the portion by will was secured to the children of the legatee (a daughter) after her death, she having but a life estate in it, and yet it was held adeemed by an advance of a large part of the amount to the daughter, absolutely upon her marriage, and the conveyance of the residue upon the trusts of the marriage settlement, differing entirely from the trusts of the will. The testator,

in framing his will, sought to make the legatee equal with his other daughters, whom he advanced in like amounts upon their marriage, and this intent was fully carried out by the provision upon the marriage. So here the prominent idea was equality among the children, and that was accomplished by the advance after the making of the will, to aid Orlando in purchasing a farm. The Court does not inquire whether the portion by the will is entirely and absolutely to the child, or whether the subsequent advance is in the precise form indicated by the will. The advancement not being a performance of a covenant or satisfaction of a debt, it is presumed to be a satisfaction of the portion, although differing in some of the circumstances from the provision of the will. (See per Lord Eldon, in *Trimmer v. Bayne*, *supra*.) A stricter rule is observed as to the satisfaction of a covenant or debt. (*Clark v. Sewell*, 3 Atk. 98; *Monck v. Monck*, 1 Ball & Beat. 304; *Sparks v. Cator*, 3 Ves 530.) The presumption upon the will was that the advancement was intended in satisfaction of the portion, and the onus was upon the plaintiffs to overcome that presumption by showing a different intent. Parol proof was competent, not to vary the terms of the will, but to establish the acts and intents of the testator, either in behalf of the plaintiffs in rebutting the presumption of satisfaction, or of the defendants in reply to such evidence in support of the alleged satisfaction. (*Langdon v. Astor's Ex'rs*, *supra* ;

Williams v. Crary, 4 Wend. 443; 2 *Williams on Executors*, 827.) The note or receipt taken upon the advance of the principal sum, rather strengthens the presumption contended for by the defendants. It was an acknowledgment of the receipt of fifteen hundred dollars which Orlando was "to account for without interest." Orlando had been intemperate and imprudent, and the very form of the voucher indicates, not a loan, but an advance in a way to give the donor a control or influence to some extent over the son, in place of that absolute control which the executors were to have in the use and appropriation of the legacy for his benefit. The purpose of the father was not to make the son his debtor, but by a discreet and prudent advance of the portion during his own life, to encourage and help on the unfortunate son, and enable him to provide for himself and family, and dispense with the tutelage of the executors. There was no provision to pay, or terms of payment fixed, and no security asked or given. It was an advance of a trifle less than the portion, and for the same purposes for which the portion was set apart and appropriated, and the voucher taken in reference to it, and the accounting, in the minds of the parties, was an abatement of the legacy *pro tanto*. All the circumstances and acts, as well as the declarations of the parties, confirm this view of the case, and the judgment of the referee must be affirmed with costs."

In *Garrett's Appeal*, 3 Harris, 212, Elizabeth Garrett bequeathed \$800 in trust, to pay the income yearly to her son, and the principal to his children at his death. She subsequently lent him \$640 and took his bond. The instrument was found among the papers of the testatrix after her death, with the following indorsement in her handwriting: "This is not to be collected, but is a part of my son's portion, and stands against him only for that purpose. Signed Elizabeth Garrett." She subsequently by a codicil to her will, increased the bequest in his favor to \$1000. Coulter, Justice, said, that it appeared indubitably from the memorandum left by the testatrix, that the amount of the bond had been advanced by her to the legatee as a portion, and was not to be collected. It followed that the legacy was adeemed or satisfied to that extent, not only as it regarded his life interest, but as to that of the remainder-men; the amount which was to have gone to them, having been appropriated absolutely to the life tenant. The codicil did not vary the case, except by augmenting the balance to which the legatee would be entitled after deducting the \$640 which he had received on account.

The presumption does not extend beyond the parental relation, to persons however near or dear, for whom the testator is not under an obligation to provide, or even it is said to a wife or grandchild; and hence a legacy to such a one will not be adeemed by a subsequent advance, *ante*, 773. Agreeably

to this view, if one who has bequeathed \$10,000 to his wife, and a like sum to his son or daughter, gives that amount to each of the legatees, the wife's claim under the will continues, while the child's is at an end, *ante*, 774. Such a result would scarcely be anticipated by any man who was not versed in this branch of the law, and is calculated to disappoint intention rather than effectuate it. The true exit from the difficulty seems to lie in regarding the presumption as one of fact, which at the most shifts the burden of proof, and leaves the court free to decide according to the truth. See *Powell v. Cleaver*, 2 Brown C. C. 499.

In *Powell v. Cleaver*, the testator left his niece a legacy of £6,000 which, was not designated or described in the will as a portion. He subsequently on her marriage gave her £5,000, and also conveyed an annuity to her use. It appeared from the marriage settlement, and from his books, that these advances were intended to be in full of her share or portion of his estate. Lord Thurlow said, "the question of ademption as between parent and child is a presumption of evidence only, not a legal presumption as to its being considered as the payment of a debt, because the law does not compel the parent to give the legacy." * * * * * Did the advancement of £5,000 on the marriage of the defendant adeem the legacy wholly or *pro tanto*? * * * "A legacy *prima facie* is presumed to be a bounty to the legatee, and must stand as such

donec probetur in contrarium The word portion, although applied in the case of a parent, shall not be so applied to the gifts of other relations or friends. It has been determined not to extend to a grandfather. Whatever foundation there might be for the original application of the rule, that the advancement of a parent shall not be a further gift, it is not now to be disputed, but it is obvious that the intent of the testator is as often disappointed as served by it. Those cases stand on their own ground; this case is an attempt to make a friend's legacy satisfied by a subsequent advancement. There are cases where a man may describe himself so that the gift by the will, and that in his lifetime, may be presumed to be intended for the same purpose, but it must appear that he meant to put himself in *loco parentis*; for there are no cases where it has been so held, if the second gift appeared to be *diverso intuitu*. I have gone through all the cases, and it appears to be the result of them, that where a stranger gives a legacy by will, and afterwards gives a sum without any evidence that it is intended for the same purpose, it is not taken as satisfaction; to make it so, it must appear at the time of the gift to be meant as an ademption of the legacy."

The turning point in this instance seems to have been, that the legacy was not described as a portion in the will, and could not be presumed to have been so intended, in the absence of extrinsic evidence to that effect and where there was no parental obligation;

and hence the designation of the subsequent gift as a portion, did not show that it was identical with the testamentary provision, or a fulfilment of the purpose therein expressed.

It is established, under the principal case, that one who takes on himself the duty of providing for another as if he were his child, is so far in the position of a parent, that a legacy from him to the subject of his care, may be regarded as having been designed to fulfil the obligation which he has thus assumed, and will consequently be adeemed or satisfied by a subsequent gift of a like kind.

Such an intention may be expressed in the will itself, or deduced extrinsically from the testator's declarations, or from his conduct in caring for the legatee, and affording him the means of support directly, or through an intermediate channel, *ante*, 770; see *Gill's Estate*, 1 Parson's Eq. 139.

In *Gill's Estate*, the testator executed a codicil, bequeathing \$3000 in trust for his niece, Ann Matilda Campbell, with a proviso that if she should marry, the amount might be laid out in furniture for her sole and separate use. The legatee was one of several children of a deceased sister to whom he had previously devised his estate in equal shares, by a will which contained a declaration, "that no loans or advances made to any of my aforesaid nieces, shall be charged against them, or the bequests and devises in their favor, unless, and only so far as

charges therefor shall appear on my book."

On the marriage of Miss Campbell, to Miller, which took place during the testator's life, he expended \$2383 in furnishing her house, and debited her with that amount in his account book. It was also in evidence, that he had promised his sister to care for her children as for his own, and that his acts and declarations were such as to show that he intended to fulfil the obligation. King, P. J., said, "Lord Eldon observes in *Ex parte*, Pye, 18 Vesy, 140, 'that, where a father gives a legacy to a child, the legacy coming from a father to his child must be understood as a portion, though it is not so described in the will; and afterwards advancing a portion to that child, though there may be slight circumstances of difference between the advance and the portion, and a difference in amount, yet the father will be intended to have the same purpose in each instance, and the advance is therefore an ademption of the legacy; but a stranger giving a legacy is understood as giving a bounty, not as paying a debt; he must, therefore, be proved to mean it as a portion or provision either on the face of the will, or, if it may be, and it seems it may, by evidence, applying directly to the gift proposed by the will.' See *Elkenhead's case*, 2 Vernon, 257; *Ward v. Lont*, Prec. in Chan. 182; *Watson v. Lord Lincoln*, Amb. 325. The presumed ademption may be destroyed or confirmed by

the application of parol evidence of a different intention by the testator; *Biggleston v. Grubb*, 2 Atk. 48; *Ronnell v. Barnett*, 3 Id. 77; *Trimmer v. Bayne*, 7 Ves. 508; *Robinson v. Whitely*, 9 Id. 577; *Thelluson v. Woodford*, 4 Madd. 420. This doctrine equally applies where the testator has placed himself in *loco parentis* to the legatee. Where the testator's assumption of the office of a parent is established, his legacy will be considered a portion, and a subsequent advancement will be an ademption in all cases where it would be so if made by a natural father.

“In the extensive class of cases on this doctrine to be found in the Equity Reports, the chief difficulty in its application seems to have arisen from the inquiry, what are circumstances sufficient to invest the testator with the assumed relation of parent to the legatee; and the evidence competent to prove that he placed himself in such character? Roper declares the test in such cases to be, whether the circumstances taken in the aggregate amount to moral certainty, that a testator considered himself in the place of the child's father, and as meaning to discharge that natural obligation, which it was the duty of a parent to perform.

“The assumption by a person of the relation of a parent to the legatee may be proved by parol, and is not required to be collected from the face of the will itself. The facts existing in this case, clearly show that the testator placed himself in that relation to

the children of his sister, Mary Campbell. On the clearest principles, therefore, the advance for furniture to Mrs. Miller must be regarded as an ademption of her legacy of \$3000, to the extent of such advance. The legacy was given chiefly to purchase for her, on her marriage, household furniture; and the money advanced was used for that purpose. So far, I agree with the auditor. But, in stating the account, he has credited Mrs. Miller with the legacy of \$3000, and debited her with the furniture; the result is, that her portion exceeds those of her brothers and sisters, \$3000; who, while they are charged with advances made to them, have no such special bequest given. Their advances come from the respective fifth parts of the general residue, while that of Mrs. Miller remains intact, being taken from the special legacy given by the codicil of June, 1842, for the purchase of furniture on her marriage. The ademption of a legacy is more properly speaking its extinguishment; see *Blackstone v. Blackstone*, 3 Watts. 337; and if, as has been shown, the advance made to her for furniture, operates as such ademption, it as effectually extinguishes the legacy to the extent of such purchase, as if it had been ever so formally cancelled and revoked. Instead, therefore, of considering Mrs. Miller as a special legatee of \$3000, in addition to her bequest of one-fifth of the residue, the auditor should have stated her account on the basis of her being a special legatee to the

extent of the difference between the sum of \$2383.44, the amount of the portion to her for the purchase of furniture, and the \$3000 bequeathed to her for the like object. This works perfect equality among the adopted children of the testator; an object he had manifestly at heart. She then stands like her sisters, who had advances made them for similar purposes. They are charged with such advances, and so will she be. That this was the intention of the testator, is not only clear from the clause in his will which directs all loans and advances made to the children of his sister, Mary Campbell, appearing in his books, to be charged against them; but from the fact, that the entry against Mrs. Miller, is actually made after the date of the codicil, giving her the special legacy of \$3000, for furniture after her marriage. The radical error of the auditor, consists in his having given Mrs. Miller credit, in settling the account of the legatees of John Gill, for a bequest which had no existence, and which was *extinguished*, this being the true idea conveyed by the technical phrase adeemed; *Blackstone v. Blackstone, supra*. If John Gill, when he purchased the furniture for Mrs. Miller, had, besides charging the sum expended for it against her, by a codicil declared his previous bequest of \$3000 revoked to the extent of his purchase, could this cancelled legacy be credited to her? Now the effect of the advance made by him is equivalent to such a formal revocation, and Mrs. Miller stands

subject to the general direction of the will, which makes her chargeable with advances made to her, appearing on the testator's books."

The opinion expressed in this instance that Mrs. Miller was to be charged with the advance without being credited with the bequest, seems to have arisen from a failure to distinguish between *ademption* in the proper sense of the term, and *revocation*. A legacy which is revoked, is as if it had never been, and must consequently be left out of any account which it may be requisite to state, between the legatee and the executors. A bequest is *adeemed* by an advancement not because of a change in the testator's purpose, but because the advancement fulfils the purpose of the bequest. The proper mode, therefore of ascertaining the balance is to deduct the amount actually received, by the legatee, from the sum total of the bequests.

Agreeably to the English authorities, a grandfather does not stand in the relation of a parent, and a gift from him to his grandchildren will not *adeem* a bequest in his will, *ante*, 775. An opposite opinion has been intimated in some of the American decisions, on the authority of Story's *Eq. Jurisprudence* see *Langdon v. Astor's Ex'rs*, 3 Duer; 16 New York, 9; *ante*, 784, *Clendenen v. Clymer*, 17 Indiana, 175; and although the point was not determined in these instances, the view taken by the court is sustained by the analogy of the cases, which establish that a voluntary covenant in favor of a

grandchild may be specifically enforced. Vol. 1. 444. Whatever may be thought on this head, it is altogether reasonable to infer that less may suffice to indicate the assumption of a parental obligation between near relatives, than in the case of a stranger, and such is the inclination of the authorities. See *Monck v. Monck*, 1 Ball & Beatty, 303; *Gill's Estate*, 1 Parson's Eq. 139, *ante*.

According to the former course of decision, the court would not presume that a legacy of a residue or other indefinite amount, had been satisfied by an advancement, because the testator might be ignorant whether the benefit which he was conferring equalled that which he had already willed; *Free-mantle v. Banks*, 5 Vesey, 85, *ante*, 758; and the law was so held in *Clendening v. Clymer*, 17 Indiana, 155, on the strength of this case and of Story's Equity Jurisprudence, sect. 1115. These decisions seem to have been influenced by the idea, which was discarded in *Pym v. Lockyer*, 5 Mylne & Cr. 29, that satisfaction must necessarily be in full; and it is now established in England, that if a residuary bequest and subsequent advancement are both made to a child, and therefore presumably intended as a portion, the legacy is adeemed wholly or *pro tanto*, *ante*, 758; *Montfiore v. Guedella*, 1 De Gex, F. & J. 93.

In *Montfiore v. Guedella*, 1 De Gex, F. & J. 93, the testator bequeathed 3000*l.* to his son Haim Guedella, absolutely, and also one-third part of his residuary estate,

in trust for him during his life, and after his decease for his issue. After the date of the will, Haim married, and the testator settled 2,000*l.* bank annuities in trust for him and his wife, and after their decease upon their offspring. The question was whether the settlement was an ademption of the pecuniary legacy to Haim Guedella, or of the residuary bequest. The Lord Chancellor said "the question remains whether the ademption shall be from the residue, or from the legacy of 3,000*l.* Instead of ademption, it would more properly be called substitution, or an advance by the testator in his lifetime, instead of payment by his executors. Then for what shall the advance on Haim's marriage be considered as substituted *protanto*. I say, for that which it most nearly resembles. The advance and the residuary bequest were almost homogeneous, the trust being substantially the same for the benefit of Haim and his children. On the contrary, the legacy for 3,000*l.* was an absolute gift which Haim was to receive for his own exclusive benefit. While it was strangely supposed that there could not be an ademption *pro tanto*, there might be some color for giving weight to the argument arising from the alleged uncertainty of the amount of the residue. But after the decision in *Pym v. Lockyer*, establishing that there may be ademption *pro tanto*, the cases relied upon to show that there is a distinction on this subject between a bequest of a specific

amount, and a bequest of a residue, are left without any reasonable support. It follows that the testator's intention must be presumed to have been, that Haim should receive the full amount of the legacy of 3,000*l.*, and that the advance on his marriage was part of the provision for him and his children, which was contemplated in the residuary bequest."

Turner, L. J., added "that the question whether a gift does or does not operate as an ademption or satisfaction, must depend upon the intention, and although the uncertainty incident to a residuary bequest may influence the result, it is not decisive."

In *Clendening v. Clymer*, the testatrix bequeathed to her daughters, Cynthia Clendening and Olinda Bills, three hundred dollars each, and directed that the residue of her estate should be distributed equally among them, and her other children. She subsequently, and within a few days before her death, gave the said Cynthia and Olinda a full share of her estate, with a distinct agreement, that the advance thus made should be in discharge of the bequest. It was held that the pecuniary legacies must be presumed to have been satisfied, but not the residuary bequests, and that in the absence of such presumption parol evidence was inadmissible to show the intention with which the advancements had been made and received. The court relied for both points on the authority of *Freemantle v. Banks*, where Lord Loughborough

declared that the presumption might be rebutted or corroborated, but not founded by parol. The evidence which was there shut out consisted of declarations subsequent to the gift which was alleged to have been satisfied, and which do not appear to have been known to the legatee, and the decision cannot be regarded as establishing that a payment or advance, on the faith of an express or implied agreement that it shall be in full of a testamentary provision, will not preclude the recipient from insisting that the bequest shall be carried into effect by the executors.

It was declared in like manner in *Clarke v. Jetton*, 5 Sneed. 229, that the presumption of ademption does not arise where the bequest is of a residue or part of a residue, or where the amount is uncertain from any other cause, and it was said to follow that a gift by deed of certain slaves to one of the testator's daughters, did not adeem her right under a provision in his will that his slaves and other personal property should be divided into nine equal parts, and distributed among his children.

It is conceded that a gift will not give rise to a presumption of satisfaction, unless it is *ejusdem generis* and substantially the same in all material particulars. A pecuniary legacy will not therefore be satisfied by a subsequent conveyance, without proof that such was the testator's purpose; nor a devise by such a legacy; nor will a deed for one tract of land adeem a devise of another; see *Weston v.*

Johnson, 41 Indiana, 1; *Dugan v. Hollins*, 4 Maryland, Ch. 439. So in *Holmes v. Holmes*, 1 Brown, C. C. 553 a legacy of £500 was held not to have been satisfied by a gift of the testator's stock in trade, although worth thrice the sum bequeathed.

In *Swoope's Appeal*, 3 Casey, 58, the testator devised his farm to his son, and \$900 to a married daughter, with a proviso that if he should make any advance to his children, it should be deducted from their respective shares. He subsequently purchased a house and two lots of ground professedly for the use of his daughter Sarah, and put her and her husband in possession, but without giving them a deed. Woodward, J., said, that where a parent bequeathes a legacy to a child, and afterwards gives a portion *ejusdem generis* to the same child, if there be nothing on the face of the will, and no circumstances in proof to indicate an intention to give a double portion, the legacy will be satisfied wholly or *pro tanto*. Had the intended gift been perfected by a conveyance, the case would not have been within the rule, because the house and lot were not of kin with the pecuniary legacy, and could not satisfy it. But there was no such deed, nor any parol evidence that would enable a court of equity to supply the defect.

In applying these decisions, it should not be forgotten that the presumption arising from the parental relation does not lose its weight, because the portion is not of the same nature as the legacy,

although the inference of satisfaction will not be drawn, under such circumstances, without some additional proof the testator's purpose. The doctrine of *Ex parte Pye*, is one of good sense and natural justice, founded on the presumption that a father in distributing his property by will among his children, means to give each of them the amount which he ought to have, in view of the claims of all, and therefore that if it becomes necessary or expedient to make an advance to any one of them, to enable him to marry or establish himself in business, the amount so given should be deducted from the bequest, in order not to disturb the apportionment. It may therefore be contended that the mere circumstance that the advancement is not *ejusdem generis*, should not exclude the rule, and we may ask why if a gift of a thousand dollars will satisfy a legacy of that amount, it should not equally be satisfied by a donation of land or of chattels of the like or a greater value; see *Pym v. Lockyer*, 5 Mylne & Craig, 27, 42, 44.

The just inference from the decisions seems to be that where the advancement is not of the same nature as the legacy, the court will not presume that it was intended to operate as satisfaction, but that if it appears from the testator's entries or declarations that he meant the gift to be in lieu of the bequest, the legatee will at least be put to his election, and cannot demand both consistently with equity and good conscience. Such must

obviously be the result, where the testator's purpose is communicated to the legatee and assented to by him, and the legacy will then be satisfied by the implied agreement without regard to the kind or value of the gift.

In *Jones v. Mason*, 5 Randolph, 577, the testator devised his plantation and thirteen slaves by name to his son Robert. When Robert came of age, his father put him in possession of the plantation, and with it gave him the number of slaves bequeathed, substituting three of inferior value for those designated in the will. The case was held to be within the principle that "a gift to a child satisfies an antecedent legacy of the same kind." It was contended that the thing given must be *ejusdem generis* with that bequeathed, and that "no case could be produced where a legacy of a specific thing, had been adjudged to be adeemed by the gift of another specific thing." The court said in delivering judgment. "This whole class of cases depends upon the intention, and a difference of kind is important only as bearing on that point. If a man bequeaths to his child \$1000, and afterwards makes to that child a deed for a tract of land, and declares therein that it is in satisfaction of the legacy, all will agree that the legacy is adeemed. In *Hoskins v. Hoskins*, Prac. in Chanc. 263, a father gave his son 750*l.* in his will; afterwards he bought him a cornet's commission, which cost 650*l.* It was decided that this 650*l.* should be a satisfac-

tion *pro tanto* for the 750*l.* If it be said that it was so decreed, because it was in proof that the testator intended the 650*l.* should be discounted out of the legacy and meant to have struck so much out of his will, but died before the accounts came from London, I answer, it still shows that intention is everything; *ejusdem generis*, nothing. For no one will contend that the commission in the horse was *ejusdem generis* with the 750*l.* In *Chapman v. Salt*, 2 Vernon, 646. S. devised 50*l.* to Mary, the wife of L.; afterwards the testator gave L. a note for 50*l.* payable on demand. Objected that the note was to one, the legacy to another. If the wife survived, she should have the legacy, and the executors of the husband, the note. But it was proved that the note was intended as satisfaction of the legacy, and the bill was dismissed; showing that intention is everything.

"It is laid down generally that a residuary legacy will not adeem a portion due under a settlement, because it is entirely uncertain what that legacy may be. But this rule like the rest, yields to intention; *Rickman v. Morgan*, 1 Bro. Ch. case 63; 2 Bro. Ch. case 394. The last case I shall cite is *Bengal v. Walker*, 15 Ves. 507, where it was decided that a bequest of a share in powder works, charged with an annuity of 20*l.* for life, was a satisfaction of a portion of 2000*l.* This certainly was not *ejusdem generis*. But the rule yielded to clear intention. Upon the whole, we are clearly of the opinion that the

plaintiff, has no claim to Moses, Harry, and Sam, the legacy being adeemed by the subsequent gift."

There is little doubt under the authorities, that a pecuniary legacy may be adeemed by the expenditure of money in purchasing goods or land for the use of the legatee, or to establish him in business; and such is certainly the rule where the outlay is made at his request. See *Gill's Estate*, 1 Parsons' Eq. 139; *Hauberger v. Root*, 5 Barr, 108. In like manner when the testator bestows value in any form on the legatee, and charges him with the amount as cash, the gift is so far *ejusdem generis* with a bequest of money, that it may operate as an ademption.

In *Moore v. Hilton*, 12 Leigh, 1, the testator directed his real estate to be sold, and the proceeds equally divided among his children. He subsequently purchased various articles for the use of one of his daughters, and charged the amount to her in his books as an advancement, with a memorandum of his wish that it should be deducted from her share of the estate. It was held that if the advance was not *ejusdem generis* with the bequest, it had still been given on account of the portion of the legatee, and consequently operated as satisfaction.

Ademption may be of the entire bequest, or merely partial. It is entire where the testator carries his whole purpose into effect in his lifetime, partial where part only is performed, and the rest left for his executors. If one who has bequeathed a sum of money to

build a dwelling for his son, erects the house in his lifetime, although on a different or smaller scale, the whole bequest is adeemed; but if he were to die before the building was completed, it would clearly be the duty of his executors to finish it. In like manner, whether a gift of a sum of money by a father to a child as an advancement, adeems an antecedent pecuniary legacy to the same child wholly or *pro tanto*, depends *prima facie* on the amount of the gift as compared with that of the bequest. See *Miner v. Atherton's Ex'rs*, 11 Casey, 528, *ante*, 787.

It was, notwithstanding, held at a former period, that in the case last supposed, ademption must be in full. If one made a bequest in pursuance of a parental obligation, and subsequently gave a portion to the legatee, although less in amount, the legacy was at an end. See *Richards v. Humphreys*, 15 Pick. 133, 136. This opinion was founded upon the idea that "the gift of the portion manifested the will and intent of the testator, who is the sole disposer of his own bounty, to reduce the amount of the provision originally contemplated when he made his will," and thus operated as an implied revocation of the bequest. But it is now settled that giving a portion or advancement does not necessarily adeem or defeat a previous legacy. See *Pym v. Lockyer*, 5 Myl. & Cr. 89. It was there contended that a provision made by will for a child would be wholly adeemed by a subsequent receipt of a smaller sum as a portion, but

Lord Cottenham said that if the rule were pushed to that extent, it would be contrary to common sense, and subversive of intention; and it was accordingly determined that "the advancements were adempptions *pro tanto* only, of the legacies before given."

The question, nevertheless, depends on whether the whole purpose of the legacy is fulfilled by the gift. That purpose as between parent and child, is presumed to be that the child shall have his just share of the parent's property. If a father, after making a testamentary provision for a son, determines, in view of the altered state of his family or circumstances, that a smaller sum is all that he can give consistently with the other claims on him, and bestows that amount on the son as his portion, the object of the bequest is attained, and ademption is a legal inference. Thus qualified, the principle laid down in *Richards v. Humphreys*, is sound, and consistent with the judgment in *Pym v. Lockyer*.

Whether the intention that a portion or advancement to a child shall be in full of his share of the estate, and consequently a valid ademption of a larger bequest, must appear from the words or instrument of gift, or may be deduced from the donor's entries or declarations, seems to be still doubtful under the authorities; *post.* See *Langdon v. Astor's Ex'rs*, 16 N. Y. 9; *Powell v. Cleaver*, 2 Brown C. C. 499.

Whatever may be thought on this head, it is clear that as a debt

which is payable on a contingency, or not yet due, may be satisfied by the acceptance of a smaller sum; 1 Smith's Lead. Cases, 7 Am. ed., the same rule must apply to a legacy which depends on the testator's pleasure, and that if the legatee receives value to any amount, however small, with a distinct understanding that he shall not claim under the will, the implied agreement may be enforced specifically by a court of chancery. See *Kirk v. Eddowes*, 3 Hare, 509, *ante*, 768.

ADEMPTION WHERE THE TESTATOR IS NOT UNDER A PARENTAL OBLIGATION.—It results from what has been said, that the burden of proof is on him who alleges that a gift from one who does not hold the relation of a parent, is an ademption of an antecedent testamentary provision, and he must show that the bequest was made for some special end or purpose, which has been accomplished by the gift; see *Powell v. Cleaver*, 2 Brown, Ch. 499, *ante*, 792. *Pankhurst v. Howell*, 6 L. R. Ch. Appeals, 136. In *Pankhurst v. Howell*, the testator left his wife a legacy of £200 to be paid within ten days after his decease, and subsequently during his last illness, gave her £200 in response to her request for a sum of money which she could control immediately upon his death. Sir W. M. James said, "that where the testator stands, neither in the natural nor assumed relation of a parent to the legatee, the legacy will be considered as a bounty, and will not be adeemed by a subsequent advance, unless

the legacy is given for a particular purpose, or unless it is in some other way legally apparent that the advancement is intended as an ademption. A legacy to purchase an advowson would, for instance, be adeemed, or more correctly speaking, satisfied, by the testator afterwards purchasing the advowson for the legatee. It does not appear that the legacy in question was given for a particular purpose within the meaning of this rule.

SATISFACTION.—It is, nevertheless clear, under the authorities, and on principle, that if value in any form is given by the testator, in lieu of a testamentary provision, and accepted, the agreement will be binding on the legatee, and he cannot require the executors to fulfil the bequest; *Howze v. Mallett*, 4 Jones' Eq. 194; *Richards v. Humphreys*, 15 Pick. 133; *Kirk v. Eddowes*, 3 Hare, 509. In *Howze v. Mallett*, the testator bequeathed the children of a deceased daughter \$500 each. One of the legatees married, and the testator paid her husband \$500, and took from him a receipt for that amount, "to be deducted from the bequest to his wife." Ruffin, J., said: "The only question is, whether after payment by the testator, expressly in satisfaction of a pecuniary legacy, a second payment can be enforced from the executor. It would seem strange if it could; for, it would not be more directly contrary to the intention of the testator than to right and justice. The delivery by the testator to the legatee of a

specific thing bequeathed has always been held to be a satisfaction or ademption of the legacy. Although the tenor of the will stands, yet the gift is ineffectual, because the legatee having got the thing intended for him, cannot get it again. In that respect it must be the same with the pecuniary legacy. Express anticipated payment by the testator must exclude a claim for a second payment of the same sum, since the testator intended but one gift, and that he completed in his lifetime. The ademption or satisfaction of legacies is founded on a doctrine of natural as well as artificial equity against double payments of one bounty, and the abrogation of that principle would not only not aid in effectuating the intention of testators, but in almost every case would defeat the intention. * * * * If a will says on its face, after giving a pecuniary legacy, that if the testator pays it in his lifetime, it shall not be again paid by his executors, surely the fact and the intention of a payment by the testator, may be shown in satisfaction, and that although the will is in general to speak as of the moment of his death, and might thus apparently preclude the possibility of the prepayment of a legacy given in that moment. It is in the nature of a conditional legacy. So, indeed, are all legacies in respect to this point of satisfaction from the principle of equity forbidding two satisfactions. Then the act and the intention of a payment by the

testator are here as clear a satisfaction of the legacy, as in the supposed provision in the will itself."

These decisions indicate that the executors may be exonerated from the fulfilment of a bequest on two grounds: one that the testator accomplished the purpose expressed in the will; the other that he made a gift in lieu of the bequest. The result is the same in both cases; but there is a material difference as it regards the principle. In the former case, the legacy is adeemed; in the latter, satisfied. An act which renders it impracticable to execute the will, may properly be described as an ademption, but that term cannot with equal propriety be applied to the substitution of something else for that which was originally designed. If one who has bequeathed a sum of money to be expended in erecting a house in a particular locality for a child or relative, subsequently builds the house in his lifetime, the bequest is adeemed, because the executors cannot fulfil a purpose which has been already accomplished; *Monck v. Monck*, 1 Ball & Beatty, 303, *ante*, 774. The case is substantially the same where one gives an equal undivided share of his estate by will, and afterwards conveys the same share by deed to the devisee. But where a pecuniary bequest, is followed by a voluntary conveyance of real estate, or a devise of land by a gift of money, it cannot be said that both donations are the same, or that the will is no longer capable of being carried into effect. The question then is, did the testator intend that

the gift should take the place of the bequest? If this appears on the face of the instrument of gift, or from his accompanying acts or declarations, the legacy will be "satisfied," though not "adeemed."

In *Richards v. Humphreys*, the testator bequeathed the sum of \$500 to his sister, and afterwards advanced the sum of \$466, to enable her to purchase land; and she gave him a receipt, acknowledging that the money was "in part of her right of dower in his last will." He also said, that he was desirous of paying off the legacy, and offered her the difference, which she declined. She had a husband at the date of these transactions, who died before the testator. Upon the testator's death, the legatee brought an action for the legacy. It was held, that the receipt and the declarations of the testator were admissible to show, that the payment was made on account of the bequest, and that this was discharged or satisfied *pro tanto*.

The following reasons were assigned in giving judgment. "The ademption of a specific and of a general legacy depend upon very different principles. A specific legacy of a chattel, or a particular debt, or parcel of stock, is held to be adeemed, when the testator has collected the debt, or disposed of the chattel or stock, in his lifetime, whatever may have been the intent or motive of the testator in so doing. But when a general legacy is given, of a sum of money out of the testator's general assets, without regard to

any particular fund, intention is of the very essence of ademption. The testator, during his life, has the absolute power of disposition or revocation. If he pay a legacy in express terms during his lifetime, although the term payment, satisfaction, release or discharge be used, it is manifest that it will operate by way of ademption, and can operate in no other way, inasmuch as a legacy, during the life of the testator, creates no obligation upon the testator or interest in the legatee, which can be the subject of payment, release or satisfaction. If, therefore, a testator, after having made his will, containing a general bequest to a child or stranger, makes an advance, or does other acts which can be shown by express proof, or reasonable presumption, to have been intended by the testator as a satisfaction, discharge or substitute for the legacy given, it shall be deemed in law to be an ademption of the legacy. Hence it is that when a father has given a child a legacy as a portion or provision for such child, and afterwards upon the event of the marriage, or other similar occasion, makes an advance to such child, as and for a portion or provision, though to a smaller amount than the legacy, it shall be deemed a substitute for the provision contemplated by the will, and thence as an ademption of the whole legacy. This is founded on the consideration, that the duty of a father to make a provision for his child, is one of imperfect obligation and voluntary, that his power of dis-

posing is entire and uncontrolled, that he is the best and the sole judge of his ability in this respect, and of the amount which it is proper for him to appropriate to any one child, as such provision. The law presumes, in the absence of other proof, that it was the intention of the father by the legacy to make such provision, that it was not his intention to make a double provision, that when after the will is executed, another provision is made for the same child, the original intent of making such provision by will is accomplished and completed, that the purpose of giving the legacy is satisfied, and of course concludes, that the legacy itself is adeemed. And if the subsequent portion or provision made in the lifetime of the testator, is less than the legacy, still it operates as an ademption of the whole legacy, not because a smaller sum can be a payment of a larger, but because it manifests the will and intent of the testator who is the sole disposer of his own bounty, to reduce the amount of the provision, originally contemplated, when he made his will; *Hartop v. Whitmore*, 1 P. Wms. 681; *Clarke v. Burgoyne*, 1 Dick. 353. From this view of the subject of the ademption of general legacies, it seems manifest, that the ademption takes effect, not from the act of the legatee, in releasing or receiving satisfaction of the legacy, but solely from the will and act of the testator, in making such payment or satisfaction, or substituting a different act of bounty which is shown by

competent proof to be intended as such payment, satisfaction, or substitute.

"The question therefore is, whether from the facts shown in the present case, it sufficiently appears, that the advance of money made by the testator in his lifetime to his sister, was intended as a part payment and satisfaction of the legacy given to her by his will; if it was so intended, the law deems it an ademption *pro tanto*.

"Most of the cases cited on the part of the plaintiff, to show what the law does, and what it does not, regard as an ademption, are cases where the testator, in making an advance during his lifetime, does not express the object or purpose of such advance, and its intended effect upon a legacy given, and are designed to show, from what combinations of facts and circumstances, the law will or will not raise a presumption, that it was the intention of the testator, that the advance should or should not operate, in whole or in part, as a satisfaction or substitute for the legacy. But they all proceed upon the assumption, that where such intention is proved, either by legal and competent proof, or by legal presumption, the consequence of ademption will follow. Such were the cases of *Ex parte Dubost*, 18 Ves. 140, and *Powel v. Cleaver*, 2 Bro. C. C. 499; the former that of an illegitimate child, described as the daughter of another person, and the latter, of a niece. There was nothing in either case, satisfactorily to show that the testator intended to place himself *in loco*

parentis, and therefore nothing, according to the somewhat artificial reasoning before stated, to raise the presumption, that he intended the legacy as a provision for a child. The ground therefore was taken away, upon which the law would conclude that the advance on marriage was intended as a provision, and therefore there being neither evidence nor presumption, that the advance was a substitute for the legacy, it could not operate as an ademption.

"In the present case we are of opinion, that conforming strictly to the rules of law in regard to the admissibility of evidence, it is quite apparent from the facts proved, that the payment was intended by the testator, as an advance on account of this legacy, and an ademption *pro tanto*.

"If it stood upon the receipt alone, we are strongly inclined to the opinion, that by a necessary construction it must apply to this legacy. It acknowledges the receipt of the money, of Hawes, in part of the plaintiff's right of dower under his last will, he being her brother. Had the words 'of dower,' been omitted, the receipt would have been sufficiently clear, to wit, her right under his last will and testament. When the words come to be applied to the subject-matter, it is apparent that they are perfectly senseless. If by retaining these qualifying words, the clause could be made to apply to any other right or subject-matter, or if the effect of them in their actual application, would be such that they could not

apply to and describe this legacy, the court would certainly not be warranted in rejecting them. It is a general rule, in the construction of written instruments, that where words are used, by way of description, of persons or things, and the words apply in all material particulars to one subject, and there is no other, to which they can apply, they shall be considered as applying to that which they do describe sufficiently to indicate its identity, although they fail in some particular. Such misdescription is regarded as a latent ambiguity, which arises, when the words come to be applied to the subject-matter, and therefore may be corrected by showing *aliunde* that there is no such subject to which they can be applied, but that there is another which the words do sufficiently describe to show that it was the subject intended. So where a legacy describes one species of stock ; but it appears that when the testator made his will he had not that particular species of stock, but another so like it, that it could leave no doubt it was the one intended, this latter shall pass by the legacy ; *Seldwood v. Mildmay*, 3 Ves. 310. Here, considering the receipt as a receipt of money in part of a right of dower under his will, it is wholly senseless and describes nothing, because, on reference to the will, no such right appears, and no commutation or satisfaction of any right of dower is shown, to which it can apply. But there is another interest, which being a testamentary gift to a woman, might, by an ignorant

female, be miscalled a right of dower ; but what is more material, if the receipt does not apply to this legacy, it would be wholly without application. It is upon these grounds, that we are strongly inclined to the opinion, that if it stood upon the construction of the receipt alone, taken in connection with the will, it must be considered a payment on account of this legacy, without reference to the declarations of the testator.

“ But the ground upon which the court decide the cause is this. Whatever may be the difficulties, in applying the rule, which prohibits the admission of parol evidence to alter or control a written instrument, there is one modification, which will sanction its admission in the present case. Whenever an act is done, the declarations of the party doing it, made at the time, are received to show the character of the act, and the purpose and design with which it is done. It is readily conceded, that it would not be competent to give in evidence the declarations of the testator, showing that he intended by any clause in his will, something different from the dispositions expressed, or to limit or control the legal inferences or presumptions arising from those expressions. Nor would it be admissible to show such declarations alone, to prove a direct intent of the testator to revoke or adeem a legacy. It would be, in either case, to make or revoke a will by parol ; which is alike contrary to the general rule of law, and to the Statute of Frauds. But when an act is

done, which, if done with one intent, will operate as an ademption, and if with a different intent, otherwise, under the rule already stated, evidence of the declarations of the intent may be given, to qualify the act, and the act operates by way of ademption. Here the declarations made at the time of the advance and payment of the money, not being contradictory to the receipt, but in conformity with it, prove conclusively, that they were made in part satisfaction of this legacy. Besides, if it were necessary to resort to that principle, it is a well-established exception to the general rule, excluding parol evidence to explain and control a written instrument, that a receipt for money may be so explained and controlled.

"But there is another fact, stated in the case, which it seems competent to show by parol evidence, and which leads to the same conclusion. It is stated, that the testator expressed his desire to the plaintiff, at the same time, to pay off the legacies to his brothers and sisters in his lifetime, and that he offered to pay her *the balance* of her legacy which she declined receiving. What is the inference from an offer to pay the balance, except that part was already paid? On the whole, we are satisfied, that the evidence, to the extent of showing the intent and purposes of the payment, was admissible, and being admitted, it proves conclusively, that it was a payment on account of this legacy.

"As to the objection, that at the time of the payment, the plaintiff

was a *feme covert*, we are of opinion, that it does not vary the result. It is very clear, that the plaintiff's husband, having died before the testator, had no interest in this legacy. The only ground, therefore, is, that the plaintiff was, at the time of the payment, under the disability of coverture. But we have seen that ademption depends solely on the will of the testator, and not at all upon the ability of the party receiving to give a valid discharge. Had the money been paid to trustees or others for her benefit, without any act or consent of hers, if given expressly in *lieu* or in satisfaction of such legacy to her, it would have operated as an ademption. Had he purchased a house or other property in her name, and for her benefit, with the like intent and purpose expressed, it would have had the same effect. The circumstance of her disability, therefore, at the time of the payment, is not inconsistent with the testator's intent in making it, to advance and satisfy the legacy to her, nor does it affect the efficacy of such payment as an ademption. The balance of the legacy having been paid into court, nothing remains due."

It might be inferred from the language held in this case and in *Hopwood v. Hopwood*, *ante*, that ademption results from a change of purpose, and will ensue wherever it appears from the testator's acts or declarations, that he intended to substitute a gift for the bequest. If this were true it would apply although the legacy were from a stranger, or the gift not

ejusdem generis. Yet it will hardly be contended that a legacy from one who is not under a parental obligation, can be adeemed by a donation which is not accepted or enjoyed by the legatee, or that where the relation of parent and child does not exist, the mere execution of a covenant to settle an amount answering to that bequeathed will preclude the covenantee from claiming under the will. The covenant in *Hopwood v. Hopwood*, was an express and irrevocable undertaking to give the portion which was presumably the object of the bequest, and ademption followed not because the intention had been altered, but because it had been carried a step nearer to fulfilment. The case is not therefore an authority for the position, that a legacy bequeathed for one purpose will be adeemed by a gift intended for a different purpose, however clearly it may appear that the testator meant the gift to take the place of the bequest. If, as in *Richards v. Humphreys*, and *Kirk v. Eddowes*, the legatee receives the gift in payment of the bequest, it is necessarily discharged; if he does not, he cannot claim both benefactions, but may take which of them he will.

Extrinsic Evidence.] In considering the admissibility of parol evidence in cases of this description, it seems proper to advert to a distinction which has sometimes been overlooked. The object of a legacy must be sought in the language of the will, with the aid of such light as may be derived from the testator's circumstances and

position in life, and the relation which he holds to the object of his bounty, *ante*, 674, but the purpose of a gift, and whether it is or is not intended as an advancement, or to satisfy an antecedent bequest, may be shown by the donor's acts and declarations, and does not ordinarily admit of being proved in any other way; see *Langdon v. Astor's Ex'rs*, 16 N. Y. 11; *Gill's Estate*, 1 Parson's Eq. 139; *Parks v. Parks*, 19 Maryland, 323; *Cecil v. Cecil*, 20 Id. 153; *Lawson's Appeal*, 11 Harris, 85; *ante*, 806. In this regard the satisfaction of a legacy depends on rules which are nearly the same as those which apply in the case of a debt, or if there be a difference it is against the legatee, whose claim is derived from the testator's bounty; see *Richards v. Humphreys*, 15 Pick, 133; *Kirk v. Eddowes*, 3 Hare, 509. If he accepts a gift or advancement knowing that it is designed to fulfil a testamentary provision, there is a tacit agreement which may be set up as a defence by the executors; *Kirk v. Eddowes*, 3 Hare, 509; *Jones v. Mason*, 5 Randolph, 577; *Howze v. Mallett*, 4 Jones Eq. 194; if he has no such information at the time, and obtains it afterwards, it will then be incumbent on him to choose between the donation and the legacy, and as he cannot conscientiously claim both, it follows that the legacy is equitably paid in full or in part.

A chief difference between the case where the legatee is, and where he is not acquainted with the donor's purpose at the time of

accepting a gift which is not of the same kind as the bequest, is that in the one, satisfaction will not go beyond the value actually received, while in the other, it may extend as far as the agreement of the parties carries it.

The cases may be ranged under three heads. 1st. Where extrinsic evidence is adduced to show the purpose of the bequest. 2d. Where it is adduced to show the purpose of the gift. 3d. Where the object is to prove that a gift for a different purpose, was intended to be in lieu of the bequest.

It is generally conceded that the testator's declarations, cannot be received to contradict the purpose set forth in the will, or even as it would seem to show the purpose of a testamentary provision where none is expressed. This results not only from the general rule with regard to written instruments, but from the provisions of the statute of wills. It cannot, for instance, be shown by parol, that a pecuniary legacy has been adeemed by the purchase of a house, unless the legacy is expressly bequeathed for that end, although if this appeared on the face of the will, ademption would be the *prima facie* if not irrefragable inference.

In considering the second head, it is necessary to distinguish between the cases where a bequest from a parent is followed by a gift *ejusdem generis*, and those where the gift is of a different kind, or where the parental relation does not exist. Where one who has bequeathed a pecuniary legacy to a child gives him a like

amount, two questions arise, was the bequest intended as the child's share or portion, is such the nature of the gift? The inference that the legacy is a portion, is drawn by the Court from the relation between the parties, but being one of fact, or in the words of Lord Thurlow, of "evidence" it may be rebutted by the testator's declarations or other extrinsic proof, and the door being once thrown open, parol evidence may be adduced to corroborate the presumption, *ante*, 769; see *Powell v. Cleaver*, 2 Brown C. C. 499; *Trimmer v. Bayne*, 7 Vesey, 516; *Pole v. Lord Somers*, 6 Id. 309, 326; *Zeigler v. Eckert*, 6 Barr, 13; *Sims v. Sims*, 2 Stockton's Ch. 158, 163; *Brady v. Cubitt*, 1 Douglas, 30, 39. Whether the gift is an advancement, or in other words, an anticipation of the whole or a part of that to which the donee will be entitled at the parent's death, is essentially a question of fact, to be solved by an attentive consideration of the circumstances, and of what is said and done on either side; see *Lawson's Appeal*, 11 Harris, 85; *Parks v. Parks*, 19 Maryland, 323; *Cecil v. Cecil*, 20 Id. 153. If it appears in view of all the evidence, that both benefactions, that *inter vivos*, and that conferred by the will, are the same share or portion, the bequest is adeemed, through the fulfilment of the purpose for which it was made.

Thus far the authorities agree. The difference is as to whether the testator's declarations can be given in evidence to show that a gift

which is not *ejusdem generis*, was intended to be the legatee's share or portion, and therefore, an ademption of an anterior bequest; as where one who has bequeathed stocks to a child, subsequently gives him money, or *vice versa*. Here there is no difficulty in inferring that both benefactions are portions, because the law deduces the conclusion in the one case, and it may be established by parol in the other; the difficulty is that the gift does not appear to be of the same portion as the bequest. It may therefore be necessary to determine whether the testator's entries or declarations, are admissible to prove that he intended the gift like the legacy to be in full of his obligation to provide suitably for the child, and the question should seemingly be answered in the affirmative where they are cotemporaneous with the gift, although not communicated to the legatee. In like manner where the purpose of a legacy from a stranger appears in the will, as, for instance, that it is to establish him in life by procuring him a situation, the court may take what the testator said or wrote at the time of making a subsequent gift, into view in determining whether it was intended as a fulfilment of the bequest; see *Weall v. Rice*, 2 Russell & Mylne, 251, 263; *Lloyd v. Harvey*, Ib. 310; *Richards v. Humphreys*, 15 Pick. 133.

If we now turn to the third head, that where the gift does not fulfil the purpose appearing in the bequest, parol evidence is confessedly inadmissible to show that

both were for the same purpose contrary to the will, but the executors may, notwithstanding, prove that the legatee received the gift in satisfaction. Thus if one who has given a pecuniary legacy, conveys a house to the legatee in lieu of the bequest, and it is so received by him, the legacy will be satisfied though not adeemed.

It results from what has been said that contemporaneous declarations may be received to show that a gift was intended to be as an advancement on account of the sum bequeathed in the will. What one says in making a payment or doing any other act, is part of the transaction, and must be taken into consideration in determining the effect; see *Kirk v. Eddowes*; *Richards v. Humphreys*, 15 Pick. 133; *Langdon v. Astor's Executors*, 16 N. Y. 9, 30. The right to put subsequent declarations in evidence is not so clear. "An entry" said Denio, C. J. in the case last cited, "made at the time of a voluntary gift or endowment which does not require any consideration, or an undertaking on the other side, and where the only inquiry is as to the intent of the donor, is of the essence of the transaction, and in the absence of evidence to contradict it, characterizes the nature and object of transfer. It seemed necessary to say thus much to distinguish the entries provided for in the codicil from a memorandum which might be used to declare the intention of a past transaction. I concede that a testator could not in his will reserve a right to

qualify by an unattested writing, a transaction which had already past and taken effect, or which was the act of another person, so as by means thereof to affect legacies or other provisions in his testamentary papers."

The distinction between cotemporaneous and subsequent declarations is just within certain limits, but it should not be carried too far. Where the bequest is from a parent, and a subsequent gift of the same kind is an advancement, the law infers that it fulfils the purpose of the bequest. Whether such is the purpose of the gift depends on the donor's intention; and it would seem that in arriving at a conclusion on this head what the testator says afterwards may be taken into view, though it is entitled to less weight than his utterances at the time. Although the character of an act cannot be changed by a subsequent declaration, it may be explained.

In like manner, the *ex parte* declarations of a parent, are admissible to show that a gift to a child is an advancement, and as such adeems an anterior bequest. For as ademption results from the fulfilment of the will, and irrespectively of the assent of the legatee, so it will take place although he is ignorant of the testator's purpose in making the gift.

The question is more complicated where a bequest is alleged to have been satisfied by a gift of a different kind, or from one who is a stranger to the legatee. Satisfaction must ordinarily be the fruit of agreement; and what either party

intends is irrelevant, unless it is communicated to the other, and assented to by him. But a chancellor will not suffer a benefaction to be enjoyed without complying with the condition on which it was bestowed. If a debtor were to request the creditor to accept a horse as payment, the creditor could not keep the horse and enforce the debt, although the letter containing the request miscarried, and he accepted the horse believing it to be intended as a gift. In the case thus supposed, the creditor would be a volunteer (see vol. 1, notes to *Ellison v. Ellison*); but his refusal to carry out the debtor's purpose would give rise to a failure of consideration, rendering it incumbent on him to make restitution, or account for the value of the horse. The principle is not less applicable where a testator gives value in any form to a legatee, intending that it shall be in lieu of the bequest. The case is nevertheless one for compensation rather than forfeiture; and all that can reasonably be required of the legatee is that he shall not demand the legacy without crediting the estate with the gift.

There is more doubt as to the right to rely on the subsequent declarations of the testator, in proof of the satisfaction of a bequest as distinguished from its fulfilment or ademption. Such evidence would be inadmissible as between debtor and creditor, but the rule is not necessarily the same in the case of a legatee, whose claim being merely gratuitous, and derived from the testa-

tor's bounty, will fail when the circumstances are such, that it cannot be enforced consistently with equity and good conscience. If one, who is under an obligation *ex contractu*, sees fit to put that which might operate as a payment, in the form of a donation, he cannot ask that his *ex parte* declarations shall be received to vary the right which he has conferred. The creditor is entitled to the debt, and he is also entitled to the gift, and as both demands are indefeasible by the debtor's act, so they cannot be affected by what he says. But the case of one who pays the amount of a bequest to the legatee, without indicating whether he means to confer an additional benefit, or to execute the provisions of the will, is so far different that he may revoke the will, although he cannot recall the gift. If, therefore, it appears unequivocally that he intended to satisfy the legacy, his purpose should not be allowed to fail, because it was not made known at the time. This is the more just, because a creditor who is required to treat that as a payment, which he has received as a gift, may say that a well founded expectation is frustrated, while no such complaint can be made by a legatee.

All the authorities concur that parol evidence is admissible to rebut the presumption that a gift or advance to a child was intended to satisfy a legacy previously bequeathed to him by will; *Ziegler v. Eckert*, 6 Barr, 13; see *Pole v. Lord Somers*, 6 Vesey, 309, 326; *Timberlake v. Parrish's*

Ex'r, 5 Dana, 346; *Clendenning v. Clymer*, 17 Indiana, 155; *Sims v. Sims*, 2 Stockton's Ch. 158, 163; and it follows that when such evidence is adduced, it may be met or countervailed by other proof of the same kind. In *Sims v. Sims*, the Chancellor said, "in the instance of parent and child, equity raises the presumption that the legacy is intended as a portion, whether the will so expresses it or not. If afterwards, the parent advances a portion to the child, the legacy is satisfied, the advancement and legacy being for the same purpose; parol testimony is admitted, therefore not to raise but to confirm a presumption." Roper on L. 272-3-4, and cases there cited. In 2 American Lead. Cases 435, the cases are collected and the admission of such testimony seems to be very firmly settled upon authority. In *Gresley's Eq. Ev.* 213, it is said, "the reason is shortly this, if a person who has inserted in his will a legacy for a particular purpose, afterwards executes that purpose himself in his lifetime, he is presumed to have intended to cancel the legacy which is consequently held to be adeemed. Secondly, a father, leaving a legacy to a child, is presumed to have intended it for the particular purpose of fulfilling his moral obligation of portioning that child. It follows that parol, or any other kind of extrinsic evidence, may be adduced to prove that he did, or did not, intend to cancel it.

In this case it only became necessary for the executor to offer

parol evidence in answer to that which the complainant introduced to rebut the presumption which was in favor of the executor, that the legacy was satisfied by the advancement. The case was with the defendant without his being obliged to resort to such evidence. If it was proper for the complainant to overcome this presumption by parol, it was equally proper for the defendant to resort to the same kind of testimony in reply."

The weight due such evidence in repelling the inference of ademption, was much considered in *Debeeze v. Mann*, 2 Brown C. C. 166, 529, 531. Lord Thurlow held that a bond from a father to a putative daughter whom he treated as a child, did not operate as an entire or partial ademption of a previous legacy of a larger sum; the presumption that the bond fulfilled the purpose expressed in the bequest, being repelled by his declarations that this was all that he could do then, but that there would be more at his death. This decision seems to have been influenced by the idea which was finally discarded in *Pym v. Lockyer*, 5 Mylne & Craig, 27, that ademption is necessarily in full.

REPUBLICATION.—It is well settled under the authorities, that the republication of a will by a codicil, does not revive a bequest which has been revoked, adeemed, or satisfied; and it is immaterial as it regards the application of this principle, whether the ademption is by the actual gift of value, or by the execution of a covenant which is not to be performed until

after the testator's death; see *Hopwood v. Hopwood*, ante, 786; *Miner v. Atherton's Ex'rs*, 11 Casey, 528, 537; *Howze v. Mallett*, 4 Jones Eq. 194; *Langdon v. Astor's Ex'ors*, 3 Duer, 16 New York, 9, ante, 663, 757.

In *Howze v. Mallett* the court held that the law of North Carolina had not been changed in this regard by the act of 1844, providing "that no conveyance or act subsequent to the execution of a will of real or personal estate, except revocation, shall prevent the operation of the will with respect to such estate or interest, as the testator shall have power to dispose of by will;" and also that "a will shall be construed to speak and take effect as if it had been executed immediately before the testator's death." Ruffin, J., said: "It has been settled that republication makes a will speak from that time, and that a codicil referring to the will amounts to republication, so that such a case is the same in principle as this is under the statutory provision that the will shall speak from the death of the testator, yet it is settled under the authority of *Powys v. Mansfield*, that although republication would make a will speak from that time, for the purpose of passing after purchased lands, it would not for the purpose of reviving a legacy revoked, adeemed or satisfied. Republication does not undo the acts by which a legacy has been adeemed or satisfied, but only acts upon the will as it exists at the time of the republication, when the legacy is no longer an opera-

tive part of the will. In other words, the legacy stands in the will, but it stands there as a satisfied legacy. The same reason is precisely applicable to those parts of our statute which touch the operation of wills, and the time to which their operation is to be referred. The bill to enforce the payment of the legacy must be dismissed." A like statute received a similar interpretation in *Langdon v. Astor's Ex'ors*, 3 Duer, 16 New York, 9.

PRIOR ADVANCEMENTS. — The authorities, agree that an advancement cannot operate as a satisfaction of a subsequent legacy, although the testator declares at the execution of the will, or afterwards, that such is his design, unless it is proved to have been communicated to the legatee and assented to by him, under circumstances rendering it a fraud on his part to claim the whole amount of the bequest; *Zeiter v. Zeiter*, 4 Watts, 212; *Krider v. Boyer*, 10 Id. 54. In *Zeiter v. Zeiter*, Gibson, C. J., said that the testator's parol declarations, previous, or subsequent to the will, or contemporaneous with it, were admissible to rebut equities or implied trusts; although cotemporaneous declarations were of more account than those made subsequently, and precedent of less weight than either. Hence such evidence might be received to show that an advancement by a parent was not intended as an ademption of a prior bequest to the child, and the better opinion was, that a subsequent transaction might be shown by

such means to have been intended as an advancement. But the testator's declarations could not be received to rebut an express bequest, or what came to the same thing, to show that it was satisfied by a transaction which occurred before the making of the will.

In *Krider v. Boyer*, the testator lent \$123 to his son-in-law, Isaac Krider, and took his note. He subsequently made a bequest to his daughter Catharine, Krider's wife. She died many years afterwards, without having made any claim under the will, and her administrators then instituted proceedings to recover the legacy. The defence proved that the testator had declared on several occasions after the making of the will, that he did not consider the loan to Krider as a debt, but as a gift to him, which was to go in satisfaction of the amount subsequently bequeathed to his wife. Kennedy, J., said, the money was not given, but lent to Krider, and became a debt from him, which might undoubtedly have been appropriated to the payment of the legacy, by an agreement between the testator and Krider, or Krider's wife. But the testator could not adeem the legacy by an oral declaration, nor could he by such means forgive or discharge the debt. The one would be a parol revocation contrary to the statute of wills; the other not less contrary to the rule of law that delivery or a consideration is essential to the creation, transfer, or extinguishment of a right. In *Flower's Case*, A. hav-

ing borrowed a hundred pounds of B., brought it at the day of payment in a bag, and cast it on the table before B., when B. said to A., being his nephew, "I will not have it; take it you, and carry it home with you." This was held a good gift by parol, because the money being cast on the table, was considered then as in the actual possession of B., and that A. might well have waged his law. But the court said it would have been otherwise if A. had only offered it to B., for then it would have been a chose in action, and could not have been given without writing. If the testator had at any time after the execution of the will, given up the note to Krider for the purpose of being cancelled, such an act on his part would have operated as a subsequent advancement equalling the amount of the debt, and might, if so designed, have satisfied the legacy. But no such effect would follow from an intent declared, but not carried into effect by any appropriate act. Where a parent makes a provision for a child by his will, and afterwards gives to such child a portion in marriage, if a daughter, or pays a sum of money for establishing him in the world, if a son, the legacy is held to be adeemed; *Hartop v. Whitmore*, 1 P. Wms. 681; and in such cases, parol evidence of the testator's declarations is admissible to show that the advancement was intended either to be an ademption of the legacy, or satisfaction of it *pro tanto*.

Accordingly, in *Bigleston v. Grubb*, 2 Atkyns, 48; where a bill

was brought for a legacy of 500 pounds by a husband in the right of his wife, given her under the will of her father, notwithstanding he had received of the testator in his lifetime 500 pounds as a portion, parol evidence was admitted to show that the father gave the 500 pounds to the husband, in full of what he intended for his daughter under his will. Also, in *Roswell v. Bennett*, 3 Atkyns, 77, where B. having by his will given all his real and personal estate equally among his children, and at the conclusion of it directed his executors to lay out a sum not exceeding 300 pounds in putting out the defendant, his son, apprentice; and B. in his lifetime afterwards laid out 200 pounds in putting out the defendant, clerk to a person in the navy office, and died without revoking his will, evidence was allowed to be read of the testator's declarations that his advancement should be taken as an ademption of the legacy. But then this can only be where the will is made anterior to the advancement, for without a will in being there can be no legacy, and consequently the advancement can have no relation to, nor take away that which does not exist. Such are the cases referred to, as also all others on the subject, going to establish the same principle. In cases of intestacy, however, as the intestate laws are in force at all times as long as no wills are made, advancements may be made by a parent with a view of giving to his children some portion at least, if not the whole, of what would

be coming to them of his estate after his death, according to the intestate laws of the commonwealth regulating the descent of his real, and the distribution of his personal estate. But if a parent make advancements to one or more of his children, and afterwards makes his will, disposing of the whole of his estate among his children, without taking any notice of the advancements so made by him, it is conceived that each child will have a right to claim whatever is given to him or her by the will, without being liable to any abatement or reduction whatever, on account of such advancements, however great they may have been; because such is the legal effect of the last will of the testator, reduced to writing, which cannot be altered or changed by any subsequent verbal declarations, made by him as it would be contrary to the act regulating the making of wills."

It is clear under these decisions, that the declarations of the testator or the entries in his books, cannot be adduced as proof that prior gifts or advancements are to be taken into view in computing the share of a child under the will, or deducted from the amount to which he is entitled, agreeably to the letter of the bequest; *Yundt's Appeal*, 1 Harris, 575.

Ademption results from the fulfilment of the purpose expressed in the legacy, satisfaction from the substitution of something else for the original design, and hence neither can be predicated of an act which antedates the will. Conceding that parol evidence is

admissible to show the gift was originally meant to be in full of the donee's share or portion, the subsequent making of the bequest indicates a change of purpose, which cannot be controlled or modified by parol consistently with the statute of wills.

A will which depends for its effect on a writing which is not executed as the statute of wills requires, is invalid; see *Clayton v. Lord Nugent*, 13 M. & W. 200; *Johnson v. Ball*, 21 Law Journal R. N. S. Ch. 210; *Habergham v. Vincent*, 2 Vesey, Sr. 206; *Brown's Ch.* 353; *Langdon v. Astor's Ex'rs*, 3 Duer. 477, 580; 16 New York, 9. If, for instance, a testator were to direct that his estate should be distributed after his death among the persons, or in amounts specified in his books of account, the instrument would be void on its face for uncertainty, and the books could not be resorted to for the purpose of supplying the defect; see *Clayton v. Lord Nugent*; *Langdon v. Astor's Ex'rs*. But this rule does not preclude one who is making a testamentary provision for his children, from directing that the advancements made to any of them, whether before or after the making of the will, and so charged in his ledger or the memoranda kept by him, shall be deducted from the share of such legatee, because the reference is primarily to an extrinsic fact, and the entry merely the mode by which the nature and extent of that fact are to be ascertained; see *Langdon v. Astor's Ex'rs*; *Yundt's Appeal*, 1 Harris, 575, 579. The

question arose but can hardly be said to have been determined in *Musselman's Estate*, 5 Watts, 9. The will there contained a clause reciting that the testator had "kept an account of the advancements made to his children respectively, to which reference must be had in making the following division, and so much as shall at my death stand charged against any child, shall be estimated as part of the share allotted to him; each child to receive as much as shall make him equal to that one of the seven which has received most." He then went on to say, "this being done, and the several legatees being made equal therein, the residue of my estate shall be divided into seven shares and distributed among my children." It appeared in evidence that one of the legatees, Mary Spottswood, had received an amount from the testator, which he had charged to her by an entry which was still standing in his books at his death, although the money was repaid before the execution of the will. The court held that the ruling purpose of the testator, as declared in the will was to produce equality of distribution, and particular expressions which stood in the way of the attainment of this object should be construed in subordination to it, or disregarded. The words "so much as shall stand charged at my death," were not intended to give effect to a charge which had ceased to be just, through a repayment which the testator had accidentally omitted

to credit. He might, no doubt, have peremptorily directed that his books should be conclusive proof of the state of the accounts between him and the legatees, but such was not the intention disclosed in the will.

In *Langdon v. Astor's Ex'rs*, 3 Duer, 477, 16 New York, 9; the testator bequeathed to his daughter, Mrs. Langdon, the sum of \$100,000 of the debt of the city of New York for her life, with the remainder to her issue living at her death; and by a codicil to his will, declared that "inasmuch as I may make advancements for persons or purposes provided for in my will or codicil, it is my direction that such advancements, if charged in by books, shall be deemed so much on account of the provisions in my will or codicils for such persons or purposes." By a second codicil he bequeathed to the same daughter, the income during life of \$100,000 deposited in the New York Life Insurance and Trust Company," the capital to go to her children on her death, and also, left her children \$100,000 of the debt of the city of New York, usually called the "water loan." Subsequently to the execution of the will and codicils, the testator transferred \$100,000 city "water stock," and \$100,000 deposited in the New York Life Insurance and Trust Company, in trust for the plaintiff during her life, and for her six children at her death, and on the following day entered the transaction in his books of account as "a transfer in trust of

property bequeathed to her, Mrs. Langdon, in similar items by a codicil to my will;" and she was subsequently charged in the same book as debtor for the same stocks. The Court of Appeals held, reversing the judgment of the Superior Court, that both the legacies to the plaintiff, that of \$100,000 bequeathed to her by the will, and that of \$100,000 deposited in the trust company, were satisfied by the transfer in trust. Denio, C. J., said that the legacies were by the terms of the will and codicils, subject to be defeated by subsequent advancements charged in the testator's books. There was no rule of law, that rendered such a condition inoperative, or that precluded it from avoiding the bequest on the happening of the event. A testator could not declare that a mere entry in his books, or other entry not attested according to the statute, should affect the provisions of his will. But he might make a devise conditioned to fail if a certain act were done by himself, by a third person, or by the legatee, and the right to do this would imply the right to prescribe under what circumstances the act should operate to avoid the devise. If he could lawfully provide, that the legacy should be defeasible by an advancement, he might also provide that a gift should not operate as an advancement, unless it was so entered or described in some memorandum made by him. The case was therefore simply that of a bequest on a condition, which had taken effect in defeasance of the bequest.

There can be no doubt, in view of these authorities, that the testator may direct that all that his children have received from him as an advancement at any time before his death, shall be deducted from the amounts bequeathed to them in his will; but in determining what is an advancement under such a will, regard must be had to the nature of the act as fixed by what is said and done at the time; *Yundt's Appeal*, 1 Harris, 575. In *Yundt's Appeal*, the will contained the following provision, "all the remainder of my estate shall be divided into ten equal shares, after adding all the advancements heretofore made by me to my children, and then all advancements shall be respectively deducted from each respective share." It appeared that the testator had lent \$6,000 to his daughter's husband, and evidence was adduced of his declarations, that this amount was to be deducted from her share under the will. Bell, J., said that an advancement was an irrevocable gift from a parent to a child, in anticipation of the share to which the child would be entitled at the parent's death. The testator's declarations were not competent to bring a loan to a son-in-law, within this definition, nor would such a result ensue from the admissions of the legatee.

SATISFACTION OF PORTION BY LEGACY.—Prima facie, and unless the contrary is apparent, a provision for a child by will, is presumed to be intended as a means of satisfying or fulfilling

an anterior covenant or agreement to make a provision of a like kind ; *Gilliam v. Chancellor*, 43 Mississippi, 437 ; *Hinchcliffe v. Hinchcliffe*, 3 Vesey, 516 ; *Taylor v. Lanier*, 3 Murphy, 198 ; *Winn's Adm'rs v. Wier*, 3 B. Monroe, 648. This is not because a revocable appropriation, can under ordinary circumstances be supposed to be intended as a performance of an irrevocable contract, but because both provisions are presumed to be made in pursuance of the same parental obligation, and therefore identical in purpose ; see *Guignard v. Mayrant*, 4 Dessausur, 614 ; *Hinchcliffe v. Hinchcliffe*. In this case the Master of the Rolls adverted to the difference between such a case and one where a debt is alleged to have been satisfied by a bequest. "Of all the rules that have been adopted in this Court, I should regret the rule that a legacy is a satisfaction of a debt, provided it is equal to the debt. That, however is clearly established ; but any little circumstances are laid hold of by the Court, to take it out of the rule. That is admitted at the bar not to be the case as to the doctrine of portions, for if both have the same object, and there are only slight differences, still they shall not both avail."

The presumption will not arise, unless the parties stand in the relation of parent and child, nor unless the covenant is voluntary, or at least not made for a valuable consideration moving to the covenantor, nor where the testamentary provision is not of the same kind as that already stipulated for ; *ante*,

764 ; see *Guignard v. Mayrant*, 4 Dessausure, 614. In *Guignard v. Mayrant*, the testator covenanted to settle the sum of 500*l.* on his wife, in lieu of the fortune which she had brought him, and many years afterwards executed a will, devising land and negroes to a much larger amount than the debt created by the marriage settlement. The chancellor said that the settlement was not a gift, but a purchase by which the testator became debtor, and the wife creditor to that amount, and the will left no room for construction, as it emphatically said that the legacy was in lieu of dower, which if accepted, formed another and distinct contract. They were moreover, different in their nature, one being for the payment of money, and the other for land and negroes. It followed that the will and settlement must both take effect.

The question is nevertheless one of intention, and if it appears from the terms of the bequest, that it is intended as a fulfilment of the covenant, the legatee must choose between them, and cannot enforce both ; see *Gilliam v. Chancellor*, 43 Miss. 437. In this case the testator entered into a covenant with his intended wife, wherein it was stipulated *inter alia*, that she should have \$5000 from his estate at his death. The marriage took place, and the testator died not long afterwards, leaving a will, wherein he directed his executors to pay his debts and see that his contracts were fulfilled, and that his wife, Mary Ann Gilliam, had a

dowry of \$5000 in currency. The Court held that Mrs. Gilliam was not entitled to the benefit of both the marriage settlement and the legacy, and that the latter was *pro tanto* a satisfaction of the former. It was not a payment in full, because the testator intended her to receive the amount, in the currency of the Confederate States, which was only worth \$250 in the lawful money of the United States. The result was, that Mrs. Gilliam was entitled to recover the amount which would have been due to her, if the bequest had not been made, to wit: the sum stipulated in the marriage contract.

SATISFACTION OF DEBT BY LEGACY.—It has been seen, that where one does an act which may be gratuitous, or the performance of an anterior obligation, the latter interpretation will be adopted as more consistent with the motives which should govern conduct. Hence, a legacy by a debtor to his creditor, of a sum equalling or exceeding the amount due, is presumably a payment of the debt. The principle is the same as that on which the gift of a portion by a parent to a child, is regarded as an ademption of an antecedent testamentary provision of a like kind, *ante*, 784. The presumption is stronger in the latter case than in the former, because a legacy is *prima facie* intended as a gratuity, and some violence is done to the common use of language in construing it as a payment; see *Mulherran v. Gillespie*, 12 Wend. 349; *Strong v. Williams*, 12 Mass. 391, 393; *Horner v. McGaughy*, 12 P.

F. Smith, 189, 191; *Byrne v. Byrne*, 3 S. & R. 54, 59. A gift may more readily be supposed to be in lieu of another gift, than the performance of a pecuniary obligation. Accordingly, while a bequest may be satisfied by an advancement, notwithstanding slight or even considerable differences, the court will not presume that a legacy is intended as a satisfaction of a debt, unless they are alike in all material particulars.

It is established in accordance with this reasoning, that where one makes an absolute bequest to his creditor, of a sum which would satisfy the debt if paid in the testator's lifetime, the legatee will be put to his election, and cannot enforce the debt without relinquishing the legacy, or at all events without deducting the amount received on one account, from any claim, which he may advance on the other; *Wesco's Appeal*, 2 P. F. Smith, 195; *Horner v. McGaughy*, 12 Id. 189; *Perry v. Maxwell*, 2 Devereux's Eq. 488, 499; *Ward v. Coffield*, 1 Id. 108.

The presumption will not arise where the legacy is not of the same nature as the debt, nor where it is payable on a contingency, nor where the time of payment prescribed by the will is subsequent to that at which the debt would be paid in the ordinary course of administration; see *Byrne v. Byrne*, 3 S. & R. 541; *Van Riper v. Van Riper*, Green's Ch. 1; *Perry v. Maxwell*; *Eaton v. Benton*, 2 Hill, 576. "A legacy is not presumed to be in satisfaction, if there be a difference in the nature of the

debt and legacy, a difference in the times at which they are payable respectively, or if one be certain and absolute, and the other contingent;" *Dey v. Williams*, 2 Dev. & Bat. Eq. 66.

It results from what is here said, that a specific or general bequest of chattels, or a devise of land, will not discharge a pecuniary obligation; see *Cloud v. Clinkenbeard*, 8 B. Monroe, 397; *Partridge's Adm'r v. Partridge*, 2 Harris & J. 63; *Smith v. Marshall*, 1 Root, 159. So it will not be presumed that a legacy is intended to satisfy a debt which the testator does not owe personally, though it is charged on his real estate. See *Caldwell v. Richard*, 1 B. Monroe, 228.

It was accordingly held in *Edelen v. Dent's Adm'r*, 2 Gill & J. 185, that a legacy payable at a future day, and coupled with a charge for the payment of debts, did not satisfy a debt due at the testator's death. The court said, the rule "that a pecuniary legacy, of an equal or a larger amount, is a satisfaction of a debt, is undeniable; but it is not an unbending rule, and not being much favored, is made to yield to slight circumstances to be found in the will; such as an express devise for the payment of debts and legacies, the creation of a fund for the payment of debts and a charge of the legacies on that fund; or if the legacy be uncertain, and made to depend upon a contingency (2 Mad. Ch. 42, 43, 44; 3 Atk. 65); or if the payment of the legacy be postponed by the will to a time subsequent to that

at which the debt is due and payable, or if the debt be due at the time of the testator's death, and the legacy be not made payable immediately, but at some future time; 2 Mad. 44; 3 Atk. 96; 1 Brown, Ch. Rep. 295. In this case, with the exception that the legacy is not made to depend upon a contingency, all these circumstances concur. The debt was subsisting and due before and at the time of the testator's death; there is an express devise for the payment of debts and legacies, the creation of a fund charged with the payment of debts and legacies, and the legacy in question is not made payable immediately on the death of the testator, but with the other legacies, is to be paid out of the proceeds of sales of the real and personal property, and might in part, at least, not be paid until long after the executors by law were bound to pay the debts, the real property being directed to be sold at a credit of six, twelve, and eighteen months from the time of sale."

The presumption is not a favorite with the courts, and will not arise if there be anything in the will, or dehors, which denotes a different intention; see *Horner v. M'Gaughey*, 12 P. F. Smith, 191; *Byrne v. Byrne*, 3 S. & R. 54. Thus, where the testator directs that his debts shall be paid, or charges them upon his real estate, the inference is that a bequest to a creditor is meant to be as it appears, a gift, and not that it is to operate as payment; *Perry v. Maxwell*, 2 Devereux Eq. 488,

499; *Strong v. Williams*, 12 Mass. 391, 394; *Eaton v. Benton*, 2 Hill, 576, 587; *Byrne v. Byrne*, 3 S. & R. 60; *Van Riper v. Van Riper*, 1 Green's Ch. 1.

It has also been held that while an advancement may satisfy a legacy of a greater amount, *pro tanto*, or even absolutely, if such is manifestly the testator's purpose, a bequest of a less sum than the debt will not operate even as a partial payment. If, said Bronson, J., in *Eaton v. Benton*, "the debt be \$100, and the legacy be also \$100, the debt is paid and the legatee has got nothing by the gift. But if the debt be one hundred, and the legacy but ninety-nine, no part of the debt is satisfied, and both debt and the legacy must be paid by the executor." The rule applies, although the testator also bequeaths various specific articles, which together with the money exceed in value the amount due; *Strong v. Williams*, 12 Mass. 389.

In *Strong v. Williams*, the action was bought on a bond conditioned to pay the plaintiff \$333, within six months after the obligor's decease, and also to pay her \$20 annually so long as she should continue in his family, and to provide her during the same time with food, wearing apparel, and whatever else her necessities might require. The obligor subsequently made a will bequeathing the plaintiff \$300, together with his household furniture and sundry other chattels, in consideration of her long and faithful services. The aggregate pecuniary value of these

bequests exceeded the amount claimed on the bond. The court held that the cause of action was not satisfied. The pecuniary legacy did not equal the amount due, and therefore could not be presumed to have intended to satisfy the debt, and the specific bequest not being *ejusdem generis*, could not be taken into account in the absence of a direction that it should be received in satisfaction. "The general rule," said Putnam, J., "anciently established in chancery was, that, when a testator being indebted, gave to his creditor a legacy equal to, or exceeding, the amount of his debt, the legacy should be considered as a satisfaction of the debt. The rule has been acknowledged in later cases, but with marks of disapprobation, and a disposition to restrain its operation in all cases where, from circumstances to be collected from the will, it might be inferred that the testator had a different intention; *Haynes v. Mico*, 1 Bro. Cha. Ca. 131. Thus, where a testator left a sufficient estate, it was determined that he was to be presumed to have been kind as well as just. So, if the legacy was of a less sum than the debt, or of a different nature, or upon conditions, or not equally beneficial in some one particular, although more so in another.

"All the cases agree that the intention of the testator ought to prevail; and that, *prima facie* at least, whatever is given in a will is to be intended as a bounty. But, by later cases, the courts have not been disposed to understand

the testator as meaning to pay a debt, when he declares that he makes a gift; unless the circumstances of the case should lead to a different conclusion.

"Thus, in the case cited for the plaintiff (*Brown v. Dawson*, 2 Vern. 498), where the wife joined in the sale of her jointure, and the husband gave her a note of 7l. 10s. per annum for her life; and afterwards, upon another such sale, he gave her a bond for 6l. 10s. per annum for her life; and he afterwards made his will, and gave her 14l. per annum for life; the legacy was adjudged to be a satisfaction for the note and bond. Here it will be perceived, that the annuity given in the will amounted exactly to the sum secured by the bond and note; and the presumption of satisfaction proceeded upon the similitude of the legacy to the debt. 2 Fonbl. 330, *in notis*. So, in the case of *Fowler v. Fowler*, 3 P. Wms. 353, the general rule was applied. There the husband, being indebted to the wife for arrears due by the marriage settlement, gave her a larger legacy by the will; and it was held a satisfaction of the debt. But it is to be observed, that Lord Chancellor Talbot, expressed great dissatisfaction with the rule; and it does not appear, that any circumstances could be found to take the case out of its general application. In that case the court refused parol evidence, to prove that the testator intended both should be paid.

"But cases of this nature must depend upon the circumstances;

and there must be a strong presumption, to induce a belief that the testator intended the legacy as a payment, and not as a bounty. 2 Fonbl. 332. Thus, where the testatrix had given her servant a bond for 20l. free of taxes for her life, and afterwards made her will and gave her servant 20l. per annum, payable half yearly, but said nothing about the taxes, the court held that both should be paid. *Atkinson v. Webb*, 2 Vernon, 478. Here the legacy, being not quite so beneficial as the debt, did not raise a presumption that it was intended as a payment.

"So, where the testator, having sufficient assets, and having manifested great kindness for the legatee, gave a legacy of a greater amount than he owed, it was holden by Lord Chancellor Cowper, that the testator might be presumed to be kind as well as just; and he decreed the payment of the legacy as well as the debt; *Cuthbert v. Peacock*, 1 Salk. 155. It has been holden, that a legacy for a less sum than the debt shall never be taken as satisfaction (1 Salk. 508); and that *specific things* devised are never to be considered as satisfaction of a debt, unless so expressed; 2 Eq. C. Abr., title, Devises, pl. 21, cited Bac. Abr., Legacies, D.

"So the circumstance, where the testator had devised 'that all his debts and legacies should be paid,' was holden sufficient to take the case out of the general rule; as, where the testator, indebted to his maid servant 100l. by bond for wages, afterwards gave her 500l.

Lord Chancellor King decreed that both should be paid, and as the testator had made provision for the payment of his debts; 1 P. Wms. 408, 409, vide note.

"So, where it appeared, that the legatee had lived with the testatrix as a servant for twenty or thirty years, and she had given her a bond for 260*l.*, and, in one month afterwards, she made her will and gave her 500*l.*; and, in another clause, she gave the rest of her servants 5*l.* a piece, but not to *Jane Greese*, the legatee; 'because,' said the testatrix, 'I have done well for her before;' and she also made provision for her debts and legacies. Lord Hardwicke thought the circumstances above stated took the case out of the general rule, and decreed the legacy to be no satisfaction for the debt; *Richardson v. Greese*, 3 Atk. 65; *Nichols v. Judson*, S. P., 2 Atk. 301; *Clark v. Sewell*, S. P., 3 Atk. 97.

"So, where the testator was indebted for goods on an open account, a legacy for a larger sum was not held a satisfaction, because he might not know whether he was indebted or not; and, therefore, no presumption was to arise, that he intended merely to pay a debt; 1 P. Wms. 299; *Powell's Case*, S. P., 10 Mod. 201.

"In the case at bar, the consideration for the legacy appears from the will to have been for the services of the legatee. A presumption that the legacy was intended to be a satisfaction of the bond, also, must rest on the fact, that the bond was given for the

same services; of which fact there is no evidence before us. It may have been for a different cause. We can only presume that it was for a lawful one.

"It appears, also, from the will, that the testator intended his debts and legacies should be paid before his residuary legatees should take anything. The pecuniary legacy to the plaintiff, also, is not so much as the debt; and, therefore, cannot be considered as a payment of it. Neither is there any declaration of the testator, that the specific articles given should be considered as a satisfaction of the debt. It appears, also, that there are sufficient assets.

"From a consideration of the principles and decisions applicable to this case, we are, therefore all of opinion that the plaintiff ought to recover."

The rule that the legacy must be at least equally certain with the debt, and alike in every material particular, was strictly applied in *Byrne v. Byrne*, 3 S. & R. 54. The testator being indebted to his sons Patrick and Henry Byrne, in the sum of 350*l.*, by his will, cancelled a debt of ten thousand dollars from Patrick Byrne, and at the same time bequeathed to him "\$500," and "no more." He gave Henry Byrne some small specific legacies, and one-fourth of the residue of his estate. The court held that the cancellation of the debt of \$10,000, was not equivalent in all respects to a devise of so much money, nor was the debt so discharged, *ejusdem generis* with the demand for

which the suit was brought, that being an amount due to both the sons jointly, while this was the several obligation of Patrick Byrne. The legacy to Henry Byrne could not operate as satisfaction, because it was necessarily doubtful whether his share of the residuary bequest would equal his moiety of the 350*l.* in suit. The strong probability was that it would exceed it; but the amount was uncertain, and it lay within the range of human events and vicissitudes of trade, that the testator might have died insolvent, instead of leaving a large estate. It was, also, a circumstance that as there was no deficiency of assets, he could well afford to be generous as well as just.

There can be no presumption of an intent to satisfy a debt which is not contracted until after the execution of the will; and the case is nearly if not quite the same, where the consideration is a continuing one and has not been fully performed or executed when the bequest is made. See *Strong v. Williams*, *Williams v. Crary*, 8 Cowen, 246; *Horner v. McGaughy*, 12 P. F. Smith, 189. For a like reason the testator will not be presumed to have intended to satisfy a contingent obligation, or one which is uncertain as to amount; *Horner v. McGaughy*.

In *Horner v. McGaughy*, the plaintiff who was the defendant's nephew, and had been his ward, brought a suit to recover the balance of an unliquidated or running account extending from March 1861, to February 1866, and

containing items on both sides. It appeared in evidence that the defendant bequeathed the sum of \$500 to the plaintiff by a will executed in August 1865.

Thompson, C. J., said that the case did not justify the presumption that the legacy was intended to be in satisfaction of the debt. It was as little reasonable to infer that the testator meant to satisfy a debt of unknown amount, as it would be to draw such an inference where he did not know of the existence of the debt. It was a more natural supposition, that his purpose was to give a gratuity of \$500, in view of the tie of blood, and the position which he held as guardian. The court below was right in instructing the jury, that the gift of a legacy under such circumstances, does not give rise to a presumption of payment.

It is well settled that one who renders services to another, in the expectation of being remunerated by a provision in his will, cannot maintain an action, if a bequest or devise is made in his favor, which amounts to a reasonable compensation; see *Jacobson v. Legrange*, 3 Johnson, 199; *Paterson v. Peterson*, 13 Id.; *Eaton v. Benton*, 2 Hill, 576, 578; *Williams v. Crary*, 4 Wend. 443, 450. In like manner, where it is expressly or impliedly agreed between a creditor and a debtor, that the demand shall be paid by a provision in the creditor's will, and the latter subsequently makes a bequest on the faith of that agreement which the creditor accepts, he will be precluded from recovering the

debt; *Williams v. Crary*, 5 Cowen, 368; 8 Id. 246; 4 Wend. 443. In *Williams v. Crary* the testatrix boarded in the plaintiff's house, and was indebted to him on this and other accounts, in a sum amounting to \$2,400. On the other hand, she had lent him \$4,000, for which she held his bond. During her last illness they talked about a settlement, when the testatrix said that "she would leave him enough to pay for his trouble; there was a bond which should be given up to him at her death. No settlement was requisite; at her death he would be satisfied." Her will executed at or about this time, contained the following provision: "Whenever Colonel Williams shall pay to my executors \$1,600, I order that satisfaction shall be entered for the mortgage which I hold against him, and his bond cancelled and surrendered." The plaintiff paid the \$1,600 and received the bond from the executors, and now brought suit against them to recover the amount due by the testatrix in her lifetime. Woodworth, J., said that agreeably to the understanding of both parties, the debt due from the plaintiff to the testatrix was the source to which he was to look for the payment of his account. There could be no doubt on the evidence, that the implied relinquishment of \$2,400 was an appropriation of so much to satisfy the plaintiff. The testatrix in substance directed that the plaintiff should retain \$2,400, parcel of the \$4,000 in his hands, and pay the remainder to her executors. This had

been done, and was a full discharge of both demands. It followed that he was not entitled to recover.

It was said in this case, and reiterated in *Clark v. Bogardus*, 12 Wend. 672, and *Eaton v. Benton*, 2 Hill, 576, 580; that a legacy 'will not be deemed a satisfaction, of a pre-existing debt unless it appears to have been the testator's meaning that it should so operate;" and this observation is so far just that a bequest is *prima facie* gratuitous, and should not be construed as a payment without some sufficient ground. Whether the language of the will is "I give" or "I bequeath," it equally implies an intention to be bountiful, and not merely to confer that on the legatee, to which he is already entitled as of right; see *Eaton v. Benton*, 2 Hill, 576, 578; *Horner v. McGaughey*. There is nevertheless the countervailing argument, that one who owes ought to pay before he thinks of giving, and hence when a legacy is in all respects the same as the amount due, it will be presumed to have been intended as a fulfilment of the antecedent obligation, and not to be merely gratuitous; *ante*.

In *Van Riper v. Van Riper*, 1 Green Ch. 1, the court assigned the following reasons for holding that a demand against an administrator for the distributive shares of the complainants as next of kin, was not satisfied by the bequests to them in his will. "In the first place the testator directs his executors to pay all his just debts; next the legacies are not to be paid

until the legatees severally arrived at full age. All the cases agree that a present debt cannot be satisfied by a contingent legacy, nor can there be any reasonable presumption that the testator intended to satisfy a demand due at the time by legacies payable at a future day. The debt is also in a measure unliquidated; the testator never having settled his accounts as administrator. Moreover, the case is made stronger from the fact that the debt was due in his representative capacity and not in his own right."

It has been seen that a covenant by a parent to provide pecuniarily for a child, is regarded as a portion, and that if the parent subsequently advances money to the child, or makes a similar provision for him by will, the covenant will be satisfied in the former case, and the legatee compelled to elect in the latter; and it has also been seen that this presumption does not apply to a covenant in consideration of value actually received, or by one who is not under a parental obligation, *ante*, 819. Such a covenant is not distinguishable from an ordinary pecuniary obligation, and it is consequently subject to the rule that to render a legacy a satisfaction of a debt, it must not only be like, but identical. Where, however, the covenant is to convey or settle land, stocks, or chattels, and property of the kind designated in the will, is subsequently devised by the covenantor, and accepted by the covenantee, satisfaction may be inferred as in other cases where a creditor receives value in full of an

antecedent obligation; see *Bryant v. Hunter*, 3 W. C. C. R. 48.

In *Bryant v. Hunter*, the allegation was that a covenant by a husband, to convey land in trust to secure to his wife the interest of \$5000 during his life, and the principal at his death, had been fulfilled by her acceptance of land which he devised to her after the execution of the covenant. The question is, said Washington, J., "whether the devise to Mrs. Hare, was a satisfaction or performance in whole, or in part of the marriage contract, and was accepted? The general rule is, that a devise of *land* is not a satisfaction, or part performance, of an agreement to pay *money*. But in this case, Alexander Hare, by the marriage contract, bound himself to assure to the trustees of his intended wife, a sufficient real or personal estate, to secure the payment of 5000 dollars for her sole use, in case she should survive him, or that he would, by his last will, within the said year from the date of the bond, bequeath to her such estate as should be fully adequate to the intended provision. He accordingly makes a provision for her by will, and though not made within the year, this circumstance is immaterial; a will being ambulatory. This provision is to all intents and purposes, a performance or part performance of the contract; and, although he does not so declare in his will, yet, that he intended it, is not to be questioned; for, it is inconceivable that he should have meant to give, as a bounty to his wife, nearly half

his estate, and to have left this large debt to sweep away the provision intended for his son. The reference in the bond to a provision in land, or other property to be made by will, differs this from all the cases that were cited; and, we must presume, that the will was intended to comply with the condition of the bond. The nuncupative will amounts to an express acceptance of the devise; as it disposes of all the property of every kind, vested in her by the will of her husband, or otherwise. This property consisted of land and personal estate, the latter very trifling, particularly, after the plate and other things devised by her, were deducted. The court has no authority for limiting her words to the personal property; because the will could not, in point of law, pass the real estate; a circumstance which most probably she did not know." The turning point in this instance seems to have been that the object of the covenant which was to secure the wife, was as well attained by a devise to her, as it could have been by a conveyance to trustees.

The doctrine that a debt from a parent to a child, is presumably satisfied by a subsequent advancement, was applied in *Kelly v. Kelly's Ex'rs*, 6 Randolph, 176; although the advancement was not *ejusdem generis*. There, one Kelly received a legacy of \$1000, which had been bequeathed to his children by a relative, and subsequently conveyed land to them of greater value than the legacy. The deed was accepted

by the grantees, who went into possession of the land. The court held, on the authority of *Wood v. Bryant*, 2 Atkins, 521, that the conveyance must be presumed to have been in satisfaction of the amount due by the grantor.

If it was objected that it was a money debt, and the property conveyed land, and that therefore the latter could not be considered satisfaction for the former, the argument was by no means conclusive. The question was one of intention to be ascertained from all the circumstances. When a child is entitled to a portion of 500*l.* by will, and the father afterwards in his life advances him 500*l.*, both sums being the same in amount, and the same in kind, these are taken as circumstances tending to show that the advancement was made in satisfaction of the portion or legacy. On the contrary, if the advancement is land, it is taken as *prima facie*, going to show it was not intended as a satisfaction of the 500*l.*, they being different things. But yet these are mere presumptions liable to be rebutted and overthrown. For, if it be made to appear that the father did not intend the 500*l.* advanced, to go in satisfaction of the portion or legacy, it will be no satisfaction, though *ejusdem generis*, and if the court is convinced that he did mean the land as a satisfaction, it will be so taken, though not *ejusdem generis*.

FORGIVENESS OF DEBT BY WILL.
—A legacy from a creditor to a debtor may afford ground for an argument, that the testator would

not have put his estate under a pecuniary obligation to one who was indebted to him, if he had not meant to forgive the debt. But, inasmuch, as this is a mere inference that a purpose existed, which has not been expressed, it will not be allowed to prevail, unless it is corroborated by the testator's acts or declarations, or by circumstances.

All that can justly be inferred from such a testamentary provision is, that the testator did not mean that the executors should compel that to be paid as a debt, which it would be incumbent on them to refund as a legacy. A court of equity may, therefore, to prevent circuity of action, authorize the executors to set off the debt against a demand for the legacy, or, if the estate be solvent, direct that they shall give credit for the legacy in suing for the debt; see *Clark v. Bogardus*, 2 Edwards Ch. 387; 12 Wend. 67; *Wilmot v. Woodhouse*, 4 Brown C. C. 227.

In *Clark v. Bogardus* the bill was filed to restrain an action brought by the plaintiffs as executors, on a bond which had been executed by the complainant to the testatrix, for a valuable consideration moving to her daughter, who was the complainant's wife. The bill alleged that no payment had been made on the bond for sixteen years before the death of the testatrix, and that she had by her will bequeathed to her daughter a larger sum than the amount of the bond, and relied on these circumstances as evidence that the debt was forgiven or extinguished. It

was held by the Vice-Chancellor, and afterwards by the Court of Errors, that there is no presumption of payment from the lapse of time, short of twenty years, without corroborating circumstances, which did not exist in the case under consideration, where the bond remained in the testatrix's possession uncanceled at her death, and she did not discharge the obligation in her will, as she presumably would have done if she had intended to forgive the debt. *Wilmot v. Woodhouse*, 4 Brown, C. C. 486. The just inference, was that the testatrix meant that so much of the assets of the estate as were in the complainant's hands, as her debtor, should be appropriated to the payment of the legacy. The injunction which had been granted was consequently dissolved.

The question subsequently arose in the Supreme Court, where a plea setting forth the circumstances as a defence to the bond, was overruled on demurrer. The Chief Justice said in delivering judgment: "If a legacy be left to the testator's debtor, the debt shall be deducted from the legacy, because the legatees demand is in respect of the testator's assets, without which the executor is not liable, and, therefore, the legatee in such case is considered by a court of equity to have so much of the assets already in his hands as the debt amounts to, and consequently to be satisfied pro tanto; for there can be no pretence to say, because the testator gives a legacy to his debtor, it is an argument to

show that the testator meant to remit the debt: Toller, 338. Mr. Toller cites *Rankin v. Barnard*, 5 Maddock's R. 32, to prove that where a legacy was left to the wife of A., who was largely indebted to the testatrix, and A. became a bankrupt, and his wife afterwards died, without having asserted any claim in respect to the legacy, and the assignee claimed it, it was held that the executors of the testatrix were entitled to retain the legacy in part discharge of the debt due the testatrix. The question also arose in *Rickets v. Livingston*, 2 John. Cas. 98, where Radcliff, Justice, said "a legacy to one who at the date of the will is indebted to the testator, does not release or extinguish the debt, unless it appears to be so intended on the face of the will."

In *Stagg v. Beekman*, 2 Edwards, 89, the testator bequeathed the sum of \$1,000 to the complainant, and afterwards by codicil made a devise in his favor, which he subsequently revoked by another codicil, and directed his executors to hold the land, as well as the \$1,000 previously bequeathed, in trust for the support and maintenance of the complainant, without liability to his creditors. The question was whether a note for \$500, which the complainant had executed to the testator, for money advanced between the date of the will and of the first codicil, had been impliedly forgiven, or was to be deducted from the legacy of \$1,000? It was held that the note was a subsisting obligation, and that the executors were entitled

to a credit for that amount in settling with the legatee. The Vice-Chancellor said: "At law a testamentary act cannot operate as a release of a debt owing to the testator, while in a court of equity it may sometimes have the effect of extinguishing the debt: Ram. on Assets, 469. A mere bequest, however, of a legacy by a creditor to his debtor is not necessarily, or even *prima facie*, a release or extinguishment. The court requires evidence clearly expressive of such an intention, before it will give effect to the act. If this intention is not expressed or rendered apparent on the face of the will, then evidence *aliunde* may be admitted to prove an intention to release or discharge it: 2 Roper on Legacies, 37, 62, 64.

In the present case the evidence of such an intention is wanting, and the contrary is plainly inferrible. The amount of bounty is fixed in the shape of a pecuniary legacy of one thousand dollars, an advance of five hundred dollars afterwards takes place, a note is given for it, this note is kept in the testator's pocket uncanceled, and in the last codicil nothing appears to show an intention to increase the bounty beyond what was originally contemplated, such, however, will be the effect, provided the complainant can retain the sum advanced, and also receive the benefit of the whole original bequest; taking the note and preserving it among his papers, are circumstances which clearly indicate that the testator intended the advance should remain as a

debt against his legatee, and be deducted and retained by his executors. This they have a right to do: *Jeff v. Wood*, 2 P. Wms. 128; *Rankin v. Barnard*, 5 Mad. R. 32."

It is equally well settled that the oral or written declarations of a creditor, cannot operate as a release or forgiveness of the debt, in the absence of a seal, and where there is no valuable consideration that can enure as satisfaction, or justify the intervention of a court of equity: *Kidder v. Kidder*, 9 Casey, 298; 1 Smith's Ldg. Cases, 630, 7 Am. ed.; and it is immaterial as it regards the operation of this principle, that the intention of forgiveness is declared during a last illness, or to the persons who are named to execute the will: *Byrne v. Godfrey*, 4 Vesey, 6. The case of *Weskett v. Raby*, 2 Brown, P. C. 386, which might seem to look the other way, turned on the circumstance that the testator declared his intention to forgive the debt, to the executrix at the time of making a will by which she was constituted his residuary legatee, thus giving rise to a constructive trust, which it was incumbent on her to fulfil. See vol. 1, 352; *Byrne v. Godfrey*, 4 Vesey, 610.

It has, notwithstanding, been held that where the inference of forgiveness drawn from a pecuniary bequest to the debtor, is corroborated by the creditor's declarations at the execution of the will or afterwards, it may be a ground for restraining the executor from proceeding at law: *Eden v. Smith*,

5 Vesey, 341; *Ziegler v. Eckert*, 6 Barr, 13; see *Pole v. Lord Somers*, 6 Vesey, 309, 323. In *Ziegler v. Eckert*, the suit was brought by the plaintiffs as executors, on seven bonds, amounting in all to \$7,000, which had been executed by the defendant to the testator, who was his uncle.

It was proved at the trial, that the testator had left the defendant a legacy of \$1000, and had declared repeatedly at and before the making of the will, that he would have bequeathed him a larger sum, but for his intention to cancel the bonds, and that they should not be enforced after he was gone. It was also shown that the testator during his last illness, and while making his will, requested the scrivener who prepared the instrument and brought it to him for execution, to take the bonds out of his trunk and put them out of the way, and that he reiterated this injunction at the last moment before his death. Gibson, C J. said that the presumption that the legacy was intended to be a clear gratuity, which was repelled in the first instance by the production of the bonds, was restored by the parol proof of an intention to release them, which had been frustrated by accident. There was consequently a distinct ground for equitable relief.

This decision was chiefly based on the authority of *Aston v. Pye*, 5 Vesey, 350, 354, and of *Eden v. Smith*. It may be observed with regard to the former case, that a memorandum of the intention not to exact payment, was indorsed

on the promissory note which was the cause of action, and might, therefore, be regarded as a cancellation. See *Garrett's Appeal*, 3 Harris, 212; *Evans' Appeal*, 2 P. F. Smith, 238; *Warner v. Warner*, 37 Vermont, 356; 2 American Leading Cases, 497, 5 ed. The case of *Eden v. Smith* is s. far different from *Ziegler v. Eckert*, that the proofs of the testator's purpose consisted for the greater part of memoranda and letters written by him, which might agreeably to Lord Loughborough's opinion, have been given in evidence in a suit at law under a plea of release. In *Pole v. Lord Somers*, Lord Eldon said, "as to the case of *Eden v. Smyth*, I am not sufficiently informed upon it to state whether the evidence was admissible or not. If what is stated in the report as to the bond from Sir Frederick Eden to Mr. Smyth, that the paper produced would operate as a release, is to be taken as Lord Rosslyn's opinion, and if that opinion is right, then certainly it was properly received in evidence; and the question then is only whether that opinion is well founded."

A testamentary provision cannot operate as satisfaction on merely legal grounds, or when the question arises in a suit at law, and if the defendant is entitled to relief, it must be sought in a court of chancery;—see *Clark v. Bogardus*, 2 Edwards Ch. 387, 12 Wend. 67; *Stagg v. Beekman*, 2 Edwards Ch. 89. This is very clear where the defence consists in an allegation, that the testator bequeathed

a legacy, in satisfaction of the demand which the plaintiff seeks to enforce by suit; *Crary v. Williams*, 5 Cowen, 368; *Molony v. Scanlan*, 53 Illinois, 122. One cannot, by an ex-parte act or declaration, liberate himself from an obligation arising *ex contractu*. Such a bequest at the most affords another means of payment, which the creditor may use or neglect at pleasure. He may therefore proceed to recover the debt in the ordinary course of law, and the question of satisfaction does not arise until the legacy is paid or demanded. In *Molony v. Scanlan*, the suit was brought for a debt contracted by the testator, and the executors pleaded that he had bequeathed a legacy to the plaintiff in satisfaction. The court held that the legacy must be paid before such a defence could be available. It was the duty of the executors to satisfy the debt, and then if the creditor demanded the legacy, they could raise the question whether it was intended to pay the antecedent obligation or as a gift.. Such a conclusion is the more just, because the obligation of the debt is absolute, while the right to the legacy depends on the sufficiency of the assets.

It is equally well settled, that a testamentary forgiveness of a debt, or direction that it shall not be collected, is not a legal defence, although a court of equity may enjoin the executors from bringing suit contrary to the testator's purpose. See *Stagg v. Beekman*, 2 Edwards Ch. 89; *Clark v. Bogardus*, Ib. 387, 12 Wend. 67; *Hobart*

v. *Stone*, 10 Pick. 215. This is not merely because an obligation cannot be discharged by a writing without consideration, and which is not executed and delivered as a release. One who forgives a debt by will, virtually bequeaths the amount to the debtor, who cannot take advantage of the provision, unless the testator's assets are adequate to pay his creditors, a question which cannot be considered or determined by a merely legal tribunal, or under the course of procedure at common law.

A bequest of a debt to the debtor, may be an equitable defence to an action by the executors, by operating as an assignment of the amount due; and the same result may follow from a residuary bequest which embraces a debt due by the legatee, if the assets are sufficient for the payment of testator's creditors and the legacies which he has specifically bequeathed; *Hobart v. Stone*, 10 Pick. 215. "The gift of a debt by will, to the debtor, does not oper-

ate immediately as a release, although so denominated, but rather as a legacy requiring the assent of the executor, for the obvious reason, that like other legacies it will not absolutely be available, unless there be other assets for the payment of debts; *Rider v. Wager*, 2 P. Wms. 331; but when not required for the payment of debts, and the assent of the executor is given, or presumed, such gift operates by way of release or extinguishment, to avoid circuity of action; *Sibthorp v. Moxom*, 3 Atk. 580. Were it otherwise, the executor would recover the debt to the use of the debtor himself, and be bound to repay it to the debtor himself, which would be useless. We can perceive no difference in this respect, between the release or gift of a particular debt to the debtor himself, and a similar gift or release by a general bequest, where it is evident from the condition of the estate, that the debt, if recovered, would only go to swell that residuum." *Hobart v. Stone*.

*WILCOCKS v. WILCOCKS.¹

[*415]

DE TERM S. TRINITATIS, 1706.

REPORTED 2 VERN. 558.

PERFORMANCE OF A COVENANT TO PURCHASE AND SETTLE AN ESTATE.]—*A. covenants, on his marriage, to purchase lands of 200l. a year and settle them for the jointure of his wife, and to the first and other sons of the marriage in tail. He purchases lands of that value, but makes no settlement; and on his death the lands descend on the eldest son. On a bill by the eldest son for a specific*

¹ S. C., 1 I q. Ca. Ab. 26, pl. 5.

performance of the covenant, it was held that the lands descended were a satisfaction of the covenant.

THE plaintiff's father, upon his marriage, covenanted to purchase lands of 200*l.* per annum, and to settle the same upon himself for life, and on his wife for her jointure, and to the first and other sons in tail, remainder to the daughters.

The father, who was a freeman of the city of London, died intestate, having purchased lands of the value of 200*l.* per annum but made no settlement thereof, but permitted them to descend upon the plaintiff, his eldest son, who now brought a bill founded on his father's marriage articles, to have 200*l.* per annum purchased out of the personal estate, and settled to the uses in the marriage articles.

LORD KEEPER COUPER.—The lands descended, being of 200*l.* per annum and upwards, ought to be deemed a satisfaction of the covenant, and decreed it accordingly;¹ and that the personal estate should be divided and distributed amongst the *three* children according to the custom of the city of London, and the [*416] statute for settling intestates' estates.

One of the daughters having attained the age of *seventeen* years, made her will, and devised her personal estate.

PER CUR.—The will is good as to the share that belonged to her by the statute; but as to her orphanage share,² she dying unmarried before *twenty-one*, it survives to the other orphans by the custom, and her will could not take place upon her orphanage part.

[*417] *BLANDY v. WIDMORE.³

DE TERM. S. TRIN. 1716.

REPORTED 1 P. WMS. 323.

PERFORMANCE OF A COVENANT TO LEAVE A SUM OF MONEY BY ALLOWING A SUM TO DEVOLVE BY INTESTACY.]—*Covenant by a man, previous to marriage, to leave his intended wife 620*l.* The marriage takes place, and he dies intestate; the wife's share comes to above 620*l.*: this is a satisfaction.*

UPON the marriage of A. with B., there were articles reciting, that, in consideration of the marriage, and of the portion, it was

¹ See *Herne v. Herne*, 2 Vern. 555.

² A child entitled to an orphanage share of his father's estate, dying under *twenty-one*, and unmarried, cannot devise it by his will; for, by the custom, it survives to the other children; but he might, (previous to 1 Vict. c. 26, which renders the wills of all persons under *twenty-one* invalid), have bequeathed his share under the Statute of Distributions.

³ *S. C.*, 2 Vern. 709.

agreed that if B., the wife, should survive A., her intended husband, A. should *leave* B. 620*l.*; and accordingly A. covenanted with B.'s trustees, that his executors, within three months after his decease, should pay B. 620*l.* if she should survive him.

A. died intestate and without issue; upon which B., the wife, by the Statute of Distributions, became entitled to a moiety of the personal estate, which was much more than 620*l.*; and the question was, whether the distributive share belonging to B., being more than 620*l.*, should go in satisfaction of it.

Sergeant *Hooper*.—This 620*l.* is a debt, and debts must be first paid, after which the distribution is to be made; and if the intestate had made a will, probably he would have given to his wife something additional to this 620*l.* Now, what the statute gives is not his gift, and, being not his gift, is not to be taken as his payment; or, supposing it to be his gift, still it cannot be said to be his payment.

*LORD CHANCELLOR COWPER.—I will take this covenant *not to be broken*, for the agreement is to *leave* the widow [*418] 620*l.* Now the intestate in this case has left his widow 620*l.* and upwards, which she, as administratrix, may take presently upon her husband's death; wherefore, let her take it; but then it shall be accounted as in satisfaction of, and to include in it, her demand by virtue of the covenant; so that she shall not come in first as a creditor for the 620*l.*, and then for a moiety of the surplus.

And Mr. Vernon said, it had been decreed in the case of *Wilcocks v. Wilcocks*,¹ Trin. 1706, that if a man covenants to settle an estate of 100*l.* per annum on his eldest son, and he leaves lands of the value of 100*l.* per annum to descend upon such son, this shall be a satisfaction of the covenant to settle; and that this last was a stronger case, it being the case of an heir, who is favoured in equity; also the case of *Phiney v. Phiney*² was cited.

Whereupon the decree³ made by Sir John Trevor, Master of the Rolls, was now affirmed by Lord Chancellor Cowper.⁴

Wilcocks v. Wilcocks was decided in accordance with the rule of equity, that, where a person covenants to do an act, and he does that which may either wholly or partially be converted to or towards a completion of the covenant, he shall be presumed to have done it with that intention. In that case, it will be observed that a person covenanted to *purchase and to settle* lands of a certain value, and afterwards purchased lands of equal, or greater value, which descended upon his heir, and they were deemed a performance of the covenant.

¹ 2 Vern. 558, ante, 376.

² 2 Vern. 638.

³ 2 Vern. 709.

⁴ And again affirmed upon a rehearing. Reg. Lib. A. 1715, fol. 372.

The result will be the same where a person, having no real estate, covenants to *convey and settle*, and he afterwards purchases, but does not convey or settle, real estate: *Deacon v. Smith*, 3 Atk. 323; and see *Wellesley v. Wellesley*, 4 My. & Cr. 561; *Ex parte Poole*, De Gex Bankruptcy Ca. 581.

Where the lands purchased are of less value than the lands covenanted to be purchased or conveyed and settled, they will be [*419] considered as purchased in part performance of the covenant: *Lechmere v. Earl of Carlisle*, 3 P. Wms. 211; *Lechmere v. Lechmere*, Ca. t. Talb. 80; *Sowden v. Sowden*, 1 Bro. C. C. 582; 3 P. Wms. 228, n.; *Gardner v. Marquis of Townshend*, G. Coop. 303; and see 4 Ves. 116, 117; 10 Ves. 9, 516.

Even if the heir be not a person interested in the performance of the covenant, the land will be bound in his hands by it (*Garthshore v. Charlie*, 10 Ves. 9); and it is immaterial whether the estates are to be purchased within a limited time, and the purchase is not made until after such time has expired, or at different times, and in small parcels; or whether it is to be made with the consent of trustees, and such consent has not been applied for: see *Deacon v. Smith*, 3 Atk. 329.

The doctrine upon this subject was much discussed in the leading case of *Lechmere v. Earl of Carlisle*, 3 P. Wms. 227, Ca. t. Talb. 80. There Lord Lechmere, upon his marriage with Lady Elizabeth Howard, daughter of the Earl of Carlisle, covenanted to lay out, within one year after the marriage, 6000*l.*, her portion, and 24,000*l.* (amounting in the whole to 30,000*l.*), in the purchase of freehold lands in possession, in the south part of Great Britain, with the consent of the Earl of Carlisle and the Lord Morpeth, to be settled on Lord Lechmere for life, remainder, for so much as would amount to 800*l.* a year, to Lady Lechmere, for her jointure, remainder to first and other sons in tail male, remainder to Lord Lechmere, his heirs and assigns for ever; and Lord Lechmere also covenanted, that until the 30,000*l.* should be laid out in lands, interest should be paid to the persons entitled to the rents and profits of the lands when purchased. Lord Lechmere was seised of some lands in fee at the time of his marriage, and after his marriage purchased some estates in fee of about 500*l.* per annum, and some estates for lives, and other reversionary estates in fee expectant on lives, and contracted for the purchase of some estates in fee in possession, and on the 18th of June, 1727, died intestate, without issue, and without having made a settlement of any estate. None of the purchases or contracts were made by Lord Lechmere *with the consent of the trustees*. Upon a bill being filed by Mr. Lechmere, the heir of Lord Lechmere, for specific performance of the covenant, and to have the 30,000*l.* laid out as therein agreed, it was held by Sir Joseph Jekyll, M. R., that he was entitled to specific performance, and that none of the land which was permitted to descend to the heir was to be taken in satisfac-

tion or part performance of the covenant. However, on appeal, Lord Talbot reversed his Honor's decree as to the freehold lands purchased in fee simple *in possession after the covenant, though with but part of the 30,000*l.*, and left to descend, and these were ordered [*420] by the Lord Chancellor to go as a satisfaction pro tanto, or, more correctly speaking, they were to be considered as bought in part performance of the covenant. "As to questions of satisfactions," observed his Lordship (see Sugd. V. & P. Append. 1117, 11th edit.), "where they are properly so, they have always been between debtor and creditor or their representatives. As to Mr. Lechmere, *I do not consider him as a creditor, but as standing in the place of his ancestor*, and thereby entitled to what would have vested in his ancestor. A constructive satisfaction depends on the intention of the party, to be collected from circumstances. But then the thing given must be of the same kind, and of the same or a greater value. The reason is plain; for a man may be bountiful as well as just; and if the sum given be less than the debt, it cannot be intended as a satisfaction, but may be considered as a bounty; and if the thing given is of a different nature, then, also, as the intention of the party is not plain, it must be considered as a bounty. But I do not think the question of satisfaction properly falls within this case, for here it turns on what was the intention of my Lord Lechmere in the purchase made after the articles; for, as to all the estates purchased precedent to the articles, there is no colour to say, they can be intended in performance of the articles; and as to the leasehold for life, and the reversion in fee expectant on the estates for life, it cannot be taken they were purchased in pursuance of the articles, because they could not answer the end of them. But as to the other purchases (in fee simple in possession, &c.), though considered as a satisfaction to a creditor, yet they do not answer, because they are not of equal or greater value. Yet, why may they not be intended as bought by him with a view to make good the articles? The Lord Lechmere was bound to lay out the money with the liking of the trustees, but there was no obligation to lay it out all at once, nor was it hardly possible to meet with such a purchase as would exactly tally with it. Parts of the land purchased are in fee simple in possession, in the south part of Great Britain, and near to the family estate. But it is said they are not bought with the liking of the trustees. The intention of naming trustees was to prevent unreasonable purchases, and the want of this circumstance, if the purchases are agreeable in other respects, is no reason to hinder why they should not be bought in performance of the articles. It is objected, that the articles say the land shall be conveyed immediately. It is not necessary that every parcel should *be conveyed as soon as bought, but after the whole was purchased, for it never could be intended that there should be [*421] several settlements under the same articles. Whoever is entitled to a

performance of the covenant, the personal estate must be first applied so far as it will go, and if the covenant is performed in part, it must make good the deficiency. But where a man is under an obligation to lay out 30,000*l.* in lands, and he lays out part as he can find purchases, which are attended with all material circumstances, it is more natural to suppose these purchases made with regard to the covenant than without it. When a man lies under an obligation to do a thing, it is more natural to ascribe it to the obligation he lies under, than to a voluntary act, independent of the obligation. Then, as to all the cases of satisfaction, though these purchases are not strictly a satisfaction, yet they may be taken as a step towards performance; and that seems to me rather his intention than to enlarge his real estate. The case of *Wilcocks v. Wilcocks* (2 Vern. 558), though there are some circumstances that are not here, yet it has a good deal of weight with me. There the covenant was not performed, for the estate was to be settled, but the land was left to descend, and a bill was brought to have the articles made good out of the personal estate; to which it was answered, that the 200*l.* per annum was bought, which descended to you. It is true a settlement hath not been made, but they were bought with an intention to make a settlement, and you can make one. The same will hold as strong in the present case, that these lands were bought to answer the purposes of the articles, and fall within that compass; and it is not an objection, to say they are of unequal value, for a covenant *may be executed in part, though it is not so in satisfaction; and in this particular I differ from the Master of the Rolls.* There must be an account of what lands in fee simple in possession were purchased after the articles entered into, and so much as the purchase-money of such lands amounts to must be looked on in part satisfaction of the 30,000*l.* to be laid out in land under the articles, and the residue of the 30,000*l.* must be made good out of the personal estate." See also *Barham v. Earl of Clarendon*, 10 Hare, 126.

The doctrine has also been extended to a case where the covenant was to pay money to trustees, to be laid out by them in a purchase of land. See *Sowden v. Sowden*, 3 P. Wms. 227, reported in a note of Mr. Cox; *S. C.*, 1 Bro. C. C. 582, 1 Cox, 165. In that case, by marriage settlement, reciting that R. S. had actually paid to the trustees a sum of 1500*l.*, and had also agreed to pay them a further sum of 500*l.* [422] at least *upon the trusts after mentioned, he the said R. S. covenanted with the trustees that he would, within six months, pay the said further sum of 500*l.* at the least, which said sums of 1500*l.* and 500*l.* were to be applied in the manner thereafter mentioned. And it was thereby declared, that the said sums of money were so paid, and to be paid, upon trust that *the said trustees should, as soon as conveniently might be, with the consent of the said R. S., lay out and invest the same, either together or in parcels, and together, with or without any further sum to*

be advanced by the said R. S., in the purchase of freehold lands in the county of Devon; and that such lands, when purchased, should be conveyed to the trustees to the uses of the marriage, as therein mentioned. Notwithstanding the recital in the settlement, R. S. did not pay the 1500*l.*, which, together with the 500*l.*, remained unpaid at his death. Soon after the marriage he purchased an estate in the county of Devon for 2150*l.*, which was conveyed to him in fee, but he never made any settlement of this estate, and died intestate. There was no evidence in the cause, upon which the Court thought any reliance could be had; but it was argued, that this case might be distinguished from the others, inasmuch as, in this case, the husband covenanted to *pay the money to the trustees*, of which covenant he scarcely could mean a performance, when he made a purchase *himself*. However, Sir L. Kenyon, M. R., declared, that if this case had been *res integra*, he should have thought the distinction worthy of great consideration, but he thought this case within the principle established by *Lechmere v. Earl of Carlisle*, that, where a man covenants to do an act, and he does that which may pro tanto be converted to a completion of his covenant, he shall be presumed to have done it with such intention: and declared the estate to be subject to the trusts of the settlement. See also *Trench v. Harrison*, 17 Sim. 111.

The expenditure, however, by a tenant for life in building on lands vested in trustees will not be taken to be in part satisfaction of a covenant by him to pay a sum of money to the trustees, which they had power to invest in the purchase of lands to be held upon the same trust: *Horlock v. Smith*, 17 Beav. 572. And see *Mathias v. Mathias*, 3 Jur. N. S. 429.

The principle upon which *Wilcocks v. Wilcocks*, and *Lechmere v. Lechmere* were decided, has been held to apply equally to the case where the obligation to purchase lands arose from an Act of Parliament. Thus, in *Tubbs v. Broadwood*, 2 Russ. & My. 487, where a tenant for life sold part of the settled estate under the authority of an Act of Parliament, which directed *him to lay out the consideration money in the purchase of other lands, and to settle them [*423] to the same uses, and he afterwards purchased lands to nearly the same amount, but died without having settled them accordingly, leaving them to descend to his heir-at-law, who was also the first tenant in tail in remainder under the settlement, it was held* by Lord Brougham, that the purchase was to be presumed to have been made in performance of the obligation imposed by the Act, and that the remainder-man could not recover the value of the lands sold against the personal estate of the tenant for life. "If," said his Lordship, "a person, by the provisions of an Act of Parliament, disposes of lands, and, by the condition under which he receives the price, is bound to lay out the money in other lands, to be settled to the same uses, the presumption is, that

what he did in laying out that money, was done with reference to his pre-existing obligation."

Where a person upon his marriage covenanted with trustees to settle an estate upon his wife, but he failed to do so, and subsequently exchanged the estate for another and the sum of 1050*l.*, it was held that the estate taken in exchange, and the sum of 1050*l.* ought to be taken in substitution for the estate covenanted to be settled, and that the 1050*l.* was a specialty debt under the covenant: *Powdrell v. Jones*, 2 Sm. & Giff. 335.

And it is no objection to a purchase being considered as a part performance that it is optional to settle lands or a rent-charge, unless the intention to settle a rent-charge be shown. See *Deacon v. Smith*, 3 Atk. 323, 328, in which case Lord Hardwicke also held, that the assignment of a mortgage upon the estate, by the covenantor, was no objection; "for," he observed, "it was only continuing, in effect, the same mortgage upon the estate, because he wanted to take up money to complete the purchase."

But where the covenant points to a *future* purchase of lands, it cannot be presumed that lands, of which the covenantor was seised at the time of the covenant, descending to his heir, were intended to be taken in performance of it: *Lechmere v. Lechmere*, Ca. t. Talb. 80. And see *Davys v. Howard*, 5 Bro. P. C. 552.

Nor can it be presumed that property of a different nature from that covenanted to be purchased by the covenantor, was intended as a performance. Thus, leaseholds for lives or terms of years, although with a covenant to purchase the fee, or estates in reversion expectant upon lives, unless, perhaps, the lives fall in during the life of the covenantor, will not be taken in performance of a covenant to purchase fee simple lands in possession. See *Lechmere v. Earl of Carlisle*, 3 P. [424] Wms. 227; *Lechmere v. Lechmere*, Ca. t. Talb. 80; *Deacon v. Smith*, 3 Atk. 323; *Whorwood v. Whorwood*, 1 Ves. 540; *Lewis v. Hill*, 1 Ves. 274.

So, in *Pinnell v. Hallett*, Amb. 106, where a person covenanted to purchase and settle *lands* of inheritance on his wife for life, without *impeachment of waste*, with remainder to the issue of the marriage, and he afterwards purchased the moiety of a house and a copyhold estate, the question arose, whether these estates, or either of them, were applicable in part satisfaction of the covenant; and Lord Hardwicke was clearly of opinion, that the moiety of the house was not, because it was not the kind of estate intended by the articles; and that the copyhold estate was not applicable, because the wife was to take the estates settled for life, *without impeachment of waste*. Besides, the copyhold estate appeared to be of the nature of *borough English*, and therefore could not be taken as part satisfaction to an eldest son, which by its nature went to the youngest.

Where, however, there was a covenant generally to purchase lands, the purchase of copyhold estate was held a part performance: *Wilkes v. Wilkes*, 5 Vin. Abr. 293, fol. 39; but see *Whorwood v. Whorwood*, 1 Ves. 540.

As a covenant is construed most strongly against the covenantor, a covenant by him to secure a jointure "out of estates he should thereafter acquire," will be a charge upon an estate which he had at that time already contracted to purchase: *Warde v. Warde*, 16 Beav. 103.

A covenant to purchase lands is a mere specialty debt, and will not create a specific lien upon lands afterwards purchased, although the presumption may arise that they were purchased by the covenantor, intending them to go in performance of the covenant in his marriage articles, and will not affect a purchaser or mortgagee without notice; "for if the covenantor," as observed by Lord Hardwicke, "had sold them or mortgaged them, it would have been evidence of a different intention, and would therefore have taken off all evidence of his intention to bind them by the articles: *Deacon v. Smith*, 3 Atk. 327; see *Countess of Mornington v. Keane*, 27 L. J., N. S. (Ch.) 7. And other specialty creditors cannot complain that the presumption arises, that lands were purchased in performance of a covenant; for it is in the power of the owner of an estate to prefer one specialty creditor to another, for none of them have any specific lien on it: *Deacon v. Smith*, 3 Atk. 327.

Notwithstanding the observation made by Lord Hardwicke in *Deacon v. Smith*, it has been held that where a person who has purchased *lands in satisfaction of the covenant has mortgaged [*425] them, the equity of redemption will be liable to the covenant: *Ex parte Poole*, 11 Jur. 1005.

Where the presumption arises that lands were bought with the intention of performing a covenant, in the absence of fraud, the price paid for them will be considered their value; see *Tyrconnell v. Duke of Ancaster*, Amb. 239, and note; and in *Pinnell v. Hallett*, Amb. 106, where a person in his marriage articles covenanted to buy lands of the clear yearly value of 5000*l.*, an estate which, when it was purchased, produced 180*l.* a year, had since fallen to 150*l.* a year, Lord Hardwicke directed the Master to inquire what was the yearly value of it at the death of the covenantor, at which time it became a satisfaction pro tanto; and said, if it had been purchased at the time of the marriage articles, the value should have been taken as at the time of the purchase; not that the Master was to consider it at the rent, supposing it to have lessened at that particular time by any accident, such as mortality amongst cattle; see also *Wace v. Bickerton*, 3 De G. & Sm. 751; *Horlock v. Smith*, 17 Beav. 572.

Where trustees, under an obligation to lay out money in land, have trust funds in their hands, any purchase by them will, more readily

than in ordinary cases, be taken to have been made in fulfilment of their obligation: *Mathias v. Mathias*, 3 Sm. & Giff. 552; 3 Jur. N. S. 429. And where trust monies have been improperly invested by trustees, it will be followed into the land: *Phayre v. Peree*, 3 Dow. 116; Sugd. Prop. 160. So, where trustees of a settlement, having a power to invest money with the consent of the husband and wife, the husband, being authorized by the trustees and with the consent of his wife, purchased property not authorized by the settlement, it was held that *as between the husband and the trustees*, he must be considered to have purchased the estate for them: *French v. Harrison*, 17 Sim. 111; *Sealy v. Stawell*, 2 I. R. Eq. 326.

Where trust money was laid out in the purchase of land, pursuant to the trusts of a settlement, and the husband advanced a further sum of 500*l.*, and the estate was conveyed to the trustees, without any notice being taken of the fact that part of the purchase-money had been advanced by the husband, it was held by Lord Langdale, M. R., that the husband had devoted the 500*l.* to the trusts of the settlement, as an advancement to the parties entitled under it. "In a case like this," said his Lordship, "where the father of a family makes a purchase for the purposes of his marriage settlement, I should require very strong evidence to show that he did not intend it for the benefit of all [*426] parties* entitled under it." *Ouseley v. Anstruther*, 10 Beav. 461.

Covenant to leave a Sum of Money.—Upon a principle analogous to that upon which the former class of cases proceed, it has long since been settled, upon the authority of *Blandy v. Widmore*, that, if a person covenants to *leave*, or that his executor shall *pay*, to another, a sum of money, or part of his personal estate, if he dies intestate, and such person becomes entitled to a portion of his personal property, of equal or greater amount, under the statute, such distributive share will be a performance of the covenant, and he cannot claim both: *Lee v. D'Aranda*, 1 Ves. 1; see also *Thacker v. Key*, 8 L. R. Eq. 408.

If the distributive share, as for instance, in the case of a widow, be less than the sum which the husband covenants to leave, it will be taken to be a part performance: (*Garthshore v. Chalie*, 10 Ves. 14, 16;) and it does not depend upon the accident of the wife taking out administration or not: (*Garthshore v. Chalie*, 10 Ves. 11, 12;) and the Court will not look upon the slight difference between *leaving* and *paying*; or whether payment is to be within three months or six months after the covenantor's death, as the year allowed to executors and administrators to retain property in their hands is for convenience merely, and does not prevent vesting; and if a case were produced in which it was quite clear that there were no debts, the Court would give the fund to the party, notwithstanding there had not been a lapse

of twelve months: *Garthshore v. Chalie*, 10 Ves. 13; *Lang v. Lang*, 8 Sim. 465.

So, likewise, where the covenant is to pay to trustees, the distributive share of the wife will be taken in performance of the covenant. Thus, in *Lee v. D'Aranda*, 3 Atk. 419; *S. C.* 1 Ves. 1, L., by articles previous to his marriage with M. C., covenanted that he would in his lifetime, by will, or by some sufficient assurance, grant to M. C., or E. D., her mother, or her executors or administrators, in trust for M. C., for her separate use, 1000*l.*, to be paid to M. C. after his decease, if she should survive him; and, in case he should not, by will or otherwise, assure to M. C. the sum of 1000*l.*, his executors should, within six months after his decease, pay her that sum for her own use. L. died intestate; and, upon the question being raised, whether she should have the 1000*l.* and her distributive share also, Lord Hardwicke decreed, that she was not entitled to the 1000*l.* as a debt due on the articles, and also to a distributive share, in case it should amount to more than 1000*l.*

A general covenant by a husband *to pay or assign a moiety [*427] of real and personal estate to his widow, will be in part performed by the devolution of one-third of the personalty on the widow. Thus, in *Garthshore v. Chalie*, 10 Ves. 1, there was a covenant in a marriage settlement by the husband, in the event of his death, leaving his wife surviving, and children, within six months after his decease to convey, pay, and assign one full clear moiety of all such real and personal estate as he should be seised and possessed of, or entitled to, to her at his decease. Lord Eldon, upon the principle of part performance, held the widow not entitled, in addition to the moiety under the covenant, to a third of the residue of the personal estate by the intestacy of her husband, or, in other words, that her distributive share, under the Statute of Distributions, was to be taken in part performance of her husband's covenant.

But it seems that a gift by will, either of a sum of money or a residue, or part of a residue, will not, per se, be considered a performance of a covenant to leave a widow a certain sum; for a gift by will prima facie imports bounty, and admits a presumption of an intention in the testator to augment the provision under the covenant, and not to satisfy or perform it. See and consider *Haines v. Mico*, 1 Bro. C. C. 129; *Devese v. Pontet*, 1 Cox, 188; *Prec. Ch.* 240, n., Finch's edition.

The last mentioned cases, however, are clearly distinguishable from *Goldsmid v. Goldsmid*, 1 Swant. 211, where, although the testator made a will, the principle of the decisions in cases of intestacy was applicable. In that case G. having by marriage articles, covenanted that, if he died in the lifetime of his wife, his executors should, within three months after his decease, pay to her 3000*l.*, by his will gave all his property to his executors, in trust, after payment of his debts, at the expiration of three years from his decease, to divide it in such

ways, shares, and proportions as to them should appear right." On G.'s death, during the life of his wife, the executors having died or renounced, his property became divisible according to the Statute of Distributions. It was held, by Sir Thomas Plumer, M. R., that the widow's distributive share, exceeding 3000*l.*, was a performance of the covenant in the marriage articles. "The rule," observed his Honor, "is clearly this: that the distributive share of the widow, in the case of absolute intestacy, is considered as a performance of a covenant by which the husband had undertaken that she should receive a fixed sum at his death, provided that her share is equal to that sum. I state that the question is at rest; because I consider that rule conclusively established by the case of *Blandy v. Widmore*, in which the judgment* [*428] of Sir John Trevor was affirmed, and, on a re-hearing, reaffirmed by Lord Cowper. More than a century has since elapsed, and the subject has been frequently under the review of the most distinguished judges,—of Lord Hardwicke, Lord Thurlow, Lord Alvanley, and the present Lord Chancellor; and I am warranted by the expressions of his Lordship in *Garthshore v. Chalie* (10 Ves. 1), when I say that case is unshaken. The rule was recognized by Lord Hardwicke, in *Lee v. D'Aranda* (1 Ves. 1, 3 Atk. 419), and again in *Barrett v. Beckford*, (Prec. Ch. 48, Finch's edit.); and though the subsequent authorities of *Haynes v. Mico*, and *Devese v. Pontet*, have decided that, in the case of testacy, what was given should not operate as performance or satisfaction of what was due, those decisions, grounded upon particular circumstances, are so far from impeaching the rule, that they expressly recognise it. The only question now is, whether a distinction can be made in the present case, the widow taking her distributive share under not an absolute, but a quasi intestacy where the purpose of the testator being disappointed, a virtual intestacy ensues, and the statute is the guide of distribution. . . . Considering the question of performance of the contract, on what principle can it be contended, that the share taken under a quasi intestacy, is not a performance which the same share taken under absolute intestacy indisputably is? In this case, as well as in the other, the widow takes pleno jure, herself being administratrix, and precisely the same sum. Every rule and principle established in the former cases, applies equally when the widow, in that character, receives a proportion of the assets by operation of law, exceeding the amount which she was entitled to receive under her marriage contract. To determine that this is not a performance of the contract, when in the case of absolute intestacy, I should be bound to determine it to be performance, would be to proceed on those nice distinctions so strongly reprobated by Lord Eldon (10 Ves. 12, 15), and Lord Hardwicke (3 Atk. 422), and which, to adopt the expression of the latter, 'would never stand with the reason of mankind.' In substance the widow obtains all for which she contracted; and I am

therefore bound to say, that she is entitled to her distributive share, but not in addition to her provision under the marriage contract."

But where the covenant is not to pay a gross sum, but the interest of a sum of money for life, or a mere life annuity, the principle upon which *Blandy v. Widmore* was decided will not apply. See *Couch v. Stratton*, 4 Ves. 391, where a covenant by a husband to pay the interest of a sum of *money to his widow, for life, was held not to be satisfied by [*429] her distributive share under his intestacy. See also *Young v. Young*, 5 I. R. Eq. 615. So in *Salisbury v. Salisbury*, 6 Hare, 526, where a husband covenanted by his marriage settlement, that, after his decease his heirs, executors or administrators should levy and raise out of his real and personal estate an annuity of 500*l.*, and that he would, by his last will and testament in writing, give, bequeath, and secure to her the said annuity of 500*l.*; on the death of the husband intestate, it was held by Sir James Wigram, V. C., upon the authority of *Couch v. Stratton*, that the widow's share of the husband's personal estate under the Statute of Distributions, was not to be taken by her as a performance of his covenant, either wholly or pro tanto. "Taking," observes his Honor, "*Blandy v. Widmore*, and *Lee v. D'Aranda* as binding authorities, and taking the principle of those decisions to be such as is stated by Lord Eldon, in *Garthshore v. Chalie*, and by Sir Thomas Plumer, in *Goldsmid v. Goldsmid*, I should (if *Couch v. Stratton* were out of the way) conclude that intestacy was a performance of the contract, as well in the case of an annuity, as in the case of a gross sum of money. The relation between the parties exists in this case, by reference to which, a very singular construction is given in this Court to a contract, the language of which would otherwise have no such effect; and in the case of the annuity, as in the other case, the effect of the intestacy is to put the annuitant in that position with respect to her demand against the estate of the intestate, as, by the terms of the contract, she ought to be in at the moment when the obligation of the husband actually to perform the contract arises, that is to say, at his death. But then the question arises, is not *Couch v. Stratton* an authority the other way? In that case, *Blandy v. Widmore* and *Lee v. D'Aranda* were both cited, and the case was argued by counsel of no common eminence. In that case it seems to have been admitted, and the judgment proceeded on the assumption, that the rule adopted by the Court in the case of a covenant to pay a gross sum, did not apply to the case of an annuity. Lord Eldon afterwards gave great consideration to the case, and did not express any dissatisfaction with that judgment. I must follow the authority of *Couch v. Stratton*, which, if it has not settled the law, can only be altered by the Lord Chancellor. I treat the case as one in which performance and not satisfaction is to be shown." See also, and consider, *Wood v. Wood*, 7 Beav. 183.

Nor will the rule laid down in *Blandy v. Widmore* be applicable

[*430] *where the husband covenants to pay a sum in his *lifetime*; for in that case there is a breach of covenant before his death, and a *debt* is due to his wife. In *Oliver v. Brickland*, or *Oliver v. Brighthouse* (cited 1 Ves. 1; 3 Atk. 420, 422), the husband covenanted to pay a sum within two years after marriage, and if he died, his executors should pay it. He lived after the two years and died intestate, leaving a larger sum than what he covenanted to pay to devolve upon his widow, as her distributive share; but Sir Joseph Jekyll, M. R., held, that it was not to be taken in performance of the covenant. See *Garthshore v. Chalie*, 10 Ves. 12, where Lord Eldon approves of this case. So, in *Lang v. Lang*, 8 Sim. 451, A., a domiciled Englishman, married a lady at the Mauritius, where the French law was in force. By their settlement (which was in the French language and form), they declared that they intended to marry according to the laws of England, the benefit of which they reserved to themselves the power of claiming; and it was stipulated, that A. should invest in certain securities 4000*l.* (the property of the lady), which he acknowledged he had received from her, and that she should receive the income on her sole receipts, for her maintenance and personal wants; and that, on her dying in A.'s lifetime without leaving issue by him, the capital should belong to him; and if A. did not invest the 4000*l.* in his lifetime, she was to be at liberty to take it out of his assets, on his death, with a proviso, that the fund should go to the children of the marriage, in the event of there being any, or to their issue, if they should die under twenty-one leaving issue; it was held by Sir L. Shadwell, V. C., upon the death of the husband without issue of the marriage, and intestate, that the widow was entitled to the 4000*l.*, and also to her distributive share of his personal estate. "It is apparent," said his Honor, "on the settlement, that there is a provision made, not only for the wife, but also for the children of the marriage, in a given event. The event happened, in which it is provided by the settlement, that the 4000*l.* should go to the wife. And I think, that, if the wife had filed a bill (living the husband), to compel him to make the investment, the Court would have considered that the husband had entered into a contract, which was to be fulfilled *in his lifetime*, and would have compelled him to produce the 4000*l.*, and to make the investment.

"If that be the right conclusion, such cases as *Blandy v. Widmore*, and *Lee v. Cox and D'Aranda*, have no application to the subject; because those cases decide only, that, where the husband has bound himself to fulfil some obligation by the payment of money, or by doing

[*431] *an act equivalent to the payment of money, *at the time of his death* (whether it be at the time of his death, or within six months after, makes no difference), that obligation is satisfied, if, by dying intestate, he allows the law to confer a benefit on the covenantee equivalent to that which he had bound himself to confer. Those cases

have no reference to the subject, there being in this case *an obligation on the husband to produce the sum in question.*"

But where a covenant is entire, although the provision for the wife be such, that, if part of it, standing alone, might be considered as performed by the distributive share of the husband's personalty devolving upon her on his intestacy, if another part of it could not be considered as so performed, the Court will not, since the covenant is entire, divide it by holding one part performed, and the other part not performed. Thus, in *Couch v. Stratton*, 4 Ves. 391, a man, in his marriage settlement, covenanted, within three calendar months after his decease, to pay to the trustees 6000*l.*, with lawful interest from the day of his death, in trust, if the wife should survive him, and there should be no issue (which event happened), to pay 1500*l.* and the interest thereof (part of the 6000*l.* and interest) to his wife, her executors, administrators, and assigns, and to pay the interest of the remaining 4500*l.* to her for her life. Upon the death of her husband intestate it was held, by Lord Rosslyn, that, as the share of the widow, under the Statute of Distributions, was not a performance of the covenant as to the interest of the 4500*l.* for her life, it could not be considered as a performance of that part of the covenant under which, in the event which happened, she was entitled to 1500*l.* absolutely.

The two classes of cases which have been considered in this note show the importance of distinguishing between cases of performance, to which those cases belong, and cases of *satisfaction*; that is to say, cases of the satisfaction of debts by legacies. This has been well shown by Mr. Cox, in his learned note to *Blandy v. Widmore*, 1 P. Wms. 324. "In the cases on the subject of satisfaction," he observes, "in which the contracting party is supposed to have done some other thing in lieu of the thing contracted for, and which therefore depend more particularly on the implied intention of the party, several rules of presumption have been adopted which do not seem to apply to the cases of performance. (Vide *Eastwood v. Vinke*, 2 P. Wms. 616.) In cases of satisfaction the presumption will not hold where the thing substituted is less beneficial (either in amount or certainty, or time of enjoyment, or otherwise), than the thing contracted for, since *satisfaction* implies the doing of something *equivalent*, *and the presumption is so much weakened where the thing *substituted* is not equivalent to the thing *con-* [*432] *tracted for*, and a *part satisfaction* will not be intended; whereas in cases where the *thing done* can be considered as a *part performance* of the *thing contracted for* it shall be so taken." And see *Devese v. Pontet*, Prec. Ch. 240, n., and the remarks on that case, and on the distinction between cases of performance and satisfaction, in *Goldsmid v. Goldsmid*, 1 Swanst. 220, 221.

As to covenants to give a child about to marry an equal share with the others, see Peachy on Settlements, 556; *Bell v. Clarke*, 25 Beav.

437; *Graham v. Wickham*, 31 Beav. 447; *Davenport v. Hinchliffe*, 1 J. & H. 713; *Scriven v. Sandon*, 2 J. & H. 743.

The distinction between equitable performance as above defined, and satisfaction, is extremely nice. If one who has covenanted to purchase and settle lands, purchases such lands, and they descend at his death on the person who would have been entitled under the settlement, it is an equitable performance of the covenant. But if the covenantor in the case supposed, devises such lands to the same person, the inference is that the devise is intended as an additional benefaction, unless he stands in the relation of a parent, and both are presumably portions. The latter point is not, however, altogether clear, and the case of *Bryant v. Hunter*, 4 W. C. R. 48, ante, 827, may be thought to incline the other way.

In *Weir v. Weir*, 3 B. Monroe, 645, the doctrine of performance was applied to an obligation founded on a valuable consideration moving to the promisor, and consequently partaking of the nature of a debt. The complainants there resided with their uncle for many years, and were during that time actively and industriously engaged in aiding him in his business which was large and complicated. The uncle died unmarried and without a will, and a large part of his real and personal estate which amounted to more than \$100,000, devolved on his nephews who claimed payment for their services, in addition to their distributive shares. The court held that no express con-

tract for remuneration had been proved, and if an implied contract existed that the plaintiffs should have a reasonable remuneration in some form from their uncle's estate, the amount which they had received by inheritance, was more than all that they had done was worth. It followed, that under the equitable doctrine of satisfaction or performance, they had been paid in full, and could not justly obtain a judgment which would sweep away a large part of the shares of others who were entitled as next of kin. Ewing, Ch. J., said, "It has been determined, that where one who is indebted to his creditor 'bequeaths a legacy simpliciter of the same nature as the debt, and of equal or greater amount, the legacy will, subject to certain designated exceptions, be deemed a satisfaction of the debt; *Brown v. Dawson* (Prec. Chan. 240); *Fowler v. Fowler*, 3 P. Wms. 353; 1 Ves. Sr. 123, 125; 2 P. Wms. 130, Prec. Chan. 394.

But it is evident in this case, that there is no subsisting obligation for a debt in favor of either of the nephews, or express stipulation for compensation in money or wages. The proof, in fact, repels such an idea. If any implication in favor of remuneration, can be raised from the conduct, situation and mutual relations of the parties, as honest, fair and just men, it is that their uncle would either in his lifetime, or at his death advance them out of his

ample fortune, an amount equivalent or more than equivalent to the amount which he had received from them, and that they looked to and relied upon this expected advancement for their compensation, and not to wages or a remuneration in money. If so, they have by operation of law obtained an advancement more than equivalent to their services, and equity will not imply a promise to pay more.

It has been settled as a well established rule in equity, that where a parent is under express obligation by articles, to provide portions for his children, and afterwards by will or codicil, makes a provision for them, such testamentary provision shall be considered a satisfaction or performance of the obligation; and so much opposed are courts of equity, to raising double portions, that if the amount bequeathed shall be less than the amount agreed to be advanced, the sum so bequeathed will sometimes be considered as part satisfaction. *Brown v. Brown*, 2 Vern, 439; *Blois v. Blois* (2 Chan. Rep. 347); *Moulson v. Moulson*, 1 Browers C. C. 82; *Copley v. Copley*, 1 P. Wms. 147; *Ackworth v. Ackworth*, 1 Bro. C. C. 307, note; *Warren v. Warren*, 1 Bro. C. C. 305; *Finch v. Finch*, 1 Ves. Jr. 534; and various cases referred to and commented on in 2 Roper on Legacies, Chapter 18.

So where an express obligation, to provide portions, or make an advancement or other provision, is subsisting, the devolution of a distributive share of personalty,

or the descent of real estate from the person under obligation to make provision, upon the individual for whom it was to be made, has been decreed to be a performance. *Lee v. Deranda*, 3 Atk. 419; *Blandy v. Wilmore*, 1 P. Wms. 323; *Garthshaw v. Carlie*, 10 Ves. 1; *Goldsmith v. Goldsmith*, 1 Swan. 211; *Wilcox v. Wilcox*, 2 Ver. 558.

If where there is an express obligation to provide portions or make advancements, a testamentary provision or devolution of personalty, or the descent of realty may be presumed to be, and treated as satisfaction or performance, much more when as in the case under consideration, from the conduct, condition and relations of the parties it is rendered doubtful whether any implication for compensation can be raised, and if any, it must be regarded as an implication to make provision for them out of his estate, and they look to that as their expected remuneration and no other; will the descent of realty and slaves, and the devolution of personalty to a much larger amount than any of the other heirs save the infant, and much larger than any pecuniary compensation that they might be entitled to for services, be regarded as a full performance or satisfaction of their expected remuneration? And a court of equity ought not, and will not, imply a promise to pay more. "They have received by operation of law what they looked for, and more than they had any just right to expect, and it would be unjust to the other heirs to decree them more."

[*433]

*WAKE v. CONYERS.¹

MAY 19; JUNE 16, 1759.

REPORTED 1 EDEN, 331.

BOUNDARIES.]—*All cases where the Court has entertained bills for establishing boundaries, have been where the soil itself was in question, or there might have been a multiplicity of suits.*

The Court has no power as of course to issue commissions to fix the boundaries of legal estates. Some equity must be superinduced by the acts of the parties, as some particular circumstances of fraud; or confusion, where one party has ploughed too near the other, or the like.

Bill to ascertain the boundaries of two manors dismissed, there being no dispute as to the soil.

THE defendants, John Conyers, Esq., as tenant for life, his wife Lady Henrietta, as entitled after his death to her jointure, and his son, an infant, as tenant in tail, were entitled to the manor of Epping, and also to the freehold of certain lands next adjoining to it, lying in the manor of Waltham; the boundary lines of the two manors passing through Mr. Conyers' park. He had cut down certain trees, which, it was alleged by the bill, were standing on the line, and were boundary marks.

The present bill was filed by Sir William Wake, as prochein amy to his three infant sons, who were tenants in tail successively of the manor of Waltham, praying that the boundary of the manor of Waltham, so far as the same abuts on the manor of Epping, might be fixed and set out, and that a commission might issue for that purpose; and that the defendant John Conyers might set up new boundary marks in the room of those which he had cut down and destroyed.

[*434] *Mr. Conyers by his answer admitted the cutting down of certain trees, but denied that they were boundary marks; though he submitted to have the boundaries ascertained and settled, and that marks might be set up to perpetuate such boundaries.

²On the opening, the Lord Keeper (Henley) objected to the nature of the suit, as being merely to settle the boundaries of the manor. He said he did not think the Court had jurisdiction, and desired it to stand over, for counsel to consider whether there was sufficient equity for the Court to entertain the bill.

³It came on again this day.

The Attorney-General (Sir Charles Pratt), Wilbraham, and Browning, for the plaintiffs.—This is not merely a bill of peace; though

¹ 2 Cox, 360, Hill's MSS.

² May 19th, 1759.

³ June 16th, 1759.

as far as the jurisdiction of the Court is concerned, it is usual and proper to establish peace and good neighborhood. But it is a case peculiarly coming under the most favourable jurisdiction of this Court; which is to give a remedy where there is none at law. The law is defective. The boundary cannot be set out. It can only be tried by action of trespass or ejectment, which can do no more than settle the local trespasses; while a boundary line extending a mile or two, may be disputed inch by inch.

There is no objection to this bill, as being merely a bill to settle boundaries. Bills to settle boundaries have been entertained in this Court from very ancient times: *Tothill*, 126, 127; so early as the reign of James the First, *Id.* 84, 210; *Bowman v. Yeat*, cit. 1 Ch. Ca. 146; there was a rent charge, and the grantee did not know where to distrain, on account of the confusion of boundaries: a commission was ordered. So, *Harding v. Countess of Suffolk*, 1 Ch. Rep. 63; *Corks v. Foley*, 1 Vern. 359. In the case of *The Duke of Dorset v. Serjeant Girdler*, Prec. Ch. 531, a demurrer to a bill, to perpetuate testimony on the ground of a menace being used to disturb the plaintiff in a sole fishery, was overruled; and on this ground, because he could not proceed at law. So in this case, *what is prayed by the bill cannot be done at law: [*435] the defendant has destroyed the last remaining boundary marks, and by his answer consents that they may be set out. The only difference between this and the common case is, that there is no dispute about the soil, which is confessedly Mr. Conyers'; and it may be asked upon that, cui bono to fix the line? The answer to that is the manorial rights; a manor has a seignory; lands escheat; the lord has a right to treasure-trove, to deodands, to the game. The only difference, then is the value. In a hundred years' time, the boundaries will be confounded and lost unless this commission be granted.

Perrot and Hoskins, for the defendants.—This bill, under pretence of establishing boundaries, is, in fact, to settle manorial rights. It is said, that every question for the settling of boundaries is a proper subject for the jurisdiction of this Court. That is, however, not the case. Those cases which have been cited, in which a man, having joint occupation, has confounded the boundaries, have turned upon the fraud which has been relieved against. A similar principle has given the Court jurisdiction in the cases of rent-charge. As to the loss of evidence, if any injury arises to the plaintiffs from that, it will be from their own laches, in not making perambulations. This does not come under the common case of issues, where enjoyment is decreed accordingly. It is an incorporeal hereditament, and that cannot be done.

LORD KEEPER HANLEY¹—This bill is merely for ascertaining the boundaries of these two manors, and is intended to bind the inheritance of the parties for ever. It struck me as new, upon the

¹ Afterwards Lord Chancellor and Earl of Northington.

opening. I have been, ever since I sat here, extremely jealous of the jurisdiction of this Court over legal inheritances. I was, therefore, desirous that some precedent should be produced, to show me that this Court could entertain a bill of this nature, to settle the boundaries of an incorporeal inheritance; but none such [*436] has been produced. There have, since I sat *here been several [Bills] to fix boundaries where a right to the freehold of the soil has been incidental. But I have seen such frightful consequences arising from them, that I think these suits are very far from deserving encouragement. They originally came into this Court under the equity of preventing multiplicity of suits; yet in those cases I have observed that they have been sometimes attended with more expense than if all the suits which they apprehended, and which they were brought to prevent, had actually been tried at law.

Hitherto these disputes have been only between persons of great fortune. But the consequences have been, that the parties have been eager to come into this Court, without any attention being paid to see whether the prayer of the bill applies properly to the jurisdiction. An issue is directed, and after going down to the Assizes at a very great expense, and a verdict being found for one party, the other is dissatisfied, and a new trial is directed. I was extremely unwilling to grant the last new trial, in the case of *The Earl of Darlington v. Bowes* (1 Eden, 270); but on inquiring of the bar whether there was any instance of a decree made upon one verdict only, none could be produced; and if there were any, they were so few, that they could not be remembered. I therefore thought myself bound by the current of opinions to grant it. But I am determined, if any such case should ever come before me again, to consider it in a very different light, and to have the matter more fully inquired into, and prevent, if possible, an expense, which is a reproach to the law.

All the cases where the Court has entertained bills for establishing boundaries, have been where the soil itself was in question, or where there might have been a multiplicity of suits.

The Court has, in my opinion (and if parties are not satisfied, they have resort elsewhere), no power to fix the boundaries of legal estates, *unless some equity is superinduced by the act of the parties, as some particular circumstance of fraud or confusion, where one* [*437] *party has *ploughed too near the other, or the like; nor has this Court a power to issue such commissions of course, as here prayed.*

In this case it is said there is no legal remedy, and therefore there must be an equitable one; but this does not follow unless there is an equitable right. If there is a legal right, there must be a legal remedy; and if there is no legal right, there can, in this case be no equitable one.

It is said that in some future time, there may be a casual right, such as escheat, treasure, trover, &c.; but am I to countenance such a suit as this before there is any such right, merely because it

may happen, though, when it does happen, it may perhaps be such a right as the parties will not think it worth their while to contend for?

If I were to make this a precedent, it would be, in effect, to issue commissions to settle boundaries all over the kingdom; for if of manors, why not of honours, of hundreds, and all other inferior denominations of districts? I shall always, while I have the honour to sit here, be very attentive to prevent the subject from great waste of expense about matters by no means adequate to it. Should I entertain such a bill as this, I should put it in the power of every opulent lord of a manor to distress, if not ruin, not only a poor man, but even a man of moderate fortune, whose estate happens to border upon his; for these suits are often attended with 2000*l.* or 3000*l.* expense—a dishonour to justice.

In order to give this Court jurisdiction, there must appear some equitable circumstances in the case. I know of no boundary marks to a manor in another's soil. The trees were Mr. Conyers' own: he had a right to cut them down; and if the plaintiffs are afraid of losing, in the course of time, the evidence of the boundaries of their manors, they may preserve it by perambulations as often as they please; but I cannot fix the limits of a legal right (if any), unless the jurisdiction of this Court is superinduced by some equitable circumstances, which it is not in this case.

*Another consideration is, that the plaintiffs are infants, and so is one of the defendants; and shall I send the infant plaintiffs beforehand, when they know not the value of their estate, to bind the inheritance quia timent, under the protection of the father, who is not privy in estate to them? I am well satisfied that this bill ought to be dismissed. [*438]

Although the jurisdiction of the Court to issue a commission to ascertain boundaries is very ancient (*Mullineux v. Mullineux*, *Peckering v. Kempton*, Toth. 39; *Spyer v. Spyer*, Nels. 14; *Boteler v. Spelman*, Rep. t. Finch, 96; *Wintle v. Carpenter*, Rep. t. Finch, 462; *Glynn v. Scawen*, Rep. t. Finch, 239), its origin is by no means free from doubt.

The Lord Keeper, in the principal case, was of opinion, that suits to determine boundaries originally came into the Court of Chancery under the equity of preventing multiplicity of suits; but Sir W. Grant, M. R., in a case where it became necessary to inquire by what principles the Court is guided in granting a commission of this description, observes, that "there are two writs in the register (since abolished, see 3 & 4 Will. 4, c. 27, s. 36), concerning the adjustment of controverted boundaries, from one of which it is probable that the exercise of this jurisdiction by the Court of Chancery took its commencement. The first is the writ de rationalibus divisis (Reg. Brev. 157, b.); the other,

the writ de perambulatione faciendâ (Reg. Brev. Ib.). Both Lord Northington and Lord Thurlow, without referring to this writ or commission as the origin of the jurisdiction of the Court, have yet expressed an opinion, that *consent* was the ground on which it had been at first exercised. The next step would probably be, to grant the commission on the application of one party who showed an *equitable* ground for obtaining it; such as, that a tenant or copyholder had destroyed, or not preserved, the boundaries between his own property and that of his lessor or lord. And to its exercise on such an equitable ground, no objection has ever been made:" *Speer v. Crawler*, 2 Mer. 416.

It is not, however, improbable, that equity, which has borrowed so largely from the civil law, may have assumed jurisdiction to settle boundaries from the proceeding in that law known as *actio finium regundorum*: see Dig. lib. X., tit. 1, l. 1; Domat, b. II., tit. 6, s. 1, 2. Doubtful, however, as the origin of the jurisdiction may be, it is certain that it has been viewed with extreme jealousy by modern [*439] *equity judges, who have always been desirous that the rights of parties should, where practicable, be tried and determined in the ordinary legal mode. In short, although the Court, in some cases, has granted commissions or directed issues on no other apparent ground than that the boundaries, even of manors, were in controversy, it is now clear that a confusion of boundaries furnishes, per se, no ground for the interposition of the Court; the rule now acted upon is that laid down by the Lord Keeper in the principal case, "*that the Court has no jurisdiction to fix the boundaries of legal estates, unless some equity is superinduced by the act of the parties.*" see *Speer v. Crawler*, 2 Mer. 418; *O'Hara v. Strange*, 11 Ir. Eq. Rep. 262; *Ireland v. Wilson*, 1 Ir. Ch. Rep. 623.

In *Atkins v. Hatton*, 2 Anst. 386, the rector of a parish filed a bill for an account of tithes, and to have a commission to settle the boundaries of the parish and the glebe. Some confusion, it seems, had arisen from the negligence of both parties in not keeping their rights distinct. The bill, however, so far as it related to the commission to set out the boundaries, was dismissed with costs. "The plaintiff," observed Macdonald, C. B., "here calls upon the Court to grant a commission to ascertain the bounds of the parish, upon the presumption that all the land which would be found within those boundaries would be titheable to him. That is, indeed, a *primâ facie* inference, but by no means conclusive; and there is no instance of the Court ever granting a commission in order to attain a remote consequential advantage. It is a jurisdiction which Courts of equity have always been very cautious of exercising. . . . A commission is also prayed to set out the glebe land. It appears that the plaintiff has a full equivalent for every piece of glebe that ever belonged to the rectory; so that, if the exact metes and bounds are unknown, he has already the full effect of a com-

mission: if they are known, and any part not delivered up to him, his remedy is at common law; he has made no case for our interference."

In *St. Luke's v. St. Leonard's*, cited 2 Anst. 395, a bill was filed by the parish of St. Luke's to avoid confusion in making their rates, and prayed a commission to fix their boundaries for that purpose. A number of houses had been built upon land formerly waste, and it was doubtful to which parish each part of the waste belonged. Lord Thurlow refused to interfere, and observed, that the greatest inconvenience might arise from doing so; for if that commission were granted, and the bounds set out by the commissioners, any other parties, on a different ground of dispute, might equally well claim another commission; these *other commissioners might make a different return, and so, in place of settling differences, endless confusion would be [*440] created. In the note of this case in Brown's Chancery Cases (vol. i. p. 41), Lord Thurlow is reported to have said, that if he should entertain a bill, and direct an issue in such a case as this, he did not see what case would be peculiar to the Courts of law. He did not know how to extract a rule from the *Mayor of York v. Pilkington*, (2 Atk. 302). Where there was a common right to be tried, such a proceeding was to be understood: the boundary between the two jurisdictions was apparent. That is the case where the tenants of a manor claim a right of common by custom, because the right of all the tenants of the manor is tried by trying the right of one; but in this case, he saw no common right which the parishioners had in the boundaries of the parish. It would be to try the boundaries of all the parishes in the kingdom, on account of the poor-laws. He apprehended these issues had usually been directed by consent of the parties: *S. C.*, 2 Dick. 550, nom. *Waring v. Hotham*.

In *Miller v. Warmington*, 1 J. & W. 484, a termor having, by himself or his under-tenants, suffered the boundaries between the demised premises and contiguous lands of his own to become confused, he was held not entitled, after the expiration of the term, to a commission to ascertain them, in opposition to the assignee of the lessor, who then, and had since, continued in the possession of both, it not being shown that such possession was improperly obtained. So, in *Speer v. Crawler*, 2 Mer. 417, Sir W. Grant, M. R., refused to issue a commission to ascertain the boundaries of manors, observing, "In *Wake v. Conyers*, Lord Northington held, that it was in the case of manors that the exercise of the jurisdiction which (he says) 'had been assumed of late,' was peculiarly objectionable. He refused either to grant a commission or to direct an issue. So did Lord Thurlow, in the case of two parishes, *St. Luke's v. St. Leonard's*, (2 Anst. 386-395). In the same case, of *Wake v. Conyers*, Lord Northington says, that, in his apprehension, this Court has simply no jurisdiction to settle the boundaries even of land, unless some equity is superinduced by the acts of the parties. I concur in that opinion, and think that the circumstance of a confusion

of boundaries furnishes per se no ground for the interposition of the Court."

What is a sufficient Ground for issuing a Commission or directing an Issue.—If the confusion of boundaries has been occasioned, not by the negligence of both, but by the fraud of one of the parties, where, for instance, he has been gradually encroaching, by ploughing [*441] *or digging too near to the other, with the intention of obliterating the boundaries, a Court of equity will interfere: *Wintle v. Carpenter*, Rep. t. Finch, 462; *Marquis of Bute v. Glamorgan-shire Canal Company*, 1 Ph. 681. This was, according to the opinion of Lord Chief Baron Macdonald, the ground of the decision of the House of Lords in *Rouse v. Barker*, (4 Bro. P. C. 660, Toml. edit.). See *Atkins v. Hatton*, Aust. 396.

Where such a relation exists between two parties, as that of tenant and landlord, which makes it the duty of the tenant to preserve the boundaries, if he permits them to be destroyed, so that the landlord's land cannot be distinguished from his, and restored specifically, he will, even in the absence of fraud on his part, be compelled to substitute land of equal value, the land or its value being ascertained by commission. "It has been long settled," observes Lord Eldon, "and that law is not now to be unhinged, that a tenant contracts, among other obligations resulting from that relation, to keep distinct from his own property, during his tenancy, and to leave clearly distinct at the end of it, his landlord's property, not in any way confounded with his own. This is, therefore, a common equity, that a tenant, having put his landlord's property and his own together, for his own convenience, in order to make the most of it during his tenancy, is bound, at the end of the term, to render up specifically the landlord's land, and if he cannot, that a commission shall issue from a Court of equity, to inquire what were the lands of the landlord, the Court taking care, to the intent that the tenant may discharge his obligation to do what is right as to the possession in the meantime; and if the tenant has so confounded the boundaries, subdividing the land by hedges and stones, and destroying the metes and bounds, so that the landlord's land cannot be ascertained, the Court will inquire what was the value of the landlord's estate, valued fairly, but to the utmost, as against that tenant, who has himself destroyed the possibility of the landlord's having his own:" *Attorney-General v. Fullerton*, 2 V. & B. 264. And see *Glynn v. Scawen*, Rep. t. Finch. 239; *Wintle v. Carpenter*, Rep. t. Finch. 462; *Aston v. Lord Exeter*, 6 Ves. 293; *Duke of Leeds v. Earl of Strafford*, 4 Ves. 180; *Grierson v. Eyre*, 9 Ves. 345; *Godfrey v. Little*, 1 Russ. & My. 59, 2 Russ. & My. 630.

And it seems that the same result would follow, if the confusion of the boundaries was occasioned by a tenant for life (*Attorney-General v. Stephens*, 6 De G. Mac. & G. 133); or where confusion of the

boundaries of manors was occasioned by the acts or neglect of a tenant or lessee of *one of the manors being the owner of the other. See *Speer v. Crawler*, 2 Mer. 415, 418; *Clayton v. Cookes*, 2 Atk. 449. [*442]

So where several lands allotted to the holders of certain offices, were for a long series of years in the possession of a single individual, in consequence of his holding all the offices, a confusion of boundaries taking place in consequence thereof seems to have been considered to be a good ground for proceedings in equity, though it was not necessary to determine the point; *Kennedy v. Trott*, 6 Moo. P. C. C. 467.

And it seems where a confusion of lands is occasioned by a deviser, if they come into the hands of parties whose duty it is to ascertain the boundaries, a person entitled to part of such lands may come into equity to establish his claim. Thus in *Hicks v. Hastings*, 3 K. & J. 701, a testatrix by her will appointed the manor of Watton (over which she had an equitable power of appointment) to uses, under which the plaintiff became entitled as tenant in tail in possession, and devised her residuary real estate to trustees upon trust to sell. The trustees sold (amongst other things) a field, part of which was shown by the abstract to be parcel of the manor, and procured the legal estate in the whole to be conveyed to the purchaser. It was held by Sir W. Page Wood, V. C., that, notwithstanding the fault of the confusion lay with the party through whom the plaintiff claimed, the plaintiff was not precluded from establishing in the Court a claim to a portion of the land and to a proportional part of the rents from the time when he became of age. And an inquiry was directed, in what part of the field the plaintiff's portion was situated. "This," said his Honor, "is not the ordinary case of confusion of boundaries. The testatrix, having a certain number of acres of land which is partly freehold and partly leasehold, devises the freehold part to the plaintiff, and the leasehold part to trustees for sale. The trustees undertake to discharge that trust and proceed to sell. It then became the duty of the trustees to see that the leasehold part, and no more, was comprised in the conveyance to the purchaser, and the duty of the purchaser to do the like. It is true that the testatrix was the party to blame for the confusion of the freehold land improperly sold by the trustees with the leasehold; but in reference to that argument, *Clarke v. Yonge*, 5 Beav. 523, appears to me to have a material bearing."

A Court of equity will grant relief not only against a party guilty of neglect or fraud in causing a confusion of boundaries, but also against all those who claim under him, either as volunteers or purchasers, with *notice: See *Attorney-General v. Stephens*, 6 De G. Mac. & G. 134; *Hicks v. Hastings*, 3 K. & J. 701. [*443]

The Court, in cases relating to confusion of boundaries, proceeds upon the same principle as it does where an agent or bailiff, or any

other person who is under an obligation, express or implied, to keep his own property separate from the property of another, mixes them together, for under such circumstances he will have the onus thrown upon him of distinguishing his own property; and if he is unable to do so, the other person will be entitled to the whole of the property. See *Lupton v. White*, 15 Ves. 432; in which case the defendants were under the obligation of keeping distinct accounts of the ore produced by two different mines, to the produce of one of which the plaintiffs were entitled. The defendants having mixed it, were held liable to be charged with the whole net produce, except what they should prove to have been taken from their own mine. And see *Panton v. Panton*, cited 8 Ves. 440; *Chedworth v. Edwards*, 8 Ves. 46; *Cook v. Addison*, 7 L. R. Eq. 466, 1 Smith's Lead. Cases, 642, 7 ed.

In addition to the grounds of equitable relief in order to sustain a bill for a commission to ascertain boundaries, the plaintiff must show that some portion of the lands, the boundaries of which are alleged to have been confused, is in the possession of the defendant (*Attorney-General v. Stephens*, 6 De G. Mac. & G. 111, 149, overruling *S. C.*, 1 K. & J. 724); he must also establish, by the admission of the defendant, or by evidence, a clear title to some land in the possession of the defendant; *Godfrey v. Littell*, 1 Russ. & My. 59, 2 Russ. & My. 630. In the *Bishop of Ely v. Kenrick*, Bunb. 332, it is laid down, that the Court will not entertain jurisdiction, except on the admission of the plaintiff's title to some of the lands, by the party against whom the relief is sought. If, however, that were the case, there could be no such remedy as a commission to ascertain boundaries; for the defendant would in every case take especial care to deny the plaintiff's title, and so deprive him of his remedy. It was held, therefore, both by Sir J. Leach, M. R., and by Lord Brougham, in *Godfrey v. Littell* (1 Russ. & My. 59, 2 Russ. & My. 630), that the plaintiff might establish his title by evidence. "The position," observes Lord Brougham, "laid down in *Bunbury* is indeed contradicted by the other cases; and in *Wake v. Conyers*, Lord Northington, though strongly disposed to dismiss the bill, and though he talks of the frightful consequences arising from such commissions, preferred accomplishing his object by taking another ground for the dismissal of the bill, namely, *that the manorial rights claimed by the plain-
[*444] tiffs were incorporeal hereditaments, and that the defendants were entitled to the soil and freehold in the estates in question. This, therefore, proves that Lord Northington not only did not acquiesce in the principle attempted to be established in *Bunbury*, but that he wholly repudiated the authority of that case:" 2 Russ. & My. 633.

Where the quantity of the land of the plaintiff, in the possession of the defendant, is doubtful upon the evidence, the Court will direct an inquiry (*Hicks v. Hastings*, 3 K. & J. 701), a commission, or an issue,

as will best answer the justice of the case; *Godfrey v. Littell*, 1 Russ. & My. 59, 2 Russ. & My. 630.

It must be shown clearly, that, without the assistance of the Court, the boundaries cannot be found; *Miller v. Warmington*, 1 J. & W. 491.

Another and a very old ground for equity interposing in cases of this kind, which is mentioned in the principal case, is to prevent multiplicity of suits; see *Bouverie v. Prentice*, 1 Bro. C. C. 200; *Mayor of York v. Pilkington*, 1 Atk. 282, 284; and see *Whaley v. Dawson*, 2 S. & L. 370, 371; *Meadows v. Patherick*, Rep. t. Finch, 154; *The Commissioners of Sewers of the City of London v. Glasse*, 41 L. J. Ch. (N. S.) 409.

The doctrine laid down in the principal case has been reviewed and approved of in the important case of the *Marquis of Bute v. The Glamorganshire Canal Company*, 1 Ph. 681, where a commission to ascertain boundaries was prayed for, and the bill, amongst other thing, alleged that the defendants had gradually encroached upon the plaintiff's land, filling up the ditch or the greater part of it, and obliterating the boundary, and that the occupiers were fifty in number, and that it would be impracticable to proceed at law. It was objected, that it was only a dispute between two contiguous proprietors as to their actual boundaries, and that the remedy was at law, and that there was no ground for equitable interference. But the Lord Chancellor held otherwise. "The rule," observed his Lordship, "as I apprehend, is this, that the mere confusion of boundaries between adjacent proprietors will not support a bill for a commission; there must be some equity arising out of the conduct or acts of the party against whom the commission is prayed, or the bill must be brought for the purpose of preventing a multiplicity of suits. In the case of *Wake v. Conyers*, (1 Eden, 331), referred to by the defendants, it is stated by the Lord Keeper (Northington), that the Court will entertain such a bill 'where there might have been a multiplicity of suits, or where the confusion has been created by the act of the parties, as where a party has ploughed too near another, or the like.' I *think the allegations in this bill present a case, which, if substantiated by evidence, would entitle the plaintiff to a com- [*445] mission; the bill states a system of gradual encroachment on the part of the defendants, the filling up of the ditch, and obliterating the boundaries; and further, the necessity, if this Court should not interfere, of bringing a great number of actions against different parties, in order to fix the boundaries and establish the plaintiff's right."

Where charity lands have been occupied with other lands, and the tenant cannot ascertain what part of the lands belong to the charity, a commission may be issued by the Court of Chancery to ascertain what land belongs to the charity, and what does not; and if the charity land cannot be ascertained, so as to be restored specifically, land of equal value must be substituted in its place. *Attorney-General v. Bowyer*, 5

Ves. 300; *Attorney-General v. Fullerton*, 2 V. & B. 263, 266; and see *Reresby v. Farrer*, 2 Vern. 414; and see Stat. 2 & 3 Will. 4, c. 80, to authorise the identifying of land and other possessions of certain ecclesiastical and collegiate corporations.

It seems that a Court of equity in England has jurisdiction to issue a commission to ascertain boundaries in our colonies: see *Tulloch v. Hartley*, 1 Y. & C. C. C. 114: where the Vice-Chancellor Knight Bruce entertained a bill to settle the boundaries of real estates in Jamaica. *Penn v. Lord Baltimore*, 1 Ves. 444; *Pike v. Hoare*, 2 Eden. 182, and *Bayley v. Edwards*, 2 Swanst. 703, were cited, but his Honour gave judgment, without mentioning any doubt as to the jurisdiction.

A somewhat similar class of cases may be here mentioned, in which the owner of a rent will be entitled to relief in equity, "on the usage of payment," where, in consequence of the confusion of boundaries or otherwise, the particular lands on which the rent is a charge, cannot be fixed on, as a fund for the legal remedy by distress. See *Duke of Leeds v. Powell*, 1 Ves. 171, 172; *North v. Earl and Countess of Strafford*, 3 P. Wms. 148; *Bouverie v. Prentice*, 1 Bro. C. C. 200; *Duke of Leeds v. Corporation of New Radnor*, 2 Bro. C. C. 518, and cases there cited, overruling *S. C.*, 2 Bro. C. C. 338. And see the cases cited by Sir R. T. Kindersley, V. C., in *Mayor of Basingstoke v. Lord Bolton*, 1 Drew. 289.

But the Court will not grant a commission unless the plaintiff can fix upon some house or parcel of land and say that it was part of the land sought to be charged (*Mayor of Basingstoke v. Lord Bolton*, 3 Drew. 50, 63); and the Court will not interfere in the case of heriots payable [*446] by custom out of the chattels of a deceased *tenant by his executor, as against his heir, in the absence of his personal representatives. *Ib.* And see 18 & 19 Vict. c. 124, s. 33, as to the power of the Board of Charity Commissioners to ascertain lands charged with a rent for the benefit of a charity, not exceeding 10*l*.

A court of equity has no jurisdiction to try a naked question of title to real estate; *Hickman v. Cook*, 3 Humphreys, 640; *The Alton M. & F. Ins. Co. v. Buckmaster*, 13 Illinois, 201; nor where the title is proved or conceded, can such a court arrogate the power of determining whether it does or does not embrace a particular tract which is in dispute.

See *Hickman v. Cook, Haskell v. Allen*, 33 Maine, 448.

"The right to issue a commission to ascertain boundaries is necessarily limited by the rule that equity will not interfere where there is an adequate remedy at law. It is, therefore, confined to cases where there is some peculiar equity attached to the controversy respecting the lost bounds, arising out of the fraudu-

lent or negligent misconduct of the respondent; where it is his duty to preserve the boundaries, and they cannot otherwise be found or restored; to cases where a resort to equity is necessary to prevent a multiplicity of suits; and to cases where the power is necessarily exercised incidentally in furtherance of another equity. Controversies not presenting any peculiar equity, like the one in question, have been left to be settled by proceedings at law;” *Perry v. Pratt*, 31 Conn. 433.

It follows that a chancellor will not intervene to fix the boundary between two adjacent tracts, although the line has become doubtful and controverted through the loss or obliteration of the land marks by which it was defined, unless some equity has been superinduced by the neglect or misconduct of the defendant, or of those under whom he claims; *Wolcott v. Robbins*, 26 Conn. 236; *Hale v. Darter*, 5 Humphreys, 79; *Topp v. Williams*, 7 Id. 569; *Doggett v. Hart*, 5 Florida, 215; *Wetherbee v. Dunn*, 36 Cal. 241; *Norris’ Appeal*, 14 P. F. Smith, 275. Every such question is necessarily, to a great extent, one of fact, to be ascertained by the testimony of witnesses, which should consequently be adjudicated in the ordinary course of law with the assistance of a jury, and cannot be brought into chancery consistently with the customary rules of English jurisprudence, as incorporated in the organic laws of the Union, and of

the several States. See *The North Penna. Coal Co. v. Snowden*, 6 Wright, 488; *Norris’ Appeal*, 14 P. F. Smith, 275; *Tilmes v. Marsh*, 17 Id. 507.

It is accordingly held in Pennsylvania, that the legislature cannot confer a general authority on a court of chancery to determine controversies as to boundary. The constitution of that State declares that “trial by jury shall be as heretofore, and the right thereof remain inviolate;” and although the sixth section of the fifth article provides that the legislature may, “in addition to the equitable jurisdiction hereinbefore vested in the judiciary, confer such other powers to grant relief and do equity as shall be found necessary, and may from time to time enlarge or curtail the same,” yet this clause must be understood as referring to “powers in that class of cases in which chancery had jurisdiction. It does not mean that the legislature may confer on the Supreme Court, or Courts of Common Pleas, the power of trying any question which has always been triable according to the course of law by jury;” *The North Penna. Coal Co. v. Snowden*, 6 Wright, 488, 492. It follows that an act of Assembly authorizing a court of equity to ascertain boundaries where no equity has been superinduced by the acts of the parties, would be invalid as transcending the limits which the constitution prescribes; *Norris’ Appeal*, 14 P. F. Smith, 275; *Tilmes v. Marsh*, 17 Id. 507. In *Norris’ Appeal*, the bill averred that the complain-

ant and defendants owned certain adjacent lands extending to low water mark on the river Delaware, and that the boundaries had become confused through the obliteration or removal of the natural and artificial monuments by which the courses and distances were originally defined, and in consequence of alluvial accretions and deposits, which had resulted in the formation of a marsh, extending between the ancient shore line, and the actual bed of the stream. The complainant then prayed for the appointment of a commission to trace the dividing lines, and especially that these should be so produced as to give each one his share of the marsh, in such wise that all should have their due proportion of the river front, which gave value to the whole. It was contended on behalf of the bill, that no case could well stand in greater need of equitable aid than this, where it was requisite to define the rights of the parties to land which had been formed since their respective titles were acquired. The suit might, therefore, be maintained under the recognized and long established power of chancery to regulate boundaries; or, if not, that the requisite authority had been conferred by the act of April 5th, 1859, providing that the jurisdiction of the court "shall extend to the ascertainment of disputed boundaries which have been confused or rendered uncertain by lapse of time, by natural causes or by the act, neglect or default of any pres-

ent or former owner or occupant." The court was nevertheless clearly of opinion that the case did not come under any of the recognized heads of equitable jurisdiction, and therefore was not one where such jurisdiction could be conferred by the legislature. It presented a purely legal question how the lines of the different parcels were to be protracted, through the marsh which had grown out from the shore, and should consequently be determined by a court and jury in an action of trespass or ejectment, like other cases involving the possession of real estate. There was no insuperable difficulty in bringing the controversy to such a test, because the complainant might enclose so much of the marsh land as he considered to belong to him of right, and thus put the other parties under the necessity of acquiescing or bringing suit. In the subsequent case of *Tilmes v. Marsh*, 17 P. F. Smith, 507, a bill was filed alleging that the complainant owned a house and lot, and that the defendant was the owner of an adjoining house and lot, with the use and privilege of a three feet wide alley, extending between the two houses, and over the complainants lot, but that the defendant claimed the privilege of building above and over the said alley, and using complainant's wall as a party wall. The prayer of the bill was that the defendant be enjoined from using the said wall for the support of his house, and to cease from overhanging the alley with the upper stories of the said house, and that the boundary

line between the premises should be defined. Sharswood, J., said, "this is a mere ejectment bill, and might have been demurred to as such; Daniels Ch. Practice, 29. In *Loker v. Rolle*, 3 Vesey, 4, a bill in many respects similar to this, Lord Rosslyn said, "Upon the face of the bill it is quite clear the plaintiff may draw a declaration in ejectment. The bill states the title, and that by some means or other, the same persons are in possession of all the lands, and have confounded the boundaries. If the complainant had filed a bill for discovery only, he must have prayed for the discovery, but it goes on to pray relief. That is merely an ejectment." * * * * It has been solemnly settled by this court, that an act of Assembly which should attempt to transfer any part of the jurisdiction of common law, to a court proceeding according to the course of a court of chancery, and of course without a jury, would be beyond the power of the Legislature. In this case the bill sets up nothing but a legal right, evaded by the defendants, and for which a complete and adequate remedy may be had in an ejectment. The bill admits that the possession of the defendants, extends over the alley. That is a trespass on plaintiff's close if the title to the soil is in him. *Cujus est solum ejus est usque ad cælum*. Ejectment will lie to recover possession of the soil subject either to a public or private easement over it; *Goodtitle v. Alker*, 1 Barb. 133; *Cooper v. Smith*, 9 S. & R. 26. It is no bar to a recovery,

says Mr. Justice Duncan, that another possesses a right of way or other easement, for the owner of the soil may maintain an ejectment for land over which a highway is laid out. There would be no difficulty here; the defendants being in exclusive occupation both under and over the alley; either in the sheriff's returning them as in possession on the summons in ejectment, or in giving possession to the plaintiff, if he should recover a verdict and judgment, upon the *habere facias*, subject to the right of way acknowledged to be in the defendants. We are of opinion that the court has no jurisdiction of this bill."

It is well settled in accordance with these decisions, that to confer jurisdiction in such cases there must be some equity arising from the relation between the parties, or superinduced by the wrongful or fraudulent conduct of the defendant, in obliterating or destroying the lines or monuments on which the evidence of boundary depends. See *Hale v. Darter*, 5 Humphreys, 79. It is not enough that the title of the complainant being equitable, he may be under a difficulty in bringing or defending himself against an action of trespass or ejectment, because he ought to complete his title by a bill filed for the purpose, and then try the legal question before the appropriate tribunal; see *Stewart's Heirs v. Coulter*, 4 Randolph, 74; *Hale v. Darter*.

In *Perry v. Pratt*, 31 Conn. 433, the plaintiff's and defendant's farms were divided by a brook which crossed the beach and fell into

Long Island sound; and it appeared that the bed of the stream had been so changed by a violent storm, extraordinary tides, and other natural causes, that the boundary was lost, and could not be fixed or ascertained in the course of legal proceedings. The complainant therefore prayed the court to appoint commissioners to inquire into the facts and settle the controversy. Butler, J., said, that relief could not have been granted, but for the act of 1859, which provided that in case of a lost, obscure or uncertain boundary, the court might appoint a committee to inquire into the facts, establish the bounds, and report to the court on the want of an adequate remedy at law. The case in hand was clearly one of a lost boundary within the meaning of the statute, and although the commissioners did not pretend to have ascertained the original bed of the stream, and had on the contrary established a new dividing line, as that which in their judgment came nearest to the truth, their course was within the statutory power, and should be confirmed. This decision does not conflict with the authorities in Pennsylvania, because the constitutionality of the statute was not touched on during the argument or considered by the judges.

When the nature of a wrong or spoliation is such as at once to preclude the possession or enjoyment of a right, and destroy or suppress the evidence, through which the right can best be established, and the extent of the injury ascertained, there may be ground for the inter-

vention of a chancellor to afford the redress which cannot readily be had in a merely legal tribunal. Under these circumstances, it may be for the interest of both parties, that the defendant should have an opportunity of making an answer under oath, which may afford a measure of the loss, and mitigate the hostile presumption, that would take the place of proof. See 1 Smith's Lead. Cases, 642 7 ed. If A. wilfully confuses his goods with B.'s, the law will give the whole to B. rather than allow him to be a loser. A. cannot, therefore, reasonably demur to a bill filed for the purpose of enabling each one to have his own, and the principle is the same when boundaries are intentionally confused.

Hence, it is that when the loss or confusion of boundaries results from the defendant's act or default, the case will fall within the cognizance of a court of equity, which may appoint commissioners to determine the line, and direct an account of rents and profits which have been wrongfully withheld, *ante*, see *Merryman v. Russell*, 2 Jones Eq. 470.

In *Merryman v. Russell*, the bill averred that the defendant had granted to the complainant the privilege or easement of an artificial pool on his, the defendant's land, together with the dam by which it was sustained, and also a race leading from the pool over the said land, and to be used as a means of supplying water to the complainant's mill. It was also averred that the defendant had broken down the dam and filled the

pool and race, and ploughed up the soil; and had done all this so effectually that it was no longer possible to distinguish the place where they had been. The court held that this was a gross violation of an undoubted right, attended with an attempt to efface the evi-

dence through which the nature and extent of the injury could be most readily ascertained and directed that a commission should be issued to determine the site of the race and the mill dam, and ascertain how much it would cost to replace them.

*AGAR v. FAIRFAX.
AGAR v. HOLDSWORTH.

[*447]

ROLLS, NOVEMBER 29, 30, 1808. ON APPEAL, NOVEMBER 13, 1809;
MAY 28, 30, DECEMBER 11, 1810; MARCH 15, 1811.

REPORTED 17 VES. 533.

PARTITION.]—*Decree for partition among several joint proprietors; and no objection from a covenant not to inclose without general consent, rights of common, and the inequality and uncertainty of the shares in proportion to other estates.*

The decree directed a reference to the Master, to inquire whether the plaintiff and defendants, or any or which, are entitled; and in what shares, according to the respective values of the other estates; and then a commission to divide accordingly; the costs of the partition to be borne by the parties in proportion to the value of their respective interests; and no previous or subsequent costs; by analogy to the proceeding at law.

THE bill stated that Lord Fairfax and other persons were, in 1716, seised in fee of the manor of Bilbrough, in the county of the city of York, and of the greatest part of the lands in the said manor, and also of the whole of the piece of land in the said manor called Bilbrough Moor, then uninclosed; and by indentures of bargain and sale and release, dated the 14th of July, 1716, Lord Fairfax and the other persons so seised sold and conveyed all the said manor, lands, and Bilbrough Moor, and other estates in the county of the city of York, to the use of Robert Fairfax and John Hardwicke and their heirs.

By indentures of lease and release, dated the 7th and 8th of September, 1716, reciting that part of the purchase-money *paid for the premises, conveyed by the former deeds, [*448] was advanced to Robert Fairfax by Thomas March, under an agreement whereby he was to become the sole purchaser of the lands and hereditaments therein mentioned, Fairfax and Hadwicke conveyed to Thomas March and Arthur March the several lands, particularly described, situate in Bilbrough, and

also all the said Thomas March's part and share of and in the moor or common called Bilbrough Moor, and of and in the soil, freehold, and inheritance of the same; which part or share, it was thereby declared, Thomas March had purchased of Robert Fairfax, together with the farms and lands thereby granted and released; and that the said moor was to be estimated and allotted between the said Robert Fairfax and the said Thomas March, and the other purchasers under Robert Fairfax and John Hardwicke; viz, Charles Redman, Bernard Banks, Matthew Smith, and Nathaniel Hird, in proportion to the several farms and lands in Bilbrough aforesaid by them respectively purchased, and the valuation of the same, whenever the said moor or common called Bilbrough Moor should happen to be inclosed in time to come; but reserving to Fairfax and Hardwicke, their heirs and assigns, all the back lanes and the High Street, and a small waste thereupon in Bilbrough aforesaid, with liberty to them to inclose the same, subject, nevertheless (both before and after such inclosure), to such ways, &c., in and through the same, to be made by the said Thomas March, his heirs and assigns, as had been anciently and customarily used and enjoyed by the tenants, owners, or occupiers of the farms, lands, and premises thereby released to March and his heirs; to hold to Thomas and Arthur March, their heirs and assigns for ever.

The bill further stated that Redman, Banks, Smith, and Hird respectively, purchased under Fairfax and Hardwicke divers farms and lands in Bilbrough, and also several parts or shares of Bilbrough Moor, and of and in the soil, freehold, and inheritance thereof, in proportion to the several farms and lands in Bilbrough [*449] aforesaid by *them respectively purchased, and what should be the value thereof respectively, when the said piece of land called Bilbrough Moor should be divided or inclosed, in the same manner as the share of Thomas March in the said moor was to be estimated and allotted; and the said messuages, farms, lands, and premises, and the said parts or shares of Bilbrough Moor, were conveyed to Redman, Banks, Smith, and Hird, and their respective heirs and assigns, in fee simple; and Fairfax and Hardwicke retained the remaining part of the said lands in Bilbrough, and a part or share of Bilbrough Moor, and of and in the freehold and inheritance thereof, in proportion to the farms and lands in Bilbrough aforesaid retained by them, and what should be the value thereof at the time when the said piece of land called Bilbrough Moor should be divided or enclosed, in the same manner as the share of the said Thomas March in Bilbrough Moor was to be estimated and allotted.

Arthur March, who was a trustee for Thomas March, died in his lifetime; and Robert Fairfax died in the lifetime of Hardwicke; and by divers mesne conveyances, &c., the whole of the said premises, conveyed to Fairfax and Hardwicke, and Bilbrough Moor, became vested in the plaintiff, and such of the defendants to the original bill, as therein named, in the manner, shares and

proportions therein stated; and they and no other person, were seised in fee of the whole of Bilbrough Moor, and the freehold and inheritance thereof, as tenants in common, which had been used and enjoyed by them, and those under whom they derive title, as common pasture for horses, &c.

The bill prayed an account of the lands in Bilbrough, conveyed to Thomas and Arthur March, and those purchased by Redman and the other persons from Fairfax and Hardwicke, and of the lands retained by them; that the value of the said lands may be ascertained; and that a commission may be directed to issue, to ascertain the value of the said several lands, and the parts or shares of the plaintiff and the other persons named in Bilbrough *Moor; and also to allot in severalty, make partition of, [*450] and divide Bilbrough Moor into six several parts or shares, in proportion to the amount of the true and just value of the several farms and lands in Bilbrough, so conveyed and purchased or retained; and that all the said shares of Bilbrough Moor, when so allotted, may be inclosed, and held in severalty by the plaintiff and the other persons entitled, &c.

The answer stated, that in each of the derivative conveyances to the joint or sub-purchasers under Fairfax, are contained covenants against inclosures of the moor without consent: viz., covenants by Robert Fairfax and John Hardwicke respectively, with each of the sub-purchasers, that neither he nor his heirs and assigns should or would inclose, or cause to be inclosed, any part of the said moor, other than the back lanes and small waste, as therein mentioned, without the consent of the said Thomas March, &c., his heirs or assigns; and Thomas March and the other sub-purchasers entered into similar covenants with Fairfax and Hardwicke not to enclosed without the consent of them and their heirs. The answers also stated the persons in whom the estates so conveyed to Fairfax and Hardwicke were vested; and that those persons and their tenants, not exclusively, but together with others, had enjoyed and exercised the herbage and other rights and privileges in and upon Bilbrough Moor; and that the several rights, shares, and interests of the persons entitled were uncertain, and in no wise ascertained; and the defendants submitted, that such partition as was sought by the bill ought not now to take place; particularly as such rights and interests, and the other rights and interests in and to the said moor, were uncertain and indeterminate, and the parties concerned were not agreed, and had not consented to having an enclosure or partition thereof; and submitted that the case now before the Court was not proper for a partition and inclosure by a Court of equity, but by Act of Parliament only, where facilities and benefits might be secured and objections and inconveniences obviated; the former of which could not *be extended, and the latter removed, if the present attempt to obtain a partition and inclosure in this [*451] Court should succeed.

Mr. *Richards* and Mr. *Bell*, for the plaintiff.

Sir *Samuel Romilly* and Mr. *Hall*, for the defendants.—A bill for a partition under these circumstances is without precedent. Partition is of common right between parceners, joint tenants, and tenants in common; but it could not be compelled either at law or in equity, except amongst parceners, before the statute of Henry VIII.,¹ which gave it to joint tenants and tenants in common of estates of inheritance; and in the following year it was extended to particular estates. It cannot be applied to interests of any description beyond those defined limits, comprising persons with characters ascertained, and rights perfectly clear. These persons are represented as quasi tenants in common. A tenancy in common may be of unequal, but not of unascertained shares. In the declaration between parceners or joint tenants, the demandant must state the title, and the distinct shares must appear between tenants in common; the declaration must state the title and share of the plaintiff, and the shares though not the distinct titles of the defendants. The statute of William III.,² for advancing this remedy, adding particular ceremonies, declares, that in default of appearance, the Court may proceed to examine the demandant's title, and the quantity of his purpart; and shall for so much give judgment by default, and award writ to make partition, whereby such purpart may be set out in severalty. The partition can only proceed upon the title so ascertained on the face of the instrument, not by inquiries.

It cannot be maintained that common rights form no objection. The lord could not, except under the Statute of Merton,³ have enclosed or taken any part of the waste; and that statute gives the right of approving, with the qualification, that it shall not be to the prejudice of the commoners, for whom it requires sufficient to be left. Even for the purpose of inclosure, partition [*452] cannot be made in prejudice of that right, and much less for any other purpose. The statute of Edward VI.⁴ accordingly declares the right of the commoner to pull down an inclosure by the lord infringing that right, and gives the remedy by assize, with treble damages. Formerly a greater degree of strictness prevailed upon partition here than in Courts of law; and that appears to be Lord Hardwicke's opinion, in *Cartwright v. Pulleney*.⁵ In Lancashire, there are many instances of rights enjoyed by several persons, capable of being ascertained, but still uncertain, of which, therefore, they cannot be considered tenants in common; and, if ascertained, they could not remain two days without variation, fluctuating continually, according to the management, husbandry, and cultivation of the different proprietors.

This property, therefore, enjoyed in common, but by unascertained, indefinite shares, is incapable of partition. It is impossi-

¹ Stat. 31 Hen. 8 c. 1, s. 2; stat. 32 Hen. 8 c. 32, s. 1.

² Stat. 8 & 9 Will. 3, c. 31, made perpetual by 3 & 4 Ann. c. 18.

³ Stat. 20 Hen. 3.

⁴ 4 & 5 Edw. 6.

⁵ Atk. 380.

ble to frame a declaration, as the ascertained part cannot be proved, and no inquiry can be directed for that purpose. Further difficulties arise, from the nature of the property, with reference to rights long exercised and enjoyed upon it, independent of the title of these proprietors; being stocked, the herbage taken, &c., as it is said, by persons having no right; but it might be common appendant, or because of vicinage; or common appurtenant, or in gross; by grant or prescription. A very formidable impediment is, the covenant against inclosing without mutual consent, which can be the only object of partition.

The form of the decree, in these cases, is not general. In *Curzon v. Lyster*,¹ which was much considered, the direction was, that the persons named, any three or two of them, should go to, enter upon, walk over, and survey the land, and make a fair partition, division, and allotment thereof in moieties: one to the plaintiff, the other to the defendant; and the parts so allotted to divide by metes and bounds, and to examine witnesses upon such interrogatories, as they shall see occasion, &c. In some instances, close commissions were granted, the commissioners *ad- [453] ministering an oath of secrecy to the several persons before them. The commission in *Curzon v. Lyster* originally was so. But according to Lord Redesdale's clear opinion, that is erroneous; the commission is, in all respects, analogous to the writ of partition. The commissioners are to do what the sheriff and jury would have done and have no power to make any inquiry, except as to the very lands to be divided. The commission being in particular ascertained forms, a new one cannot be directed, and certainly not such as is now required, with power to compel a production of title deeds, to examine witnesses, and then to go upon each separate estate, ascertain the value, and divide accordingly, asking, in the alternative, either a commission or a reference to the Master, for the purpose of all these inquiries. The result will be several distinct cases, producing all the inconvenience which the covenant against inclosure without mutual consent was intended to prevent.

Mr. *Richards* in reply.—All persons supposed to have rights of common were made defendants, and all disclaimed except two, who are parties claiming right of common, without stint, annexed to houses, directly contrary to law. If there are any common rights subsisting, they cannot be affected by partition. Admitting that the shares are not ascertained, that may and will be done by the commissioners, who will ascertain the shares in which all these joint proprietors of the land are interested; and for that purpose some previous inquiry may be necessary. In *Calmady v. Calmady*,² much previous investigation was required to ascertain the shares and to make the proper distinction as to the costs. That course must be taken in every case where the parties differ as to their respective interests, either by an inquiry

¹ Cited from a MS. note.

² 2 Ves. jun. 568; Reg. Book 1794, A. 460.

before the Master, or some other means, as in the case of dower, which is as much a right at law as partition, and depends, in this Court, on much the same principle. The Court will find its way to the ultimate purpose; in the one case, the widow's right of dower; in the *other, a partition among parties having an undivided interest, either as joint tenants, coparceners, or tenants in common.

This is clearly a tenancy in common: the trustees of Lord Fairfax, seised in fee of the whole, conveying distinct farms and shares of this moor to the several persons from whom these parties claim; under these circumstances, a partition is matter of right: *Parker v. Gerard*.¹ The shares are, in contemplation of law, ascertained, if they are capable of being ascertained, as they are, by reference to the prices paid by the several parties. In *Leigh v. Leigh*, a manor, an entire thing, was the subject of partition; and it was impossible to know the value of a moiety of a sixth part without knowing the value of the whole. The only parties to the cause were those who were entitled to a moiety of a sixth; the commissioners must, therefore, have taken into consideration a subject of property, in the hands of persons not parties, and the duty of the commissioners was not less difficult than what is required by this bill,—a valuation having regard to the lands possessed by parties in the cause; in that case, a valuation with reference to shares of a manor not belonging to any party in the cause. This plaintiff prays the Court to declare the rights according to this deed, and that the commissioners shall divide according to the rights so declared. That object must be obtained, if not through commissioners, by a reference to the Master, under all the circumstances; these parties being clearly tenants in common, entitled in shares to be ascertained by comparison of the different farms and respective interests in the moor. The commissioners are to exercise their judgment according to the original price, or rather the present value, which is the true construction; and for owelty of partition they may, in their discretion, give more to one than another.

The covenant not to inclose is merely a private engagement, and cannot be considered as binding the parties not to apply to the law of the country, as a covenant to refer to arbitration will not prevent the party's *assertion of his right in a court of justice. This is a covenant inconsistent with the estate, applicable only to certain cases, and cannot prevent partition for ever. Partition is not within the terms of a covenant not to inclose, and there may be great advantage from partition without inclosure. The commission in *Curzon v. Lyster* was settled by the Master, the forms being very different.

SIR W. GRANT, M. R.—I shall take a little time to consider what will be the proper decree in this case. At present I am

¹ Amb. 236. See *Warner v. Baynes*, Amb. 589; *Turner v. Morgan*, 8 Ves. 142.

strongly inclined not to decree an immediate partition, upon the grounds that have been stated; but I wish to consider, whether, as incidental to the demands of partition, the Court would not put into a train of inquiry, what are the proportions in which they are interested in these lands, in order to lay a foundation for partition afterwards: that previous inquiry to be before the Master, whether the commission ought not, as the writ always does, to state the proportions in which the partition is to be made.

SIR W. GRANT, M. R.—There are two cases in which the Court referred it to the Master to ascertain the interest of the parties, and afterwards directed a commission to issue: *Calmady v. Calmady*¹ and *Duncan v. Howell*. The uncertainty of the share is not a ground for definitely refusing a partition: it is for refusing it at present. It cannot be referred to the commissioners to ascertain the interests: that must be done, as in those cases, by the Court, through the medium of the Master. In one of the cases, the form of the inquiry was, what undivided shares the several parties were entitled to, and for what estates and interests therein respectively.

The way in which it strikes me, is this. The parties have among them the whole interest in the soil and freehold, which they possess in common. Some of them seek a partition. It is said there cannot be a partition, on account of the uncertainty of their interests; the proportion *to which each [*456] if entitled not being ascertained, that depending upon the quantity of interest each has in the estate of another, and the value of that estate, with reference to which value, the allotments of this moor are to be made among the parties, the owners of that estate, and of this moor also. That is no objection, as they are not the less tenants in common; though an operation must be performed before it can be ascertained to what undivided shares they were entitled as tenants in common. It must be seen what is the value of their shares in the other estate by reference to which this allotment is to be made; and then they will be in the situation of parties having ascertained interests in this moor; but still they are tenants in common, and therefore have a right to a partition.

It seems to me to have been soundly objected, that it is impossible in the present situation to issue a commission, as then it must be referred to the commissioners: first, to ascertain their interests and the proportions in which they are entitled, and then to make the allotment. The former was never done by commissioners. The Court is to ascertain the proportions and rights of the parties, and when that is done, then the duty of the commissioners begins, to make the division in those ascertained proportions.

An objection was then taken to the rights of common over this moor. The rights of common are no objection to the commission, as that right will not be in the least affected by the partition, which regards only the freehold and inheritance of the soil. A partition never affects the interests of third parties. It is immaterial whether others have a right over that soil and freehold, which they have in common among them. Those rights will equally remain.

It is then said there is a covenant not to inclose, except by consent of all the parties. I do not exactly understand what is the meaning of that covenant. If it is only, as it is expressed to be, against inclosure, what has that to do with partition? Partition [*457] does not require inclosure, but *only that an allotment shall be made by metes and bounds. Whether they may have a right to inclose afterwards may depend upon other circumstances. It may depend upon the rights of third persons over this land, and upon the agreement of the parties themselves. The covenant against inclosure may have its effect, and I am not now called upon to say, whether it shall or not.

It is then said the rule by which the allotment is to be made, may be very unequal. It may be so, but it is a rule they have laid down for themselves. The inconvenience is of their own making, by the terms of their own agreement. If they were all agreed now, that there should be a partition, or that there should be an inclosure, this inconvenience as to the mode of making the valuation would still present itself.

There does not appear to me, therefore, in this case, anything to prevent a partition, after it shall have been ascertained what are the proportions in which the land is to be divided among the parties.

The decree declared, that the piece of land called Bilbrough Moore, is to be allotted according to the present value of the several farms and lands in Billbrough, purchased by Thomas March, &c., and conveyed to them by the several indentures of the 7th and 8th, and 12th and 13th of September, 1716, and of the farms, &c., retained by Fairfax and Hardwicke, and directed a reference to the Master, to inquire and state to the Court what undivided shares the plaintiff, and such of the defendants as had any estate of freehold or inheritance in the said moor, under the deeds of 1716, were entitled to or interested in the said moor, and for what estates and interests therein, respectively, &c.; and it was ordered that a partition should be made of Bilbrough Moor, among the plaintiff and the said defendants, who by the report should appear to be entitled to any shares of freehold and inheritance of Bilbrough Moor, under the said deeds of 1716, according to such undivided shares thereof; and it was *ordered, that a com- [*458] mission should issue for that purpose. all deeds in the power of the parties to be produced before the commissioners,

with liberty to examine witnesses, &c.; and it was ordered, that what should be allotted to the several parties, should be held and enjoyed by them in severalty, and, if any of the parties were under any disability, they, when capable, and all other proper parties, should join in executing proper conveyances, &c., for conveying and vesting the several shares in and to the said parties respectively, according to their several rights and interests of, in, and to their several undivided parts and shares of and in the said moor, the costs of the commission and inquiry, and of the defendant Parkin (the heir of Hardwicke), whose costs were ordered to be paid by the plaintiff in the first instance, to be borne by the parties interested in the moor, in proportion to what should be their respective shares and interests in it, with liberty to apply.

From this decree a petition of appeal was presented, submitting, that, having regard to the nature and uncertainty of the rights of the parties, as well as of the value, and the particular circumstances of this case, it is not a case for partition, inclosure, or any relief to be administered in a Court of equity.

Mr. *Richards* and Mr. *Bill*, for the plaintiff.—Since the case of *Warner v. Baynes*,¹ the difficulty of making partition has formed no objection in this Court. This case presents no farther difficulty than that this property is to be divided, not in any certain specific proportions, thirds, fourths, &c., but according to the value of certain other estates. There may be some difficulty as to the proportions, until the valuation of those estates shall be made; but from that moment the proportions are accurately defined: and on that ground that there is no more objection than to a devise of the residue of real estate among children, to make their fortunes equal, by reference to advances formerly made to them. This Court would proceed in many cases of complicated circumstances, from *the intricacy of the title, and the nature of the shares; though a Court of law could not. Tenants in [*459] common having a right to partition at law, there must be some mode of having a calculation if necessary, before their precise rights as tenants in common can be ascertained. Whatever is capable of division may be the subject of partition: manors for instance; with every right of the lord; and even the waste grounds are divided: *Sparrow v. Friend* (the case of the manor of Brighton;² *Lane v. Cox* (the manor of Rolleston in the county of Derby). In *Parker v. Gerard* it was resisted. The property, situated in the North of England, consisted of cattle-gates, and of

¹ Amb. 589. See *Turner v. Morgan*, 8 Ves. 143. In that case the commission having been executed, an exception was taken by the defendant, on the ground that the commissioners allotted to the plaintiff the whole stack of chimneys, all the fire-places, the only staircase, and all the conveniences in the yard. The Lord Chancellor overruled the exception, saying, he did not know how to make a better partition for them; that he granted the commission with great reluctance, but was bound by authority; and it must be a strong case to induce the Court to interpose, as the parties ought to agree to buy and sell.

² Cited from the decree.

certain other rights, of a very peculiar nature ; and partition was decreed in very minute fractions, according to the rights in the cattle-gates.

If there were other rights existing over this moor, that would not be an obstacle to partition among those persons having, by conveyance to the trustees, rights in the soil or freehold. It is not, however, made out, and cannot be presumed, that there are rights of common, as stated by the bill ; they cannot be supported at law. There is no proof, as suggested, that they were in the habit of taking greensward or sods, earth and soil, from the waste of the manor ; and no such right of common exists at law. As to furze and whins, &c., none of these are stated as rights of common ; they merely say, they have been in the habit of taking them. A covenant not to divide is not legal. There is no defect of parties ; and the decree is right in form, following the precedent of *Duncan v. Howell*, referring it to the Master to inquire what undivided shares the several parties were entitled to in the estate in question, and of what estates ; and directing partition to be made among the parties who, by the report, shall appear entitled to any share of the estate, according to the shares ; and that a commission should issue for that purpose, with the usual directions.

Sir *Samuel Romilly* and Mr. *Hall*, for the defendants.—There is no instance of such a bill as this ; and the consequences it will [*460] lead to must be very important. The cases *referred to in the Registrar's book have no application. They are cases of complicated interests, in which it was very difficult to ascertain in what proportions the parties were interested. There is no authority for the general principle, upon which it is attempted to maintain the bill. This is the case, not of all the owners except one agreeing, but of one, against the consent of all the rest, claiming a partition and conveyance, contrary to the express covenant, entered into on account of the difficulty, that there should be no partition unless they should all agree. If such a bill can be maintained upon cattle-gates and common rights, why is application made to the legislature to divide common rights ? The difficulty, from the number of parties may be overcome by the expedient of making some represent the rest, where it would be inconvenient to bring all before the Court.

All the authorities state, that a bill for partition is exactly the same as the writ at common law, with this single distinction, that, under the writ, those only are bound who are entitled to a subsisting estate of freehold, not those entitled in remainder, whom a Court of equity will bind as well as those who have particular estates. On that ground, Sir T. Clark, in the case of *Parker v. Gerard*,¹ held, that this bill is matter of right, and therefore no costs shall be given, as there are none upon the writ. Upon those principles, the Court has granted partition where it must be ruinous to all the parties, as in the case of the house,

¹ Amb. 236.

Turner v. Morgan.¹ Upon the same principle in *Parker v. Gerard*, the interest of one party being so inconsiderable that he would have preferred giving it up, he was compelled to make partition, and to pay an equal share of the expense. A stronger instance cannot be produced, that the Court in these cases acts ministerially, rather than judicially. In many instances, where from the complication of the interests, the writ would not lie, this Court would decree partition, which will not be prevented by the difficulty of the division; nor, if it is to be in very small fractions, where they are clearly tenants in common, of ascertained shares, *can it depend on the amount of interest. [*461] In *Parker v. Gerard*, the Master of the Rolls states the injustice which the Court is frequently compelled to do, having no discretion upon the subject. The objection of difficulty is very strong in the case of an advowson.

How can such a decree be executed? A considerable time may elapse between the report and the partition, and the value at the latter period, upon which the shares must depend, may be materially varied. The consequences of this jurisdiction may be easily imagined. Some of these estates, having fallen to *femes covert*, infants, or persons in remote situations, may have been suffered to deteriorate; and that moment would be seized, by a person who had improved this, taking advantage of the consequence of superior wealth or the neglect of the others, to claim partition. For the very purpose of guarding against that, from a foresight of the difficulty, confusion, and injustice to which it would lead, was this covenant against inclosure, except by general consent, introduced. It is said, the covenant is void, as inconsistent with the nature of the estate, and it would be so; but this is the case, not of tenants in common, standing upon the common-law right, but of persons agreeing to hold, and looking to partition, in a mode not according to the law, protecting themselves against the improvidence of such an agreement in an unlimited way; and one of the parties to that special contract desires now to have a part performance, striking out that express provision for the consent of all. A court of equity does not administer that peculiar and extraordinary relief, a specific performance of a contract, where the effect will be injustice, but leaves the parties to the law; and this is a case most proper for the exercise of that discretion. Another difficulty arises from the rights of common of estovers and turbary, the bill stating the manner in which those rights have been always enjoyed.

The constant course of these decrees, is first to ascertain the shares, and then to come for a partition; and it may be doubted, whether one of the cases referred to from the *Registrar's book, in which that course appears not to have been followed, was an adverse decree. The reference, therefore, in the first instance, ought to be to ascertain, not the interests, but the value computing the outgoings, &c., so as to ascertain the value

at the time of division; but if the course is not to come to the Court again, the commissioners must both ascertain the value, and make the division in the first instance, which would be very inconvenient; and there is no instance of such a discretion in commissioners, the Court only giving them the rule. This has not the character of a tenancy in common, in certain shares and proportions; and besides uncertainty, another objection is, that nothing passed immediately by this deed. The objection of uncertainty here is much stronger than in the case put by Walmsley in *Corbett's case*,¹ where the whole estate went to each on different days; but this consists of a great number of minute shares, constantly varying. They may have unequal shares, as Lord Hardwicke observes;² but they cannot be uncertain. The statute of Hen. 8,³ gives partition between joint tenants and tenants in common, in the same manner as it previously could have been had between parceners. It was necessary, therefore, to obtain judgment in the same way upon the title in joint tenancy. And as tenant in common, the defendant was obliged to state his title and share and the shares of the others, though he could not know their titles, and a mistake in stating the shares was fatal. Upon what ascertained share could any of these proprietors have declared? They calculate upon the value, which cannot remain the same for two days; and that objection of uncertainty applies equally to the whole and all the component parts; the number of shares always varying, and consequently the amount of each share. No instance can be produced of partition under this difficulty, arising from the number of shares constantly varying, and an express provision that they should remain unascertained and indefinite.

LORD CHANCELLOR ELDON.—The plaintiff in this cause is entitled [*4 3] to a partition; but the decree, though in terms *as near as possible to the case of *Duncan v. Howell*, I think is not in form the exact decree authorised, under the circumstances of this case, by that precedent. The variation, however, will be in form merely, not in substance. The ground upon which the case of *Calmady v. Calmady* (2 Ves. jun. 568) proceeded was, that the plaintiff, showing title to a part of the estate, was entitled to have a partition; and though the titles of the defendants were not proved, a reference to the Master was directed for the purpose of ascertaining them; and the report finding that the plaintiff and the defendants were entitled to the whole subject, upon further directions the decree was made for a partition according to the shares so ascertained. I cannot find any other instance of such directions given as to the costs. How can I make infants pay costs?

This Court issues the commission, not under the authority of any Act of Parliament, but *on account of the extreme difficulty attend-*

¹ Co. 76. See 78, a.

² 2 Ves. 81.

³ Stat. 31 Hen. 8, c. 1.

ing the process of partition at law ; where the plaintiff must prove his title, as he declares, and also the titles of the defendants ; and judgment is given for partition according to the respective titles so proved. That is attended with so much difficulty, *that by analogy to the jurisdiction of a Court of equity in the case of dower, a partition may be obtained by bill.* The plaintiff must, however, state upon the record his own title and the titles of the defendants ; and, with the view to enable the plaintiff to obtain a judgment for partition, the Court will direct inquiries, to ascertain, who are, together with him, entitled to the whole subject. If, therefore, the state of the record, as originally framed, is not such as to authorise the Court to say, that the plaintiff and the defendants are respectively entitled in distinct shares, comprehending the whole subject, the proper course is to direct a reference to the Master, to ascertain what are the estates and interests of the plaintiff and defendants respectively ; and, if it appears that they, or some of them, are entitled to the whole, then to order a partition, according to the rights of all, or such of them *as appear entitled ; dismissing the bill as against those who do not appear to have any right. [*464]

The decree in *Calmady v. Calmady* is perfectly regular ; directing the inquiry, and afterwards a commission to issue, to divide the estate among the several parties, who appear upon the Master's report entitled to it. The omission in this decree to reserve further directions, is a mere informality, in not reserving a mode of dismissing from the record those who may have no title. Considerable difficulty arises in this case, from the covenant not to inclose.

The order afterwards pronounced by the Lord Chancellor, directed the decree to be affirmed, with the alteration after mentioned ; viz. : instead of the words, "after the direction for the partition to be allotted, according to the present value of the several farms and lands in Bilbrough, purchased, &c.," inserting the following words : "in shares according to the present respective values of the several farms and lands in Bilbrough respectively purchased ;" and adding a declaration, that the plaintiff, being entitled to an undivided part of the said piece of land, called Bilbrough Moor, has a right to call for a partition of the said piece of land, as between him and the several persons entitled to the rest of the said piece of land : such partition to be made according to the declaration before mentioned ; and directing a reference to the Master, to inquire and state, whether the plaintiff and the defendants respectively, or any and which of them, are entitled to the freehold and inheritance of Bilbrough Moor ; and how, and if it shall appear that all or any of them are so entitled to the said moor, then to ascertain the respective values of the farms and lands respectively purchased as aforesaid ; and, having so ascertained the respective values of the said farms and lands, the Master is to ascertain, as among the plaintiff and the defend-

ants, whom he shall find to be entitled to Bilbrough Moor, in what undivided shares they are respectively entitled, according [*465] to the declaration *before mentioned; and in that case, a commission to issue to divide the said moor among the plaintiff and defendants, who, by the report, shall appear entitled to any shares of the freehold and inheritance of Bilbrough Moor, under the deed of 1716, according to such undivided shares thereof; with the usual directions for the production of deeds, &c., and liberty to examine witnesses; the shares allotted to the several parties to be held and enjoyed by them in severalty; and, if any parties appearing entitled to shares in Bilbrough Moor, are under any disability, and not capable of making the conveyance, they, when capable, and all other proper parties, to join in all proper conveyances, &c., respectively, according to their several rights and interests of and in the several undivided shares of the said moor; and if the Master shall not find the plaintiff and defendants, or any of them, entitled to the freehold and inheritance of the said moor, to state that to the Court, before any further proceedings; and the consideration of costs and further directions was reserved, with liberty to apply.

The cause was heard (Dec. 11, 1810), for further directions, and upon the costs.

Mr. *Richards* and Mr. *Bell*, for the plaintiff.—The rule laid down in the case of *Calmady v. Calmady*,¹ is, that in these cases the costs are given in proportion to the interests of the parties. The decree, distinctly directing the costs of the plaintiff to be raised out of the estate, certainly has no such direction as to the costs of the infant defendant, whose costs, however, ought, upon the same principle, to be a charge upon the estate of the infant. The old rule that prevailed previously to that case, certainly operated as a great hardship, where one part-owner might have a single acre, and another ten thousand.

Sir *Samuel Romilly* and Mr. *Hall*, for the defendants. [*466] *—The Court is now called upon to lay down a new rule as to the costs in a suit for partition. Formerly, in most

¹ The decree in that cause declared, that, the cause coming on for further directions, the report of the commissioners was confirmed, and it was ordered, that, when the defendant, Hamlyn, an infant, shall attain the age of twenty-one, the plaintiffs and the said defendant shall execute mutual conveyances to each other of the several parts of the estate allotted to them; and in the meantime the plaintiffs and the defendant to hold and enjoy the several parts of the estate so allotted, &c.; and that the costs of issuing and executing the said commission of partition, and also the costs of making out the title to the several parts of the said estate, be paid and borne by the plaintiffs and the said defendant, the infant, in the shares and proportions in which they are respectively entitled to the said estate under the said commission; and it was ordered, that such costs of the plaintiffs be raised by the plaintiffs, the trustees, in the settlement made upon the marriage of the plaintiff Calmady, by sale or mortgage of the estate in the settlement, according to the trusts of the settlement.

cases costs were not given, and the rule never could have been as represented in *Parker v. Gerard* (Amb. 236), that they shall be paid in equal moieties. The case of partition has been considered as analogous to that of dower, in which there are no costs. In *Calmady v. Calmady*, both at the bar and by the Court, the previous cases were distinguished into two classes: where costs had been and where they had not been given; and the costs of the commission were distinguished from costs of the cause. A new rule upon this subject should not be laid down without consideration, as the effect may be mischievous: for instance, where there is an interest extremely minute, two or three acres only, and in reversion, the old rule, giving no costs, may have the salutary effect of preventing a suit by one against the inclination of all the other parties. In many cases, the only way of providing for a portion of the costs may be by selling the interest: perhaps the interest of an infant in settlement; and if in reversion, the whole might be exhausted. The apportionment of costs ought also to extend to the interests of persons not in esse. These, and many other instances, show the wisdom of the old rule, and its justice, considering that a suit for partition is admitted only as being more convenient than the common-law writ. By the decree in *Calmady v. Calmady* justice was done most imperfectly, as no reason can be assigned for not apportioning the costs, previous to the hearing, as well as the subsequent costs. The effect in this case will be, that persons brought by the plaintiff before the Court are to pay costs to the hearing, because they have set up a claim which has not succeeded. The plaintiff in this suit is bound to state who are jointly interested with him; and there is no instance of making a defendant so brought before the Court, pay the costs of a claim set up by him though mistaken. He does not appear voluntarily before the Court. This application is new in another respect: the plaintiff desiring the costs of those *who, as the defendants insisted, set up a claim, but who have dis- [*467] claimed. The defendants, having only given notice that such a claim was set up, ought not to pay those costs. The plaintiff ought also to state how the costs of those defendants who are not sui juris are to be paid: whether by a sale of their interest, or in what other manner.

LORD CHANCELLOR ELDON.—This is really the great question, how costs are to be paid on partition. Several cases have occurred since *Calmady v. Calmady*; and I wish to know whether the practice has been uniform. It is, I apprehend, universally true, that no costs are given, up to the hearing; of which I do not know an instance. As to the costs of making out the title being borne in proportion to the respective interests, that does not seem very just; as the expense may be greater of making out the title of a share worth 50*l.*, than of one of the value of 5000*l.* On the other hand, the decrees are short, in not providing that the costs of infants and married women shall be borne by the share in re-

spect of which they were incurred. My impression is, that all the subsequent decrees have followed *Calmady v. Calmady*.

The LORD CHANCELLOR gave judgment upon the question of costs; declaring¹ that, as the party came into equity, instead of going to law, for his own convenience, the rule of law should be adopted, and therefore, no costs should be given until the commission; that the costs of issuing, executing, and confirming the commission, should be borne by the parties, in proportion to the value of their respective interests; and there should be no costs of the subsequent proceedings.

Although Mr. Hargrave, in his note to Co. Litt. 169, b., has treated the jurisdiction of equity to compel partition between joint owners of [*468] real estate, as of modern origin, and as trenching upon the writ of partition, and wresting from the Courts of common law their ancient exclusive jurisdiction over the subject, he cites a case in Tothill, so far back as the 40 Elizabeth (see tit. "Partition,") which one might suppose would almost give the jurisdiction the sanction of antiquity. It is, indeed, by no means clear that Courts of common law exercised exclusive jurisdiction over the subject, as Mr. Hargrave has assumed; but be that as it may, Courts of equity most probably assumed concurrent jurisdiction, not only, as is laid down in the principal case, from the extreme difficulty attending the process of partition at law, but also from the inadequacy of Courts of law, by the writ of partition to deal properly with those cases in which partition was often desired. Many instances might be mentioned, in which the deficiency of Courts of law, in proceedings on the writ of partition was supplied in equity, which appears, in an enlarged and liberal manner, to have acted upon the well-known rule of the civil law: "In communione vel societate nemo compellitur invitatus detineri."—Cod. Lib. 3, tit. 37, 1, 5. But as the writ of partition has been abolished (see 3 & 4 Will. 4, c. 27, s. 36), so that equity has now exclusive jurisdiction, it seems immaterial further to investigate this subject.

Previous to 4 & 5 Vict. c. 35 (amended by 21 & 22 Vict. c. 94), the Court of equity had no power to direct the partition of copyholds nor of customary freeholds: it is given, however, by the 85th section of that Act (*Horncastle v. Charlesworth*, 11 Sim. 315; *Jope v. Morshead*, 6 Beav. 213; *Clarke v. Clayton*, 2 Giff. 333; *Bowles v. Rump*, 9 W. R. (V. C. S.) 370); nevertheless, before the passing of that Act, the Court might decree specific performance of an *agreement* to divide copyholds (*Bolton v. Ward*, 4 Hare, 530); or where there were both freeholds and copyholds to be divided, the Court might direct such a partition

¹ Ex relatione.

as to give the entire copyhold to one party, and the freehold, or a part of the freehold, to the other (*Dillon v. Coppin*, 6 Beav. 217, n.; *Jope v. Morshead*, 6 Beav. 217, n.).

A decree of partition is a matter of right: *Baring v. Nash*, 1 V. & B. 554; *Parker v. Gerard*, Am. 236. And it is no objection to a bill for partition, that the interests of all parties will not be finally bound by it. Consequently a decree may be obtained either by or against a person having only a limited interest as tenant for life (*Gaskell v. Gaskell*, 6 Sim. 643); or tenant for life determinable upon marriage (*Hobson v. Sherwood*, 4 Beav. 184; or a tenant for a term (*Baring v. Nash*, 1 V. & B. 551; *Heaton v. Dearden*, 16 Beav. 147); or where there are remaindermen who may come into esse and be entitled, for they will be bound by a decree made against *the tenant for life (*Wills v. Slade*, 6 Ves. 498). And in *Gaskell v. Gaskell*, 6 Sim. 643, [*469] Sir L. Shadwell held, that a decree for partition would be binding on the unborn sons of the tenant for life of an undivided moiety of an estate, who, when they came into esse, would be tenants in tail; but as an agreement for a partition had been entered into between the tenant for life and the owners of the fee, of the other moiety, an inquiry was directed, whether it would be for the benefit of the future issue of the plaintiff, that the agreement, either with or without variations, should be carried into effect. And his Honor said, that, in *Martyn v. Perryman* (1 Ch. Rep. 235), the Court decreed a partition, notwithstanding *femes covert*, infants, and incumbrancers were concerned.

A person when entitled in possession only can file a bill for partition. It has been held, therefore, that a bill for a partition cannot be maintained by a joint-tenant or tenant in common in reversion or remainder (*Evans v. Bagshaw*, 8 L. R. Eq. 469; 5 L. R. Ch. App. 340); nor can he after he has filed a bill, by acquiring a title in possession and amending his bill, put himself in a better position. *Ib.*

A mortgagee of an undivided share may file a bill for foreclosure and partition, and may move for a receiver of the rents of the undivided share of the mortgagor: *Fall v. Elkins*, 9 W. R. (M. R.) 861.

A partition, however, appears not to be properly incident to a foreclosure or redemption suit in such a way, that the owners of the equity of redemption can be allowed to insist on it against the will of the mortgagee, who has no interest in the question: *Watkins v. Williams*, 3 Mac. & G. 622.

The title of the plaintiff to an interest in the property of which he seeks partition must be shown, and if he can show none, his bill will be dismissed: *Parker v. Gerard*, Amb. 236; *Jope v. Morshead*, 6 Beav. 213.

Where, however, there is only a small failure in the proof of title, or the interests of the parties in the property are uncertain, they may be ascertained by a reference, but this must be done previous to a com-

mission issuing; for, as is laid down in the principal case it is not the duty of the commissioners to ascertain the proportions and rights of the parties: their duty commences when they are ascertained, and they will then have to make a division between the parties in those ascertained proportions: *Calmady v. Calmady*, 2 Ves. jun. 568; *Cole v. Sewell*, 15 Sim. 284; *Jope v. Morshead*, 6 Beav. 213. The uncertainty, therefore, of what are the shares of the different parties, is an objection, not to partition altogether, but to partition until such shares have been ascertained.

[*470] *A bill for a partition cannot be made the means for trying a disputed title. Thus in *Slade v. Barlow*, 7 L. R. Eq., 296, a plaintiff claiming to be legally entitled to an undivided share in a freehold estate, filed a bill for partition, raising the question, whether upon the construction of the settlor's will, the estate passed under a specific or under a residuary devise, it was held by Sir W. M. James, V. C., that the Court had no jurisdiction to try such a question in a partition suit, and the bill was ordered to be retained for a year with liberty to the plaintiff to bring such action as he might be advised. See also *Potter v. Waller*, 2 De G. & Sm. 410; *Giffard v. Williams*, 5 L. R. Ch. 546, reversing. *S. C.*, 8 L. R. Eq. 494; *Bolton v. Bolton*, 7 L. R. Eq. 298, n.

With the consent, however, of the parties the Court has, it seems, decided a disputed question in a partition suit: *Burt v. Hellyar*, 14 L. R. Eq. 160; 41 L. J. Ch. (N. S.) 430.

On the death, after decree, of a person entitled to a share, the Court will direct, in case he has devised it, that it should be allotted to his devisee: *Valentine v. Middleton*, 2 Ir. Ch. Rep. 93.

The inconvenience or difficulty in making a partition will be no objection to a decree. See *Warner v. Baynes*, Amb. 589; *Parker v. Gerard*, Amb. 236. So in *Turner v. Morgan*, 8 Ves. 143, there was a decree in a partition of a single house, and Sir Samuel Romilly, in his argument, mentions the case of one Benson, an attorney at Cocker-mouth, where the partition was actually carried into effect by building up a wall in the middle of the house; and it appears from a note in the principal case (ante, p. 458), that after the commission in *Turner v. Morgan* had been executed, an exception was taken by the defendant, on the ground that the commissioners allotted to the plaintiff the whole stack of chimneys, all the fire-places, the only stair-case, and all the conveniences in the yard; but Lord Eldon overruled the exception, saying, he did not know how to make a better partition for them; that he had granted the commission with great reluctance, but was bound by authority, and it must be a strong case to induce the Court to interpose, as the parties ought to agree to buy and sell.

It is not, however, necessary that every house on an estate should be divided, if a sufficient part of the whole can be allotted to each; and in making a division the Court may direct the convenience of the par-

ties to be taken into consideration. Thus, in *Earl of Clarendon v. Hornby*, 1 P. Wms. 446, a partition was decreed of the estate lately Sir Joseph Williamson's, two-thirds whereof belonged to Lady Theodosia Bligh, and one-third to the *defendant Hornby; the estate consisted (amongst other things) of a great house, called Cobham House, and Cobham Park, in Kent, and of farms and lands about it of 1000l. a year; the defendant Hornby insisted to have a third part of the house, and also a third part of the park assigned to him by the commissioners who were to make the partition. But Lord Macclesfield recommended, that, since the plaintiff Bligh and his wife were to have two-thirds, that the seat and park should be allowed to them, and that a liberal allowance out of the rest of the estate should be made to the defendant, in lieu of his share of the house and park. "Care," said his Lordship, "must be taken that the defendant Hornby shall have a third part in value of this estate; but there is no colour of reason that any part of the estate should be lessened in value, in order that the defendant Hornby should have one-third of it; now, if Mr. Hornby should have one-third of the house and of the park, this would very much lessen the value of both. [*471]

"If there were three houses of different value to be divided amongst three, it would not be right to divide every house, for that would be to spoil every house; but some recompense is to be made, either by a sum of money, or rent for owelty of partition to those that have the houses of less value.

"It is true, if there were but one house, or mill, or advowson to be divided, then this entire thing must be divided in manner as the other side contended; secus when there are other lands, which may make up the defendant's share.

"By the same reason every farm-house upon the estate must be divided, which would depreciate the estate, and occasion perpetual contention; and it may be the intent of the defendant, when this partition is made, to compel the plaintiff to give the defendant forty years' purchase for his third of the house and park." And see *Watson v. Duke of Northumberland*, 11 Ves. 162; *Lister v. Lister*, 3 Y. & C. Exch. Ca. 540.

In a case, where a partition had been directed between two co-heir-esses, Sir R. T. Kindersley, V. C., said "It appears to me what the commissioners ought to do in this case is, that having divided the property into two equal parts, they should consider all the circumstances of the parties and the property. Suppose, for example (which sometimes happens), that one of the parties has property in a particular county or parish, and that one of the allotments is contiguous to the property already belonging to one party, and there is another allotment not contiguous, that would be a good ground, *cæteris paribus*, for allotting

[*472] that particular portion to the individual to *whom it is much more convenient to have it than the other. They may also take into consideration the circumstances that one of these is the eldest daughter, and therefore, although she has no right of priority of choice, still her being the elder is a circumstance which the commissioners may consider to be a ground, *cæteris paribus*, of coming to a decision on the allotment. So, again, you have the circumstance that she is a married lady, and that her husband has taken the family name, and has no mansion, and it is proposed that they should keep up the family mansion; and when the commissioners are looking into the matter, they must exercise their discretion, and give the lots with reference to that state of circumstances; although the fact of the plaintiff being the eldest daughter constitutes, as I conceive, no right or claim under the commission to priority of choice." Per Sir R. T. Kindersley, V. C., in *Canning v. Canning*, 2 Drew. 436.

"If the commissioners can find nothing to guide their discretion, as a last resort they may draw lots." *Ib.* 437. "If they cannot agree as to what they ought to do, they ought to make separate returns, so that the Court may deal with the separate returns as it may think advisable, and not a joint return, saying they cannot agree." *Ib.* 437, 438. "The Court has no authority where the commissioners cannot agree to appoint a person to draw lots." *Ib.* 438.

Moreover, for the sake of convenience, in equity a recompense may be made, either by a sum of money, or rent for equality, or owelty of partition; *The Earl of Clarendon v. Hornby*, 1 P. Wms. 446; *Warner v. Baynes*, Amb. 589; *Story v. Johnson*, 1 Y. & C. Exch. Ca. 538; *S. C.*, 2 Y. & C. Exch. Ca. 586, 610, 611. This could not have been done under the writ of partition at law: Co. Litt. 176, a., b., 168, a. Littleton has indeed spoken of a rent-charge for owelty, or equality of partition: Litt. 251. But, as observed by Mr. Justice Story, this is not in a case of compulsory partition by writ, but a voluntary partition by deed or parol: 1 Story Eq. Jur. 534, n. 4.

But the commissioners themselves unless directed by a decree (*Briant v. Mann*, 1 Seton on Decrees, 580, 3rd Ed.) have, it seems, no power to award sums to be paid for owelty of partition: such power rests with the Court; and in *Mole v. Mansfield*, 15 Sim. 41, where the commissioners had awarded certain sums to be paid for such purpose, Sir L. Shadwell, V. C., said, they had no power to do so; and, one of the parties being an infant, he directed the Master to inquire and state whether it was fit and proper that the sums awarded should be accepted. See *Peers v. Needham*, 19 Beav. 316.

Although, in point of law, a defendant *to a bill for partition [*473] may not have a lien on the premises for money expended in buildings and improvements, the plaintiff will not be allowed to take advantage of that expenditure without making an allowance; the Court,

therefore, will not interfere but on such terms, and will order a reference to take an account of what has been expended necessarily, or with the concurrence of the plaintiff: *Swan v. Swan*, 8 Price, 518. And where one joint owner appears to have received more than his share of the rents and profits of the estate, the Court will direct an account, and will not, in analogy to proceedings at law for a partition, confine its relief merely to partition (*Lorimer v. Lorimer*, 5 Madd. 363; *Hill v. Fulbrook*, Jac. 574; *Story v. Johnson*, 1 Y. & C. Exch. Ca. 598; *S. C.*, 2 Y. & C. Exch. Ca. 586); or if he has been in possession, he will be charged an occupation rent (*Turner v. Morgan*, 8 Ves. 145).

A tenant in common, however, occupying the premises, but admitting some co-tenants, and not excluding any, is not so chargeable (*Mahon v. Burchell*, 5 Hare, 322), though he is chargeable if he excludes the others (*Pascoe v. Swan*, 27 Beav. 508). Unless however a tenant in common in possession be charged with an occupation rent, he is not entitled to any account of substantial repairs and lasting improvements on any part of the property: *Teasdale v. Sanderson*, 33 Beav. 534. See *Swan v. Swan*, 8 Price, 518.

A mill may be divided by giving to the parties every other toll-dish, as would have been done at law in case of the writ de partitione facienda; and in this case æquitas sequitur legem: *Earl of Clarendon v. Hornby*, 1 P. Wms. 447, per Lord Macclesfield.

It was also said by Lord Macclesfield, that an advowson might be divided by giving every other presentation to the church. *Ib.* In the case, however, of *Johnstone v. Baber*, 6 De G. Mac. & G. 439, the right to present to an advowson being vested in tenants in common, it was held by the Court of Appeal in Chancery overruling the decision of Sir John Romilly, M. R. (22 Beav. 562), that the right to nominate was not to be exercised according to seniority, but was to be determined by lot.

In such cases, the Court would, it seems, direct the partition at once, by decree, without resorting to a commission: *Bodicote v. Steer*, 1 Dick. 69; Seton on Decrees, 586, 587, 3rd Ed.

But under the Partition Act, 1868, the Court might order the advowson to be sold, and the proceeds to be divided amongst the parties according to their interests: *Young v. Young*, 13 L. R. Eq. 174, cited.

Partition of a manor may be decreed: *Sparrow v. Fiend*, Dick. *348; *Hanbury v. Hussey*, 14 Beav. 152; *Ley v. Cox*, *Ib.* 157; [*474] *Cattley v. Arnold*, 4 K. & J. 595.

A partition never affects the rights of third parties; for instance, in the principal case, it was held, that the rights of common of others over the soil and freehold, which the parties to the bill had in common amongst them, would not be affected by the partition.

For this reason, as a mortgagee of the premises is entitled to the

whole, and not affected by a partition, he will not be a necessary party to the suit: *Swan v. Swan*, 8 Price, 518.

Where, in a suit for partition, the defendants are desirous that there shall be no partition of their several shares, the partition may be confined to the aliquot share of the plaintiff: *Hobson v. Sherwood*, 4 Beav. 184.

Where the shares have been allotted to each of the parties by the Commissioners, the partition is perfected by reciprocal conveyances: and one party cannot impose upon another as a condition of his executing a conveyance, that all the other parties must join in the conveyance to him: *Orger v. Spark*, 9 W. R. (V. C. W.) 180. And see *Bowra v. Wright*, 4 De G. & Sm. 265.

Where the shares of the parties were very minute and complicated, the Court, in order to save expense, *instead* of directing a conveyance of the several shares, has declared each of the parties trustees as to the shares allotted to the others of them, and then vested the whole trust estate in a single new trustee under the Trustee Acts, with directions to convey to the several parties their allotted shares: *Shepherd v. Churchill*, 25 Beav. 21.

If infants are parties, the conveyances will be respited until they come of age, and a day will be given them to show cause against the decree. See *Brook v. Hertford*, 2 P. Wms. 518, 519; *Tuckfield v. Buller*, 1 Dick. 240, Amb. 197; *Thomas v. Gyles*, 2 Vern. 232; *Wills v. Slade*, 6 Ves. 498; *Attorney-General v. Hamilton*, 1 Madd. 214. Where, however the legal estate of the share in which an infant is beneficially interested, is vested in trustees, the order need not contain a direction for the infant to execute a conveyance when of age, as the decree of the Court will bind the equitable interest of the infant, and the trustee may make an immediate conveyance of the legal estate: *Cole v. Sewell*, 17 Sim. 40.

It seems now that under the Trustee Act, 1850, ss. 7 and 30, the Court, in a partition suit, instead of giving an infant a day to show cause, may declare him a trustee of such parts of the property as are allotted to other parties: *Bowra v. Wright*, 4 De Gex & Sm. 265. So where in a suit for the partition of lands in which a lunatic was entitled to an *undivided share, a partition had been made, and the [475] lunatic declared a trustee within the Trustee Act, 1850, and on a partition by the lunatic to have the partition carried into effect, the Lords Justices have, under the Trustee Act, 1850, and the Lunacy Regulation Act, 1850, directed the committee to convey according to the partition: *Re Bloomar*, 2 De G. & Jo. 88; see also, *Moorehead v. Moorehead*, 2 I. R. Eq. 492; 1 Seton Dec. 581.

Partition at law, in this respect, differed from partition in equity, for in the former no conveyances were requisite, as it operated by the judgment of the Court of law, in pursuance of which, possession was at

once delivered up, and the rights of all parties were thereupon concluded. See *Whaley v. Dawson*, 2 S. & L. 371, 372.

The rule laid down by the Lord Chancellor in the principal case, as to costs, was this, that as a party comes into equity, instead of going to law, for his own convenience, the rule of law ought to be adopted, and therefore no costs would be given until the commission; but that the costs of issuing, executing, and confirming the commission, should be borne by the parties in proportion to the value of their respective interests, without any costs of the subsequent proceeding: see *Baring v. Nash*, 1 V. & B. 554; *Whaley v. Dawson*, 2 S. & L. 371; *Balfe v. Redington*, 2 Ir. Ch. Rep. 324, and the costs of mutual deeds of partition and of having the same settled by the Master, being subsequent costs, must be borne by the parties respectively: *Balfe v. Reddington*, 2 Ir. Ch. Rep. 324; Beames on Costs, 50.

In *Landell v. Baker*, 6 L. R. Eq. 268, Lord Romilly, M. R., decided that the 10th section of the Partition Act, 1868, has not altered the practice of the Court with respect to the costs of a partition suit. In a subsequent case, however, his Lordship held that the costs of a partition suit up to the hearing, as well as subsequent costs, should in the absence of special circumstances, be borne by the several parties in proportion to their interests as declared by the decree, *Cannon v. Johnson*, 11 L. R. Eq. 90, and in the cases of *Osborn v. Osborn*, 6 L. R. Eq. 338; *Millar v. Marriott*, 7 L. R. Eq. 1, where sales were directed, the costs of all parties were ordered to come out of the estate.

But if a defendant sets up a bar to partition, as for instance an agreement, and it turns out that he is not entitled to the benefit of the agreement he has relied on, he will be obliged to pay such proportion of the costs as have been occasioned by his setting it up: *Morris v. Timmins*, 1 Beav. 411, 418.

In *Lyne v. Lyne*, 8 De G. Mac. & G. 553, a bill filed for *partition of a freehold estate stated the death of one tenant in common in fee having devised her moiety to the defendant's husband, and the death of the other tenant in common intestate, leaving the plaintiff her heir-at-law; but that the defendant's husband, who was an illegitimate son of a deceased brother of the intestate, and claimed to be his heir-at-law, concealing his illegitimacy, had entered upon and enjoyed the entirety, and had settled it by an antenuptial settlement, under which the defendant claimed. The bill sought an account of rents and profits received by the defendant. The defendant, by her answer, submitted that the settlor was the intestate's heir-at-law, but did not claim as a purchaser for value without notice. By the decree a reference was directed to ascertain who was the intestate's heir-at-law, and the result of it was in favor of the plaintiff. It was held by the Lords Justices, reversing the decision of Sir John Romilly, M. R.

(21 Beav. 318), that a further inquiry, whether the defendant was a purchaser without notice, could not be directed on further consideration. And see *Thackeray v. Parker*, 1 N. R. (V. C. W.) 567.

The costs of infants (*Cox v. Cox*, 3 K. & J. 544), or of a lunatic (*Singleton v. Hopkins*, 4 W. R. 107), may, it seems, be charged upon and ordered to be raised out of the shares allotted to them.

Where a bill is filed for a partition, and a purchaser of an undivided share of a defendant is made a party by amendment, he is entitled to have his costs paid by the plaintiff: *Williams v. Williams*, 10 W. R. (V. C. K.) 609.

Where parties to a partition suit are equally interested, the practice is to give the custody of the deed of partition and other deeds to the plaintiff; but if they are not, then they are usually given to the person who has the largest interest in the property: per Sir John Romilly, M. R., in *Elton v. Elton*, 27 Beav. 633; and see *Jones v. Robinson*, 3 De G. Mac. & G. 911.

In a recent case, where a great many persons were interested in a partition deed, it was directed to be enrolled, with liberty to any party to have a duplicate at his own expense: *Elton v. Elton*, 27 Beav. 632. But if any of the deeds relate solely to any distinct part of the property allotted to any party, they will be delivered to him: *Jones v. Robinson*, 3 De G. Mac. & G. 910, 913; 1 Seton on Decrees, 577, 3rd Ed.

As to proceedings under a decree for a partition, and exceptions to the return of the commissioners, see Daniel's Ch. Prac. 863, 3rd Ed.

A partition will not be set aside on light grounds, or for light matters, or for mere inequality of value in the allotments, if in [*477] making them the commissioners have honestly exercised their own judgment: per Sir J. Romilly, M. R., 19 Beav. 320.

Where two different returns are made by different commissioners, both will be suppressed: *Watson v. Duke of Northumberland*, 11 Ves. 153; *Corbet v. Davenant*, 2 Bro. C. C. 252; 11 Ves. 163. So where there has been gross error of judgment on the part of the commissioners without proof of partiality: *Story v. Johnstone*, 1 Y. & C. Exch. Ca. 538.

A return will be set aside if it be not made by the commissioners in the exercise of their discretion, but according to an understanding between some of the parties. Thus, in *Peers v. Needham*, 19 Beav. 316, where under a decree for partition among three tenants in common, which did not empower the commissioners to order owelty of partition, the commissioners, upon some previous understanding that two of the tenants in common were willing to take one of the two houses comprising the property, without severance, allotted that house to them, and the other to the third tenant in common, the return was suppressed.

Sometimes the Court will approve of a partition without a commis-

sion, even when infants are interested, upon satisfactory evidence of value: *Brassey v. Chambers*, 4 De G. Mac. & G. 528; *Stanley v. Wrigley*, 3 S. & Giff. 18; *Clark v. Clayton*, 2 Giff. 333; *Bowles v. Rump*, 9 W. R. (V. C. S.) 370; *Greenwood v. Percy*, 26 Beav. 572.

The Court, before the Partition Act, 1868 (31 & 32 Vict. c. 40) had jurisdiction in a partition suit even where infants were interested, if it appeared to be for their benefit, to direct a sale, instead of a partition; at any rate, if the parties sui juris desired a sale (*Trackeray v. Parker*, 1 N. R. (V. C. W.) 567; *Davis v. Turvey*, 32 Beav. 554; *Hubbard v. Hubbard*, 2 Hem. & Mill. 38); but it was decided in a partition suit, that if one of several tenants in common refused to sell, he could, however ruinous to all parties might be the result, insist upon a partition: *Griffies v. Griffies*, 11 W. R. (V. C. K.) 943. As to form of order when one of the defendants is an infant and another is out of the jurisdiction: *Hubbard v. Hubbard*, 2 Hem. & Mill. 38.

The Partition Act 1868 (31 & 32 Vict. c. 40) has very usefully increased the jurisdiction of Courts of equity to direct sales instead of partitions. By this Act it is enacted that "In a suit for partition, where, if this Act had not been passed, a decree for a partition might have been made, then if it appears to the Court (by which is meant, the Courts of Chancery in England, Ireland, and the county palatine of Lancaster, and the *Landed Estates Court in Ireland, sect. 2), that, by reason of the nature of the property to which the [*478] suit relates, or of the number of parties interested, or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the Court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions" (sect. 3).

"In a suit for Partition, where, if this Act had not been passed, a decree for partition might have been made, then if the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates, request the Court to direct a sale of the property and a distribution of the proceeds, instead of a division of the property between or among the parties interested, the Court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary directions" (sect. 4).

"In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then, if any party interested in the property to which the suit relates, requests the Court to direct a sale of the property and a distribution of the proceeds instead

of a division of the property between or among the parties interested, the Court may, if it thinks fit, unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale, direct a sale of the property, and give all necessary or proper consequential directions; and in case of such undertaking being given, the Court may order a valuation of the share of the party requesting a sale, in such manner as the Court thinks fit, and may give all necessary or proper consequential directions" (sect. 5).

"On any sale under this Act, the Court may, if it thinks fit, allow any of the parties interested in the property to bid at the sale, on such terms as to non-payment of deposit, or as to setting-off or accounting for the purchase-money, or any part thereof, instead of paying the same, or as to any other matters, as to the Court seem reasonable" (sect. 6).

"Section 30 of the Trustee Act 1850, shall extend and apply to cases, where in suits for partition the Court directs a sale instead of a division of the property" (sect. 7).

[*479] "Sections 23 to 25 (both inclusive of the Act of the session of the 19th and 20th years of her Majesty's reign (ch. 120), 'to facilitate the leases, and sales of settled estates,' shall extend and apply to money to be received on any sale effected under the authority of this Act" (sect. 8).

"Any person who, if this Act had not been passed, might have maintained a suit for partition, may maintain such suit against any one or more of the parties interested, without serving the other or others (if any) of those parties; and it shall not be competent to any defendant in the suit to object for want of parties; and at the hearing of the cause, the Court may direct such inquiries as to the nature of the property, and the persons interested therein, and other matters as it thinks necessary or proper, with a view to an order for partition or sale being made on further consideration; but all persons who, if this Act had not been passed, would have been necessary parties to the suit, shall be served with notice of the decree or order on the hearing, and after such notice shall be bound by the proceedings, as if they had been originally parties to the suit, and shall be deemed parties to the suit; and all such persons may have liberty to attend the proceedings; and any such person may, within a time limited by general orders, apply to the Court to add to the decree or order" (sect. 9).

"In a suit for partition, the Court may make such order as it thinks just respecting costs up to the time of the hearing" (sect. 10).

"In England, the County Courts shall have and exercise the like power and authority as the Court of Chancery in suits of partition (including the power and authority conferred by this Act), in any case where the property to which the suit relates does not exceed in value the sum of 500*l.*, and the same shall be had and exercised in like man-

ner, and subject to the like provisions as the power and authority conferred by section 1 of the County Courts' Act 1865" (sect. 12).

It has been held, under this Act, that a decree will not be made for sale of an estate, if the bill contains no prayer for partition, which may, however, be added by amendment: *Teall v. Watts*, 11 L. R. Eq. 213; *Holland v. Holland*, 13 L. R. Eq. 406, overruling *Aston v. Meredith*, 11 L. R. Eq. 601. Under the Act a partition may be made of part of an estate, and a sale of the rest: *Roebuck v. Chadebet*, 8 L. R. Eq. 127.

The 4th section of the Partition Act, 1868, is retrospective. Accordingly, in a partition suit instituted before the passing of the Act, by the owners of two undivided fourths of the property, a sale was ordered, although opposed by the owners of the remaining *fourths: *Lys v. Lys*, 7 L. R. Eq. 126.

As the onus of showing that a sale ought not to be directed, [*480] is, by the Act, thrown upon the parties opposing a sale, it will be directed if no sufficient reason against a sale be adduced by them. *Ib.*

It seems that where the owners of a moiety or upwards of an estate ask for a sale, it must be ordered by the Court, inasmuch as sect. 4 is imperative, unless the parties objecting to the sale will purchase under sect. 5 the shares of the parties asking for the sale, or the Court sees some good reason why a sale should not be ordered: *Pemberton v. Barnes*, 6 L. R. Ch. App. 685; *Underwood v. Stewardson*, 20 W. R. (V. C. W.) 668. The dissent of one of six joint owners, though an important matter for consideration, is not per se, "good reason" against a sale within the meaning of sect. 4 of the Partition Act, 1868: *In re Langdale's Estate*, 5 L. R. Eq. 572.

It has been laid down in one case that the Court has jurisdiction to direct an immediate sale in a partition suit in the *absence* of parties interested in the property, but shown to be out of the jurisdiction: *Silver v. Udall*, 9 L. R. Eq. 227. But in the subsequent case of *Hurry v. Hurry*, 10 L. R. Eq. 346, where one of the parties entitled to a small fraction of the estate, was out of the jurisdiction, and had not been served, and it did not appear that any attempt had been made to serve him, it was held by Sir W. M. James, V. C., that the decree for sale could not be made in his absence.

Where, in a partition suit, it was uncertain whether absent parties were or were not within the jurisdiction, an inquiry was directed as to the persons interested in the property and their shares therein, and whether such persons were out of the jurisdiction: *Silver v. Udall*, 9 L. R. Eq. 227.

Where a decree had been made for sale under 31 & 32 Vict. c. 40, in the absence of parties who were out of the jurisdiction, the Court refused to allow the decree to be acted on in their absence, but directed notice to be given to them of the decree by advertisement, with liberty

for the plaintiffs to apply as to proceeding with the sale after the advertisements had appeared: *Peters v. Bacon*, 8 L. R. Eq. 125. In a more recent case, however, it has been doubted whether an advertisement is sufficient notice of the decree, unless it could be shown that the advertisement had been brought to the notice of the party to be affected by it, and in that case the plaintiff had liberty to apply at Chambers as to the service of the decree on the party out of the jurisdiction: *Teall v. Watts*, 11 L. R. Eq. 213.

A sale will be made under the Act where infants and married women are interested. Thus in **Osborn v. Osborn*, 6 L. R. Eq. 338, in [*481] a partition suit, where the defendants were infants, the Court, in making a decree for sale under 31 & 32 Vict. c. 40, declared that the costs of all parties to the suit were to be lien on the proceeds of the sale. See also *France v. France*, 13 L. R. Eq. 173; *Young v. Young*, *Ib.* 174, cited. So in *Fleming v. Armstrong*, 34 Beav. 109, a sale was by consent directed in a partition suit of a freehold estate in which a married woman was interested for her separate use, without power of anticipation, the Court having first made her costs a charge on her share, and directed them to be raised by a sale thereof. See also *Higgs v. Dorkis*, 13 L. R. Eq. 280.

As to when a sale should take place in Chambers before the chief clerk, and when by auction: see *Pemberton v. Barnes*, 13 L. R. Eq. 349.

After a decree has been made in a partition suit, the Court has jurisdiction to grant an injunction to restrain the defendant from destroying or wasting, the property: *Bailey v. Hobson*, 5 L. R. Ch. App. 180.

But where, after a decree for sale in the partition suit, a defendant who was in the occupation of the property, but bound by no contract of tenancy, proposed to sell the hay and turnips from off the land, contrary to the custom of the country as between landlord and tenant, it was held by Lord Justice Giffard, reversing the decision of Sir J. Stuart, V. C., that this was not such a destruction of the property as the Court would restrain, and a motion for an injunction was refused: *Bailey v. Hobson*, 5 L. R. Ch. App. 180.

With regard to the jurisdiction of the Inclosure Commissioners as to partition, see 8 & 9 Vict. c. 118, ss. 90, 91; 9 & 10 Vict. c. 70; ss. 9, 10, 11; 10 & 11 Vict. c. 111, ss. 4, 6; 11 & 12 Vict. c. 99, ss. 13, 14; 12 & 13 Vict. c. 83, ss. 7, 11; 15 & 16 Vict. c. 79, ss. 31, 32; 17 & 18 Vict. c. 97, s. 5; 20 & 21 Vict. c. 31, ss. 7, 11; 22 & 23 Vict. c. 43, ss. 10, 11.

By the Incumbered Estates Act, power was given to the commissioners to make partition. See *In re Wilkins*, 4 Ir. Ch. Rep. 575.

A partition by parol and separate possession cannot be questioned after having been acted on for more than twenty years: *Paine v. Ryder*, 24 Beav. 151.

As to Dower.—Upon the same principle, as in cases of partition, although dower was originally a mere legal demand, a widow being a joint owner is entitled in equity to an assignment of one-third of the lands of which her husband was seised in fee or in tail, which her issue might by possibility have inherited as her dower. She has still a remedy at law by writ of dower, or writ of dower *under nihil [*482] habet; see 3 & 4 Will. 4, c. 27, s. 36. The difficulty, however, of proceeding at law together, probably with the necessity of obtaining a discovery from the heir, devisees, or trustees, has given equity a concurrent jurisdiction with Courts of law, which, it seems, will be exercised without its being shown whether such difficulty actually exists or not.

For an able exposition of the law of dower, see the judgment of Lord Alvanley, M. R., in the leading case of *Curtis v. Curtis*, 2 Bro. C. C. 620; and see *Mundy v. Mundy*, 2 Ves. jun. 122; *Pulteney v. Warren*, 6 Ves. 89; *Strickland v. Strickland*, 6 Beav. 77, 81.

Widows, previous to 3 & 4 Will. 4, c. 105, were only dowable out of legal estates; but by that Act every woman married after the 1st January, 1834, is dowable out of her husband's equitable estates of inheritance. The Act, however, has put her right to dower entirely in the hands of her husband, who may defeat it by conveyance or devise, or by a simple declaration that his estate shall be exempt from it.

The dower, however, of a woman married *after* 3 & 4 Will. 4, c. 105, came into operation, out of an estate made subject to dower by that Act, will not be excluded by a declaration against dower contained in a conveyance *prior* to that Act (*Fry v. Noble*, 20 Beav. 598; *S. C.*, on appeal, 7 De G. Mac. & G. 687; *Clarke v. Franklin*, 4 K. & J. 266), and a widow's dower and freebench is not by Sir John Romilly's Act (3 & 4 Will. 4, c. 104), nor by the Dower Act (3 & 4 Will. 4, c. 105), rendered liable to the mere debts of her husband: see *Spyer v. Hyatt*, 20 Beav. 621, 623, where Sir John Romilly, M. R., observes, that "what is claimed by or comes to the widow is no part of what the intestate is seised of at his death. He dies seised of lands *subject to the widow's right to dower*, and it is only that which becomes subject to the payment of his debts."

As to a widow's being put to her election between dower and a benefit conferred upon her, see note to *Streatfield v. Streatfield*, Vol. i, p. 333.

The Dower Act does not apply to freebench, see *Smith v. Adams*, 5 De G. Mac. & G. 712. There the purchaser of a copyhold, held of a manor the custom of which entitled widows of the copyholders to freebench in one moiety of the land of which their husbands died seised, took a surrender, but died before admittance. It was held by the Lords Justices, reversing the decision of Sir John Romilly, M. R. (reported 18 Beav. 499), that the widow was not entitled to freebench at law or in equity.

If the widow's right to dower be disputed, an issue may be directed [*483] (*Mundy v. Mundy*, 2 Ves. jun. 122); or the bill retained for *a certain time, with liberty to the widow to bring a writ of dower, as she may be advised (*Curtis v. Curtis*, 2 Bro. C. C. 620: *D'Arcy v. Blake*, 2 S. & L. 390); and if necessary, an inquiry may be directed as to the lands of which she is dowable (*Meggot v. Meggot*, Seton on Decrees, 671, 672, 3rd Ed.).

The right being established, and the property out of which the widow is dowable being ascertained, the next step is to ascertain the dower; and this may be done either by a reference (*Goodenough v. Goodenough*, 2 Dick. 795); or by directing a commission to issue, which is made out, executed, and returned in the same manner as a commission of partition (*Wild v. Wells*, 1 Dick. 3; *Huddleston v. Huddleston*, 1 Ch. Rep. 38; *Lucas v. Calcraft*, 1 Bro. C. C. 133; 2 Dick. 594; *Mundy v. Mundy*, 2 Ves. jun. 125; 4 Bro. C. C. 294; Tudor's L. C. Real Prop. 67, 2nd Ed.).

As a general rule, on a bill to assign dower, no costs are given on either side: Beames on Costs, 35, 36. But if the defendant adds another case, as by disputing the title of the widow, denying the marriage, or the seisin of the husband, or sets up any other ground of defence on which he fails, he may be liable to pay the costs of the suit occasioned by that unsuccessful defence: (per Wigram, V. C., in *Bamford v. Bamford*, 5 Hare, 205;) although the question as to the right be one of considerable nicety (*Fry v. Noble*, 20 Beav. 598, 606), and it is immaterial that the defendant admits the right to dower in his answer (*Harris v. Harris*, 11 W. R. (M. R.) 62); however, in *Bamford v. Bamford*, 5 Hare, 203, where the defendant had resisted the claim of the widow to dower, under peculiar circumstances, no costs were given. In that case it appeared that the husband had been transported, and the only means the defendant had of procuring information as to the time of his death was from the office of the Secretary of State of the Home Department, and the information which he there received was such as to mislead, and might have misled any one making a similar inquiry.

Although partition is a well established head of equitable jurisdiction; see *Crowell v. Woodbury*, 52 New Hamp. 113; *Wright v. Marsh*, 2 Iowa, 94; *Witten v. Witten*, 36 Id. 26; *Wilson v. Duncan*, 44 Mississippi, 642, there is some doubt as to the source from whence the authority was derived. It

sprung, agreeably to Lord Eldon, "in the extreme difficulty attending the process of partition at law, where the plaintiff must prove his title as he declares, and also the titles of the defendants, and judgment is given according to the respective titles so proved." This may be a sufficient explanation as

it regards joint tenants and coparceners, whose title must be deduced in the declaration, but it does not apply to tenants in common, who need only allege that they hold together, without setting forth how they came by their respective shares. A more satisfactory reason may perhaps be found in the flexible procedure of the Court of Chancery, which can be so shaped as to avoid many of the inconveniences incident to the rigid methods of the common law; *Hall v. Piddock*, 6 C. E. Green, 314; *Wilson v. Duncan*, 44 Mississippi, 642.

Title and possession are not less requisite to a partition in equity than when the suit is at law; *Haines v. Haines*, 4 Maryland Ch. 133. Possession is essential because the decree was, and in England still is, executed by mutual deeds; and as the transfer of title without possession is not favored by the law, so it will not be enjoined by a court of equity; see *Burhans v. Burhans*, 2 Barb. Ch. 398; *Flower v. Hopkins*, 46 New York, 182; *Law v. Patterson*, 1 W. & S. 184; *Byers v. Donley*, 27 Arkansas, 77; *Chaplin v. Holmes*, 1b. 414. If this consideration has less weight now than at a former period, there is a more substantial reason in the folly of incurring expense and trouble, to divide that which the parties to suit do not hold, and may never enjoy. Such a proceeding is necessarily without effect at the time, and can have none ultimately, unless the possession is regained by entry, or a judgment in ejectment;

see *Cartwright v. Pultney*, 3 Atkyns' Rep. 380.

"Where," said Lord Hardwicke, in *Cartwright v. Pultney*, "a bill is brought in this court to have a partition between joint tenants, or tenants in common, the plaintiff must show a title in himself to a moiety, and not allege generally that he is in possession of a moiety, and this is stricter than a partition at law, where seisin is sufficient; the statute of 8 & 9 W. 3 C. 31, was made for that reason. * * * Here, the reason is, because conveyances are directed, and not a partition only."

The possession need not be actual, but will be presumed to co-exist with the legal title, if no adverse possession is shown; *Brownell v. Brownell*, 19 Wend. 365, 369; *Haines v. Haines*, 4 Maryland Ch. 133. Vacant land, or land which is held by one whose right is not inconsistent with the complainant's, may consequently be parted. Thus, the possession of one tenant in common, or coparcener, is the possession of all for the purposes of a partition, although they have not entered, and he is in the exclusive receipt of the profits; *Liscomb v. Rue*, 8 Pick. 376; *Miller v. Dennet*, 6 New Hamp. 109, 114; *Barnard v. Pope*, 14 Mass. 434. In *Barnard v. Pope*, Parker, C. J., said, "an actual corporeal seisin is not requisite to enable a tenant in common to maintain this process. If it were so, this beneficial remedy would be much restricted in its operation, and it would always be in the power of one tenant, by oust-

ing his co-tenant to drive him to a writ of entry; which it certainly was not the intention of the legislature, or of the court to do. It is true that by the common law, and the English statutes, the writ of partition cannot be maintained by one tenant in common, who is disseised, although the disseisin be by a co-tenant. But every dispossession does not amount to a disseisin, especially as between tenants in common. For the possession of one is the possession of all, unless by an actual ouster, or an exclusive pernancy of the profits against the will of the others, one shall manifest an intention to hold the land by wrong, rather than by the common title. But without such overt acts, or a sole and exclusive possession for more than twenty years, so that the right of entry shall be gone, a disseisin is not to be presumed."

It was said, in like manner, in *Miller v. Dennet*, that it is only where there is an actual ouster, or an exclusive pernancy of the profits by a co-tenant against the will of the others, that partition does not lie, and that even where the complainant has been actually dispossessed, he may still re-enter within the term prescribed by law, and will then be in a position to maintain a suit for partition.

Hence a purchaser of an undivided share, at a sheriff's sale, may maintain partition without entering, and although the land is in possession of a third person who is not his tenant; *House v. Moorman*, 2 Carter, (Ind.) 17; *Hawley v. Soper*, 18 Vermont, 320. In

Hawley v. Soper, the court said, "actual possession is not essential, provided the party be not legally disseised; *Monroe v. Walbridge*, 2 Aik. 410. And for this purpose a distinction is recognized between a mere possession of the plaintiff's share by a third person, or by the defendant, and a legal disseisin. Such possession may often be treated as a disseisin at the plaintiff's election (as for the purpose of bringing an ejectment) when it is not conclusively so in contemplation of law. It would seem that even adverse possession short of the period required to confer a title by the statute of limitations, does not always work such a disseisin as will oust the right to apply for partition. * * * * As between parceners, joint tenants, or tenants in common, although one of the parties claims to hold absolutely, the other party may consider himself still seised for the purposes of a partition. If, however, the complainant is effectually disseised even by a co-tenant, he is barred as to his remedy, because they no longer hold the estate together; Co. Litt. 167." The same view was taken in *House v. Moorman*, 2 Carter, 17.

The better opinion seems to be, that the mere circumstance that a tenant in common is in possession of the whole premises, claiming adversely to his co-tenants, will not preclude the latter from obtaining a decree in partition, unless the adverse possession has continued long enough to constitute a bar, or is held under an allegation of right which is made in

good faith and not merely to prevent the equitable jurisdiction from attaching; *Obert v. Obert*, 2 Stockton Ch. 98, 106; *Overton v. Woolfolk*, 6 Dana, 374; *Howey v. Goings*, 13 Ill. 108. See *Marshall v. Crehore*, 13 Metcalf, 462. To oust the jurisdiction of chancery, the title must be doubtful and controverted, or there must be some disputable question of fact, which cannot be alleged where the only plea of the defendant is that he has taken exclusive possession of that to which the complainant confessedly has an equal right. See *Overton v. Woolfolk*, 6 Dana, 375. In this case the court said, "we know of no adjudged case in which the principle has been settled that the bare fact of an adverse holding of a part of the land, by one joint tenant or tenant in common, would be a good ground to defeat the jurisdiction of a court of equity in a bill for partition, until the right of possession has been vindicated at law; nor do we believe that policy or principle require the adoption of such a rule." The weight of reason if not of authority would accordingly seem to be in accordance with this view "that no possession of one tenant in common can bar the writ of partition of the other, unless it be an adverse possession continued for such a length of time as to toll the right of entry;" *Woolfolk v. Woolfolk*; *Howey v. Goings*, 13 Illinois, 95; *Lloyd v. Gordon*, 2 Harris & McHenry, 254.

In *Bromagham v. Clapp*, 5 Cowen, 295, 9 Idem, 530, the chancellor nevertheless inclined to

the idea, that as the complainant or petitioner in a proceeding for partition, must allege that he is seised, and show a present possession, a mere right of entry will not satisfy the averment, and therefore that if a subsisting adverse possession of a co-tenant though short of twenty years, does not require the bill to be dismissed, it will preclude a decree for the complainant until he has regained the premises through an action at law. The point was not actually before the court in this instance, but the chancellor's doctrine has recently been adopted and applied by the Court of Appeals; *Burhans v. Burhans*, 2 Barb. Ch. 398; *Flourance v. Hopkins*, 46 New York, 182.

"Possession usually follows the legal title when no adverse possession is shown, and consequently when the lands are unoccupied, the possession will be deemed to be in those having the title (*Brownell v. Brownell*, 19 Wend. 369; *Beebee v. Griffing*, 14 N. Y. 235); and when one of several tenants in common is in possession, his possession will in the absence of any act of ouster on his part inure to the benefit of all."

"But even the possession of one of the tenants in common may become adverse by acts on his part, amounting to an exclusion of his co-tenants, and if he convey the whole of the premises to a third party, and the purchaser takes actual possession, claiming the whole, it is certain that the possession of such a purchaser is adverse, and is not the possession of the former co-tenants of his

grantor (9 Cow. 562). The moment such adverse possession commences, the holding in common is terminated, and until the excluded parties regain their possession by the appropriate action, I do not see how they can bring themselves within the provision of the statute, or the rule of the common law. It would be utterly incongruous to hold that where ejectment would lie, the plaintiff has possession which would entitle him to bring partition. The duration of an adverse possession is material, upon the trial of the question of title to recover possession, but it cannot be material in determining where the possession was at the time of the commencement of the action. These views are maintained in the cases of *Jenkins v. Van Schaack*, 3 Paige, 242; *Burhans v. Burhans*, 2 Barb. Ch. 398; and *Matthewson v. Johnson*, Hoff. 560, as well as by the reasoning of the chancellor in the case of *Clapp v. Bromagham*, before referred to." *Florence v. Hopkins*, 46 New York, 182, 184. The same view prevails in Pennsylvania, where it is a good defence to a suit for partition against a co-tenant, that he holds adversely, although the ouster is recent, and without color of right. See *Law v. Patterson*, 1 W. & S. 184; *M'asters v. Carothers*, 1 Barr. 324; *Longwell v. Bentley*, 11 Harris, 99.

However this may be, it is clear that if the adverse occupancy of a co-tenant continues long enough to preclude the right of entry, the question ceases to be one of possession, and a new title comes into

being which is a sufficient answer to a demand for partition whether the proceeding is in equity or at law; *Clapp v. Bromagham*; *Rickard v. Rickard*, 13 Pick. 251; *Adams v. The Ames Co.*, 24 Conn. 230.

The necessity for title is still more apparent, because there can be no effectual division without ownership. See *Currin v. Spraul*, 10 Grattan, 145; *Garnett v. White*, 3 Iredell Eq. 31; *Lucas v. King*, 2 Stockton Ch. 277. A decree that the defendant shall convey is futile if he have no right, and unjust unless the right is in the complainant. Moreover, the parties must hold by virtue of a common title; *Corbitt v. Corbitt*, 1 Jones Eq. 114, for where the right is not joint, a decree of severance is superfluous; or as the rule was stated in *Jackson v. Myers*, 14 Johnson, 354, all the parties must be tenants in common of all the lands embraced in the bill. See *Lockhart v. Power*, 2 Watts, 371. *Non tenent insimul*, has therefore always been a good plea at law, and it is also a sufficient answer to a bill in equity.

The respondent in a suit for partition may consequently show that he is the sole owner of the whole, or of any part of the premises, or that the complainant cannot deduce a title to the undivided share claimed by him. If for instance a bill were filed alleging that the premises were devised to A. and B. as tenants in common, that A. died, and that his title came by descent to his son and heir, who conveyed the same to the complainant; and then asked that B. should be de-

creed to convey a moiety of the land in severalty; the defendant might reply that the title conferred by the devise was a joint tenancy, and accrued to him by survivorship on the death of A.; That A.'s son was illegitimate, and could take nothing by inheritance; or that he did not execute and deliver the deed under which the complainant claimed. Or the defendant might admit the joint tenancy and the transfer of the title as set forth in the bill, and yet allege a new and distinct title in himself growing out of a disseisin or adverse possession for more than twenty years; see *Wilkins v. Wilkins*, 1 Johnson Ch. 111. In like manner it is a good answer to a prayer for partition, that the defendant has acquired the undivided share claimed in the bill, by a deed from the complainant, or that the complainant has entered into a contract with the defendant to convey such share to him.

It would nevertheless appear that a defendant in partition cannot impeach the right of the grantor or ancestor who is the common source of title. If the plaintiff's title is the same as the defendant's and therefore equally good, it is good enough for all the purposes of the suit, although a paramount title is outstanding which might be successfully asserted against both parties. Such a defence is not valid even in ejectment as between tenants in common or co-parceners, and therefore cannot be sustained in a proceeding which like partition is instituted for distribution and not to es-

tablish a right. See 2 Smith's Lead. Cases, 679, 7 Am. ed.

It is well settled, that a tenant in common cannot acquire a paramount title, and rely on it as a justification for withholding the possession of the premises from his co-tenants, and may on the contrary be required to hold it for their benefit, as well as his own, vol. 1, 69. See 2 *Smith's Leading Cases*, 679, 7 Am. ed. But this is entirely consistent with a right on his part to strengthen his title to the undivided interest which he already holds, and if he adopts this course, a court of equity will not deprive him of any part of an advantage which is legitimately his, by decreeing a partition at the instance of a co-tenant, who has been less diligent or fortunate. See *Ross v. Cobb*, 48 Illinois, 112.

In *Ross v. Cobb*, 48 Illinois, 112, the parties derived their title from Samuel Andrews, through various mesne conveyances, by which two-thirds of the premises were assured to the defendants, and one-third to the plaintiff. Her title would therefore have been indisputable, but for a paramount judgment recovered against Andrews, under which the premises had been sold to one Gould, who received a sheriff's deed. Gould subsequently conveyed an undivided two-thirds of the lot to the defendants, but there was no evidence as to what had become of his title to the remaining third. The complainant relied on her paper title as deduced from Andrews, and on an adverse posses-

sion under it, which as she alleged, had barred the outstanding right of Gould. The court held, that her right was not sufficiently established to entitle her to a partition as against the defendants, because if it became requisite to proceed to a sale, there would be a cloud upon the title that might depress the price in a way to be injurious to herself, as well as to them. Had Gould's heirs or assigns been made parties to the bill, and a decree obtained against them, the way would have been clear, but as the case stood, it was not ripe for a partition, unless the complainant could show affirmatively that they were not under a disability, and that their right was barred by the statute.

The distinctive feature in this instance seems to have been, that the defendants had limited themselves to covering their undivided share, and consequently did not come within the rule that a tenant in common shall not purchase an outstanding title and then set it up against his co-tenants.

It is always open to one against whom a bill is filed for partition, to show that he has an equitable right to the share which the complainant asks to have set off to him, and if this is established, the court will not order the defendant to convey that to the complainant, which the complainant may subsequently on a bill alleging fraud, or for a specific performance, be directed to re-convey to the defendant; *Kurtz v. Hibner*, 55 Ill. 514; *Cox v. Smith*, 4 Johnson Ch. 471;

Barker v. Barker, 14 Wisconsin, 131; *Hannan v. Oxley*, 23 Id. 519; *German v. Mackin*, 6 Paige, 288; *Donnell v. Mateer*, 7 Iredell Eq. 94. It was indeed held in the case last cited, that the proper mode of taking advantage of such a defence, is by filing a cross-bill, when both suits will be heard together, and a decree made in accordance with the equity as it then appears. The rule, nevertheless is, that an equity growing out of tort or contract, and appearing in the answer, is a good ground for dismissing the bill, although the defendant must institute a separate proceeding if he desires relief, and not merely to prevent a decree of partition. See *German v. Machin*; *Cox v. Smith*.

Notwithstanding the scope of this head of equitable jurisdiction, it does not reach far enough to embrace any question which is exclusively cognizable at law. Hence when the legal right of the complainant is disputed, and admits of a reasonable doubt, a partition will not be decreed until the controversy is settled by some of the various methods known to the common law; *Wilkins v. Wilkins*, 1 Johnson's Ch. 118; *Phelps v. Green*, 3 Id. 302; *Manners v. Manners*, 1 Green's Ch. 384; *Hardy v. Mills*, 35 Wisconsin, 141; *Lucas v. King*, 2 Stockton Ch. 277; *Currin v. Spraul*, 10 Grattan, 145. "Equity is not the proper forum nor is a bill for partition the proper action for trying the legal title to lands;" *Manners v. Manners*; *Dewitt v. Ackerman*, 2 C. E. Green,

215; *Hassam v. Day*, 39 Mississippi, 392. The principle is identical with that which precludes a chancellor from making a bill to settle boundaries, a substitute for an action of trespass or ejectment, and should be sedulously observed in order to prevent the jurisdiction of equity from becoming universal, to the exclusion of the right of trial by jury, which is the cherished heritage of the common law. *Deery v. M'Clintock*, 31 Wisconsin, 195; *ante*, 816. The bill may nevertheless be retained in the exercise of a sound discretion, until the legal controversy has been settled in the appropriate forum, and a partition decreed if the complainant is successful in obtaining judgment there; see *Manners v. Manners*; *Wilkins, v. Wilkins*.

In *Wilkins v. Wilkins*, Chancellor Kent said, "The questions on the title of the plaintiffs are strictly legal questions, as whether the estate created by the will, and by the deed, was an estate in joint tenancy or in common, and whether the plaintiffs are heirs of the person last seized. It may, also, be made a question at law, as has been suggested, whether the defendant be not protected from the claim by the statute of limitations; this last consideration renders it still more proper, that the plaintiffs should first be required to establish their title at law before they come here for a partition. A similar course was pursued in a case mentioned in note 1 to *Goodwright v. Wells*, Doug. 773, where the Masters of the Rolls would

not decide the legal question, but retained the bill for a twelve month to enable the plaintiff in the meantime to assert his right at law."

In like manner where the answer avers that the defendants have been in possession of the whole of the premises, claiming adversely for more than twenty-one years, it is a sufficient answer to a prayer for partition, although they may have entered originally as joint tenants or coparceners with the complainant, because such possession gives birth to a new title involving a mixed question of fact and law, and which should consequently be determined in trespass or ejectment; *Adams v. The Ames Iron Co.*, 24 Conn. 230.

It was declared in like manner in *Groves v. Groves*, 3 Sneed, 187, to be the established rule in Tennessee, "that a bill for partition will not lie, unless the title is clear of dispute; *Bruton v. Rutland*, 3 Humphrey, 435, 436. It is not a proceeding in which controverted titles can be settled; its sole object and scope are to divide that which is joint, among the tenants in severalty. If the title is disputed, partition will not be made until the dispute is settled in an appropriate form of action; *Nicely v. Boyles*, 4 Hump. 177. So soon then as it is made to appear that there is ground for a contest about the title, a court of equity will withhold its hand, until that controversy is settled in the proper forum, whether that may be at law or in chancery. This must precede a decree of partition. The defendants claim title to the whole

as devisees of the common ancestor, and by virtue of long adverse possession. How far their possession will avail them under the statute of limitations, or to raise a presumption of deeds, are questions that would properly arise in a court of law, in an action of ejectment. The complainants must establish their rights as tenants in common before they can ask for partition. This proceeding is not intended to try titles, and dispose of questions proper for an action of ejectment, and thus usurp the jurisdiction of a court of law."

It results from the same principle, that where it appears from the complainants' own showing, that there is a doubtful or disputed question of fact or law, which must be disposed of before the case will be ripe for a partition, the bill is demurrable, and must be dismissed; *Ramsay v. Bell*, 3 Iredell Eq. 209; *Hoffman v. Bond*, 22 Michigan, 59.

In *Ramsay v. Bell*, the defendant was in possession of the land holding adversely, but the complainants alleged that he had no title, or that if he had, it was only to one-half under a purchase made at sheriff's sale, and asked that if such should prove to be the true state of the case, their shares might be set off to them in severalty. The court said, that the bill did not give the defendant a joint title or a joint possession, but presented a case where the title was with the plaintiff, and the possession with the defendant, and called on a court of equity to try an action of ejectment. They must first

establish a title at law, and equity would then aid them in obtaining partition according to their several interests. It was held in like manner in *Garrett v. White*, 3 Iredell Eq. 130, that where the answer alleges a sole and adverse possession, and sets up a legal title in the defendant, he need not go into the proof of his title which would be requisite in an action of ejectment, but may simply adduce such evidence as will satisfy the court that the case admits of a reasonable doubt.

In *Hoffman v. Beard*, 22 Mich. 59, the complainant alleged that an undivided fourth of the premises was his, and that the remaining three-fourths appertained to the defendants, but also alleged that the one-fourth which he claimed had been purchased by the defendants at a sale for unpaid taxes. The bill went on to aver that the tax sale was invalid for non-compliance with the provisions of the statute, and then concluded with a prayer for partition, according to the legal rights of the parties. The court held that inasmuch as the defendants were in possession of the whole of the estate under a claim of title, involving, agreeably to the complainant's own showing, various questions which were purely legal, and should properly be determined by a court of common law, there was no ground for giving the relief prayed for, or even for retaining the bill, which was therefore dismissed with costs.

The bill must not only show that the complainant has an undivided interest, but that the defend-

ants is a co-tenant; and hence where the allegation was that the complainants had a good right to the whole of the premises under the will of their ancestor, but that the defendant claimed a right to one-half under the same will, and prayed that the rights of all the parties might be ascertained and declared, a sale of the premises decreed, and the proceeds distributed among those to whom they appertained, the court held that the bill was in effect a device for bringing a question which ought to be determined in an action for ejectment, before a court of chancery. There might, as the complainants averred, be no doubt as to the true construction of the will, and that the defendant was laboring under an entire misconception, but if so, he had no title to the property, and was not a proper party to a bill for partition.

The courts of California have been clothed by statute, for the purpose of partition, with all the powers incident to jurisdiction at common law and in equity, and may consequently consider and determine the validity of the plaintiff's title, whether the objection is made on equitable or legal grounds; *Bollo v. Navarro*, 33 California, 459.

The defendant will not be allowed to oust the jurisdiction of a chancellor by raising objections to the complainant's title which are obviously futile, and intended for delay; see *Hoffman v. Ross*, 25 Michigan, 175; *Hay v. Estell*, 3 C. E. Green Ch. 252; and the language held in these instances indi-

cates that although it is the well settled rule where the title is disputed, not to settle it upon the hearing, but to compel the complainant to establish his right at law; *Manners v. Manners*, 1 Green's Ch. 384; *Dewitt v. Ackerman*, 2 C. E. Green, 215; yet the court will not interrupt the proceedings, unless it appears from the pleadings or evidence that the case involves some question which admits of a reasonable doubt.

It has been seen that where the complainant's title is disputed on legal grounds which are sufficient to occasion a reasonable doubt, a chancellor will not take the determination of the question on himself, and will either dismiss the bill, or retain it until the point has been determined by some appropriate tribunal. Under these circumstances, the plea is to the jurisdiction, and there can be no hearing until the objection is removed.

Where, however, the defendant alleges an equitable title in himself, or impeaches the plaintiff's right on equitable grounds, the question is already before the appropriate forum, and may be considered and resolved as a necessary though incidental step to the final determination of the cause; *Foust v. Moorman*, 2 Carter, 20; *Coxe v. Smith*, 4 Johnson Ch. 274. In the case last cited, the chancellor said: "When the legal title is disputed, the course has been to send the plaintiff to law to have that title established, before he comes here for partition. But when the question arises upon an equitable title

set up on the part of the defendants, this court must decide the title, for equitable titles belong peculiarly to this court, and the parties cannot be sent to law."

Where the plaintiff's title is indisputable, and that of one or more of the defendants is in doubt, the court may allot his share, and retain the bill until the rights of the other parties have been determined by a suit at law; see *Phelps v. Green*, 3 Johnson Ch. 302.

It is not essential to a decree for partition that the complainant should have a legal title, and it will, on the contrary, generally be sufficient to show a clear equitable right to the relief prayed for. See *Obert v. Obert*, 2 Stockton Ch. 98; *Cartwright v. Pultney*, 2 Atkins, 380; *Coxe v. Smith*, 4 Johnson's Ch. 274, 276; *Leverson v. Waters*, 7 Coldwell, 20; *Carter v. Taylor*, 3 Head, 35; *Almony v. Hicks*, Ib. 39. *Willing v. Brown*, 7 S. & R. 467; *Longwell v. Bentley*, 11 Harris, 99. Hence a complainant who has entered into an agreement for the purchase of an undivided interest in real estate, may file a bill against the other party to the contract and those claiming under him, for specific performance, and that his share shall be conveyed to him in severalty. *Longwell v. Bentley*, 11 Harris, 99. In like manner, where a deed has been fraudulently obtained from an ancestor, or under an order of sale after his death, the court may set aside the conveyance and divide the estate among the heirs by one and the

same decree. See *Obert v. Obert*, 2 Stockton Ch. 98. 1 Beaseley, 423. Such a bill is not multifarious, because the partition is decreed incidentally to complete the measure of relief, and avoid a multiplicity of suits. See *Carter v. Taylor*, 3 Head, 35; *Amory v. Hicks*, 3 Id. 39; *Williams v. Wiegand*, 53 Illinois, 233. Under these circumstances, however, the bill should be so framed as to disclose its real object, and if it simply asks for a partition, it will be dismissed on the coming in of the answer, or when the truth becomes apparent from the testimony; *Williams v. Wiggand*.

In *Obert v. Obert*, the bill was filed by the complainant to have six-twentieths of the premises set off to him as one of the heirs of George Obert, from whom the other parties also derived title. The other heirs, and Peter Obert, who had administered the estate, and William Simpson, were made defendants. It appeared from the bill, answer and proofs, that Peter Obert had acquired the legal title by selling the premises as administrator under an order of the court, and buying them in through a third person who acted as his agent. The purchaser soon afterwards conveyed the land to him, and he then conveyed it to the defendant Simpson. It also appeared that the complainant had brought an ejectment against Peter Obert and Simpson for an undivided twentieth of the premises, and obtained a verdict and judgment on the ground that

the purchase by Peter Obert was constructively fraudulent, and that Simpson was not a purchaser for value. The Chancellor said that the defendants could not contest the complainant's right to so much as he had recovered in the suit at law. The parties who had been worsted in that proceeding might bring another ejectment, but the complainant was actually in possession of one-twentieth under the judgment of a competent tribunal, and this was enough to entitle him to a partition. As it regarded the remaining five-twentieths, the case was still open, but it depended on a question of constructive fraud, which, if it might be considered by a legal tribunal, was an appropriate subject of equitable jurisdiction. In *Coxe v. Smith*, 4 Johnson's Ch. 271, it had been declared by Chancellor Kent, that when a bill for partition turns on an equity set up by the defendants, the controversy must be determined by the chancellor, because equitable titles belong peculiarly to chancery, and there is no ground for sending the parties to a court of law. It followed that as it appeared from the pleadings and evidence that the purchase by Peter Obert was invalid, and that Simpson had not given value for the conveyance subsequently made to him, the complainant was entitled to have the share which he demanded set off to him, subject to the repayment of \$500; which had been advanced by Simpson to Obert on a mortgage of the premises, and afterwards applied to the payment of the inter-

tate's debts. Such relief could not be afforded to the other heirs, who had not come forward to impeach the transaction by which the title had been diverted from them. The sale was voidable, not void, and would stand good against every one who did not take proper measures to set it aside. The complainant might avoid it so far as it affected him, but not as it concerned the other parties. It followed that six-twentieths of the premises must be conveyed in severalty to the complainant, and the bill dismissed as to the residue.

In *Levertton v. Waters*, 7 Caldwell, 26, the proceeding was instituted by a co-tenant of an equitable estate for a partition, and to have a reconveyance of the legal title, which was outstanding subject to a resulting trust, in the hands of one who was made a party to the suit. The answer relied on the imperfection of the complainant's title as a reason for dismissing the bill. The court held, that under the law of Tennessee, as regulated by statute, the defendants had waived the objection by answering instead of excepting to the jurisdiction. Aside from this, a court of chancery might on general principles, take cognizance of such a state of facts, for the purpose of removing the cloud on the title, and having thus obtained jurisdiction against the holder of the legal title, exercise it for that of dividing the premises among the equitable owners.

As the right of a joint tenant, or tenant in common, to have his share of the property assigned to

him in severalty, is recognized by the law and consonant with natural justice, it will be enforced by a chancellor without regard to the wishes of the other co-tenants, and although it would seemingly be more for the interests of all concerned, that the estate should not be divided; *Holmes v. Holmes*, 2 Jones Eq. 334; *Stedman v. Weeks*, 2 Strobhart's Eq. 145; *Thurston v. Minke*, 32 Maryland, 572; *Oldham v. Jones*, 5 B. Monroe, 458; *Bailey v. Sisson*, 1 Rhode Island, 233; *Wood v. Little*, 35 Maine, 107; *Castleman v. Veitch*, 3 Randolph, 361. The case is one where the aid of equity is asked, not on equitable grounds, but to enforce an admitted legal right by means which are more advantageous for all parties, than those which can be used at law, and there is consequently little room for the discretion which ordinarily distinguishes the exercise of equitable jurisdiction; *Wesley v. Finley*, 3 Randolph, 261. It has accordingly been laid down without qualification that "such a bill is matter of right; and there is no instance of not succeeding in it, but where there is no proof of title in the plaintiff;" *Parker v. Girard*, Ambler, 256; *Howey v. Goings*, 13 Illinois, 107.

In *Wesley v. Finley*, the complainant filed a bill against the widow and children of James Finley, alleging that he had obtained a conveyance of all the right, title and interest of four of the defendants, and asking that four-fifths of the land should be set off to him in severalty. The defendants alleged

in their answer that the complainant had obtained the conveyance by artfully taking advantage of the misapprehension under which they labored that their mother had a life estate. Carr, J., said, that having an unfavorable impression of the plaintiff's conduct, he had examined the case with every disposition to find some ground on which he could feel authorized to dismiss the bill, and at first thought that he might find it in the discretion ordinarily vested in a chancellor. It was however clear under the authorities, that in exercising this jurisdiction, the courts of equity considered themselves bound by the principles which prevailed where the proceeding was by writ, and accordingly wherever the complainant showed a legal title, they considered him entitled as of right to a partition. In *Baring v. Nash*, 1 Vesey, Beam, 550, the vice-chancellor said, that courts of equity had a concurrent jurisdiction with courts of law to make partition, and must consequently be governed by the same rule. It followed that the complainant having a clear legal title was entitled to have his share conveyed to him according to the prayer of the bill, and if the defendants had any case it must be asserted through a bill impeaching the conveyance under which he claimed, on the ground of fraud.

There is another reason which conduces to the same result. A distinguishing characteristic of a suit for partition is that it is not brought to assert an adverse right, but to secure the full enjoyment of

a right confessed, which is not compatible with a divided occupancy. Conceding that the prayer of the bill involves a sacrifice, it is better that the defendant should submit to a pecuniary loss, than undergo the evils that may result from holding his estate in common with one who is actuated by a hostile or unkindly feeling, or who cannot agree as to the manner in which the property should be enjoyed. In this aspect of the case, the harsh or oppressive conduct of the complainant, and the disfavor with which he is regarded by the chancellor, are grounds for severing the tie between him and his co-tenants rather than for dismissing the bill.

A court of equity will not, therefore, any more than a court of law, refuse to divide the estate, because it will be worth less after it has been parted, or even when the effect will be to spoil the whole; see *Turner v. Morgan*, 8 Vesey, 143, *ante*, 882; although the court will out of many ways select that which will be least injurious; *Scovil v. Kennedy*, 14 Conn. 349, or may under the larger powers that have been conferred by statute, distribute the purchase-money accruing from a sale, instead of parting the land.

In *Holmes v. Holmes*, 2 Jones Eq. 334, a bill for the partition of a mill was dismissed by the court below, because it appeared from the report of the commissioners that the property could not be divided without injury, nor sold except at a great sacrifice; but the decree was reversed on appeal. The

Supreme Court said the question was not whether the sale would result in a loss, but whether it would not be less disadvantageous than a decree that the parties should run the mill on alternate days or weeks, or have every other toll dish, which were the methods known to the common law and formerly pursued in chancery, *ante*, 885. The complainant was entitled to a partition in the way least harmful to himself and to the respondent, and the mill must consequently be sold under the authority which had been conferred to that end by statute.

It was declared in like manner in *Smith v. Smith*, 10 Paige, 470, that partition is as much a matter of right in equity as it is at common law, and will be decreed wherever both of the parties cannot, or either of them will not consent to hold and use the premises in common.

It has been held for like reasons in Maine not to be a valid objection to a partition, that the property in question is a mill or other edifice which cannot be divided without rendering it useless for the purpose for which it was constructed or is employed, because it may be presumed that the parts can be put to some other use, although perchance of a less profitable kind; *Wood v. Little*, 35 Maine, 107; *Hanson v. Willard*, 12 Id. 142. A manufactory was accordingly parted in *Wood v. Little*, although the motive power was derived exclusively from a single water wheel. A chancellor will nevertheless adopt that mode

which will be least injurious in view of all the circumstances, and may set off the greater part of the premises to one of the parties, charged with the payment of a rent or sum in gross; or the court may, agreeably to the view taken in *Hanson v. Willard*, divide the profits by allotting the premises to the parties for alternate weeks or months instead of making a division by metes and bounds. See *Coleman v. Coleman*, 7 Harris, 100, *post*, 909. It was nevertheless held in *Crowell v. Woodbury*, 52 New Hamp. 613, that if such an allotment may have been adopted from necessity at an earlier period, when the choice lay between it and a division that would render the property valueless, it became obsolete when the courts were empowered to obviate the difficulty by a sale, and the same opinion was expressed in *Holmes v. Holmes*, 2 Jones Eq. 334.

A covenant not to part an estate which the parties hold in common may, it seems, be specifically enforced, where it is reasonable in itself and has no injurious tendency, and will consequently be a defence to a suit for partition so long as the circumstances under which the contract was made are unchanged. See *Coleman v. Coleman*, 7 Harris, 100; *Coleman v. Grub*, 11 Id. 393. Or as the rule was stated in *Coleman v. Coleman*, although the right of partition is an ordinary and beneficial incident of tenancies in common, it may be waived by agreement of the parties in interest. In this case, land containing iron

ore, was held in common by two persons, and the heirs of another former owner; and an agreement in writing and under seal was entered into by the two owners, and the guardians of the minor heirs of the other, that certain persons who were therein designated, should "make partition of the furnace and forges aforesaid, and other real estate according to quantity and quality, and assign the same according to the real interest and convenience of the several parties; but providing that the ore banks "shall remain together and undivided as a tenancy in common," and declaring it to be the intent of the agreement that "none of the parties, their agents or workmen, shall interfere with or interrupt the other parties at any mine-hole by them opened and occupied for the purpose of raising iron ore."

The entry of amicable actions of partition to carry out the agreement, was also provided for, and they were entered; and the persons appointed made report, allotting *the furnace and forges*, and reporting that the "Bingham place," with a small tract of forty acres adjoining, and also the ore banks and hills at Cornwall Furnace *do still remain undivided*, to be held by the parties as tenants in common, according to their respective shares, and to the covenants and articles in the said agreement." This report was confirmed by the Court in 1787, and the parties entered on the purparts respectively assigned to them, and they, and those claiming under

them continued to hold the same down to the year 1851; when suit was brought for a partition of the tracts of land which contained the ore beds. It was held that the agreement was a defence, not only because of the judgment by which it had been ratified, but because the covenant ran with the land, if not for the purpose of enabling an heir or assignee to sue, at least for that of rebutting a suit brought in derogation of the restraint which it imposed. Woodward, J., said that the arrangement made in 1787, was in effect a partition of the *profits* of the mine hills. The soil was valueless. The ore was the object to be secured, and this was indivisible into equal parts. The law did not enable one tenant to compel a sale, and there was the outstanding easement which was not subject to partition. What could be done in such circumstances except that which was done—make the hills an appurtenance of each several property, and secure to each tenant participation in the products, in the manner their convenience and experience had suggested. * * * In speaking of indivisible inheritances, Lord Coke, asks, what shall become of them? He first answers that the eldest shall have them, and others shall have an allowance in value in some other of the inheritance.

But what if the common ancestor left no other inheritance to give anything in allowance? It is answered that one co-parcener shall have the inheritance for a time, and the other for a lifetime. Or, in case of a piscary, one may

have one fish, and the other the second one, or the one may have the first draught, and the second the second draught. If it be a park, one may have the first beast, and the second the second. If a mill, one to have it for a time, and the other for a lifetime, or the one, one toll dish, and the other the second. And this, he adds, appears to be the ancient law; Thomas' Coke, Litt. vol. 1, p. 537. And says Littleton: It is to be understood that partition may be made in divers manners. *Modus et conventio vincunt legem. Pacto aliquid licitum est, quod sine pacto non admittitur.*

In Allnath on Partition, 3-5 Law Library, it is laid down that there may be partition in *effect*, and so as to give to each parcener a species of enjoyment in severalty without any division of the land.

In *Salisbury v. Phillips*, 1 Salkeld, 43, Lord Holt said: When the *thing* and its *profits* are the same; partition of the *profits* is partition of the *thing*. See, also, *Warner v. Baynes*, Ambler, 589; 6 Munroe, 179.

In the case of *Conant & Sons v. Smith & Buel*, 1 Aiken, 67, in which an ore bed similar to this was attempted to be brought into partition, the Supreme Court of Vermont denied both partition and a sale, on the ground that neither could be had without injustice to the parties, and suggested that a court of equity had the power to regulate the enjoyment of the property between the owners, by restricting them to the proportion of their respective in-

terests, by compelling accounts between them, and by appointing a common receiver for all parties.

The partition thus made in 1787, by the agreement of the parties in interest, with the sanction of the court having jurisdiction, and in accordance with law, is binding on the successors in the title, not only because of the judgment of a court in partition, under which they claim, but because the covenants of 1787 were real, and ran with the land, though the words, heirs and assigns were not used. See *Packenham's Case*, cited in *Spencer's Case*, 3 Coke, 16; and Mr. Hare's Note, 1 Smith's Leading Cases, 169, 174, 7 Am. ed. Thomas' Coke, Litt. vol. 2, pp. 247-49. Even if the covenant did not so run with the land as to give a right of action to an heir or alienee, it would serve to rebut this action, for the law is, in regard to the *implied* warranty which annexes itself to exchange and partition, that though it does not extend to assignees, yet the assignee shall rebut; see note to Coke Litt. p. 249. Much more may an express covenant be set up by a privy in estate against the very action which it was the object of the covenant to exclude, though no words of perpetuity were used.

We have thus demonstrated, satisfactorily, at least, to our own minds, that the agreement of 30th August, 1787, and the judicial proceedings had pursuant to it, constitute an insuperable bar to this action. It follows that the court below were in error in rendering judgment for the plaintiffs.

Against these conclusions it is urged that the partition of 1787 left the mine-hills a tenancy in common, and that partition is an inseparable incident of the estate of tenants in common, and therefore these plaintiffs should not be estopped.

But it must be apparent that this action is nothing more than an attempt to have a second partition of that which has already been the subject of partition."

It was held, on like grounds, in *Brown v. The Lutheran Church*, 11 Harris, 495, that a church and burial ground, which were held in trust for the use of two distinct religious corporations, under articles of association looking to a permanent union, were not divisible without the consent of the parties in interest, or fit subjects for a writ of partition. These decisions indicate that although the law will not tolerate an arbitrary or perpetual restraint on the right of partition, the parties may, nevertheless, agree that property which cannot be divided without injury, shall be held in common, so long as the exigency of the case requires it.

If a chancellor must follow the law in determining whether to grant or refuse a partition, he has a large and liberal discretion as to the choice of means; and if the jurisdiction does not rest on this ground, there is none on which it can so well be vindicated. See *Hall v. Piddock*, 6 C. E. Green, 314; *Burrell v. Burrell*, 10 Id. 173.

"The peculiarities of an equit-

able partition are, that such part of the land as may be more advantageous to any party on account of its proximity to his other land, or for any other reason, will be directed to be set off to him, if it can be done without injury to the others; that when the lands are in several parcels, each joint owner is not entitled to a share of each parcel, but only to his equal share in the whole; that where a partition exactly equal cannot be made without injury, a gross sum or yearly rent may be directed to be paid for equality or equality of partition, by one whose share is too large, to others whose shares are too small, *Brockfield v. Williams*, 1 Green's Ch. 341, 345; and that where one joint owner has put improvements on the property, he shall receive compensation for his improvements either by having the part upon which the improvements are assigned to him at the value of the land, without the improvements, or by compensation directed to be made for them;" *Hall v. Piddock*.

It may be added to this enumeration; that where one of several tenants in common, or coparceners, has been in the exclusive pernanacy or enjoyment of the rents and profits, or has committed waste, the others may in filing their bill for a partition ask for an account, or that the defendant shall be enjoined from doing further harm. See *Howey v. Goings*, 13 Ill. 107; *Obert v. Obert*, 2 Stockton's Ch. 98; *Oliver v. Jerreigan*, 36 Alabama, 41. So where the chief value of the property consists in its adaptation to a

particular use, as in the case of a reservoir or pool constructed to afford a supply of water to mills which the parties hold, or which are assigned to them in severalty, the court may apportion the stream without dividing the land, or may divide the land and direct that the pool shall remain as a servitude and easement for the good of all concerned.

In *Scoville v. Kennedy*, 14 Conn. 339, the bill was filed for the partition of a stream of water, issuing from an artificial pond, and two methods were suggested, one to divide the pond into equal reservoirs by means of a longitudinal dyke or wall, the other to distribute the water by means of equal orifices at the same level. The former plan was better calculated to insure entire equality, but attended with too much outlay and inconvenience to be practicable, and the commissioners reported that although the latter would cost less, it would still be inconvenient and expensive. They therefore, declined to recommend either, and proposed a third which the court rejected on mature consideration. The judges were, nevertheless, closely of opinion, that the difficulty of making a partition, and the inconveniences which might result to the co-tenants, were not a sufficient reason for refusing the prayer of the bill. That method should consequently be adopted, which though disadvantageous, was attended with less injury than any other that could be devised. Distributing the stream through

two equal apertures came nearest to this definition, and the decree was made accordingly.

In *Morrill v. Morrill*, 5 New Hamp. 134, where the subject matter was land overflowed by an artificial pool, which had been formed for supplying the mills of the complainant and respondent respectively, with water, partition was effected without dividing the land, by giving each party his due share of the stream, to be drawn through gates or apertures of a size proportioned to their respective interests in the pool. The court said, that in general, real estate should be divided by assigning to each owner a distinct part in severalty. There might, however, be a partition without pursuing this method, by assigning the use of the premises to one party for one week, and to the other for the succeeding week, and so on alternately; Cook Litt. 164, b; *Bishop of Salisbury v. Phillips*, 8 Vesey, 143. There was consequently no legal objection to the mode of division reported by the commissioners, and it appeared well calculated to attain the end in view.

In *Smith v. Smith*, 10 Paige, 470, the court took a different way, while recognizing the propriety of that adopted in *Morrill v. Morrill*. The land covered by the waters of a mill-pond, was set off in equal shares to the parties, subject to the right and duty of maintaining the dam for the common benefit, and with a further provision that each party should be entitled to draw an equal amount of the water, or if this could not be

done conveniently, that the party who took the larger portion of the stream, should make a pecuniary compensation to the other.

It results from these decisions that the court may, in assigning the several shares, charge one or more of them with a servitude or easement, or may direct that a watercourse or mill-dam shall be maintained by all the owners for their common use. In cases of this description the partition is obviously left incomplete, with a view to the good of all concerned. See *Coleman v. Coleman*, 7 Harris, 100, *ante*, 909; *Smith v. Smith*, 10 Paige, 470.

In the case last cited the chancellor held the following language in making the decree: "Nor does there appear from the testimony to be any difficulty in making an actual and equitable partition of the water power in controversy, so as to be mutually beneficial to each. For it is not necessary to divide the waters of the pond by horizontal lines. The land under the water and the dam may be thus divided, by metes and bounds; and one part thereof may be assigned to each party, subject to the servitude and charge of keeping up and repairing the dam on that part, by the one to whom it is assigned, for the use of the other, as well as for his own benefit; and the right to the use of the half, or of any other portion, of the waters of the pond, which are thus preserved, may be assigned to the parties respectively, to be used in such a manner as the commissioners, in their report of the

partition, may direct. And if the present situations of the flumes, and of the gates, cannot be altered without injury to the mills, so as to prevent one party from obtaining or using more than his equal half of the water, the statute has wisely provided that a sum may be decreed to the other party for owelty of partition. (2 R. S. 330, § 83.) So an equitable partition of the water may be made, by allowing the complainant at all times to have sufficient water, to be drawn through his present gateway, or through such other gateway as may be hereafter constructed in lieu of it of the same capacity and depth, to work his present machinery for so long a time as may be necessary whenever he may have any grinding to do, and by requiring the defendant to shut down his gates whenever the water gets down to a particular mark, to be designated in the report for that purpose, and keeping them shut until it rises to a certain other point; and awarding to the defendant a compensation in money, as an equivalent for such a special privilege in the use of the water. Or the commissioners may give a similar privilege to the defendant, as to both or either of his mills, and may award a compensation to be paid by him to the complainant, as an equivalent, to equalize the partition. So they may direct the water to be used in the way suggested by the witnesses, by fixing a monument or mark in the pond, in a permanent situation, and allowing both parties to draw the water from the

pond, for the use of their mills, through the present gateways, or through others of the same depth and construction, until the water is drawn down to a specified mark or point upon the monument; and directing that both parties shall then shut down their gates until the water has risen in the pond to another specified point or mark upon such monument. And if one party will, in the ordinary use of his mills and his present gateways, in the manner suggested, get more than his fair proportion of the water, either in quantity or in value, taking one portion of the year with another, the commissioners may, in their report, direct such alteration to be made in the depth or capacities of such gateways as will render the use of the water of the pond, in that manner, equal between the parties. Or if such alterations cannot be made without diminishing the head and quantity of water required for the propelling of the machinery of the mill or mills of either party, they may award a sum of money to be paid by one party to the other for owelty of partition. In short, the commissioners who are to make the partition, may divide the dam and the lands under the water, and may make such provisions for keeping the different portions of the dam, and the waste gates and flumes in the same in repair, and such regulations for the use of the water power which is not capable of actual partition without a destruction of its value, as the parties might make by a partition deed between themselves, and by agree-

ing for a compensation to be paid by one party to the other, if necessary, so as to make that partition perfectly equal; so far as human judgment is capable of producing equality in such a case.

“That such is the law, in connection with the provision of the revised statutes, authorizing this court, where an equal partition of the property cannot be made without prejudice to the rights and interests of some of the parties, to decree compensation to be made by the one to the other to produce such equality, it is only necessary to refer to a few of the leading cases on this subject.

“In the case of *Hill v. Dey* (14 Wend. Rep. 204), it appeared that the commissioners in partition had set off to one of the parties one part of the premises, by metes and bounds, and another part of the premises to the other in the same way; the whole embracing two mills upon the same stream, the one below the other. But in their report, in addition to the land itself, on which the lower mill was situated, they had given to the party to whom that part of the land was set off, the easement or right to flow back the water upon the land assigned to the other, in the same manner and to the same extent that such water had been flowed back previous to the partition. It is true, the question there arose upon the construction of the report itself. But the decision of the court recognized the principle that the commissioners in partition might assign one part of the premises to a party, charged with

a servitude or easement for the benefit of another party, to whom a distinct portion of the land was assigned by metes and bounds. And in the case of *Morrill v. Morrill* (5 New Hamp. Rep. 134), the committee appointed by the court to make partition of a mill site and mill privileges, assigned to some of the parties distinct portions of the premises by metes and bounds, with the right of taking from the river within the limits of the lands assigned to them respectively, so much water as would flow through a gateway of certain prescribed dimensions, together with a passage way or water course through the portions of the premises not assigned to them. And the court sustained the report of the committee; distinctly placing their decision upon the principles of the common law upon the subject.

“*Warren v. Baynes* (2 Blunt's Ambler, 589), decided by Lord Hardwicke, in 1750, is another case, in which such a mode of making partition of property, the principal value of which consisted in the use of water, was adopted. An easement in the land leased to the New River Company, at an annual rent for the quantity conveyed in each pipe laid down by the company, with the privilege of laying down other pipes at the same rent. And there were also two water conduits belonging to the parties in the partition suit, one of which was used for a cold bath establishment, and the water in the other conduit was running to waste. And in decreeing a partition of

the property between the owners of the water conduits and of the lands through which the pipes of the New River Company were laid, &c., and directing the mode of enjoyment of the parts set off to the owners of the premises in severalty, Lord Hardwicke directed that the rents payable in respect to the water-pipes then laid by the company, should be put into one lot, and the other part of the estate of equal value be put into another lot, and that in case the company should lay any new pipes which should run partly through the land which should be allotted to the plaintiff, and partly through that allotted to defendant, the rent for such new pipes should be apportioned between the parties according to their respective quantities of the land through which the same should run. And that the conduit in which the water run to waste should be allotted to one party, and the other conduit with the cold bath to the other; and that the party to whom the first conduit was allotted should not convert that conduit into a cold bath, so as to come in competition with the cold bath allotted to the other party. (See also *Clarendon v. Hornby*, 1 Peere Wms. Rep. 446; *Lister v. Lister*, 3 Younge & Coll. Exc. Rep. 540.)"

It has also been held that the court may, in effecting a partition, adopt a course which will be advantageous to one of the parties, without impairing the equality which is the right of all, and may consequently award him that part

of the land which he has improved, or which lies nearest to other land which he owns; *Gaithers v. Brown*, 7 B. Monroe, 90; *Graham v. Graham*, 8 Bush. 334.

The Court of Chancery had no original jurisdiction to decree a sale in partition without the consent of the parties, nor could it allot the whole of the premises to one party, and give the other a pecuniary compensation for his share of the land; *Codman v. Pinkman*, 15 Pick. 364; *Wood v. Little*, 35 Maine, 107. See *Thompson v. Tolmie*, 2 Peters, 157; *Williamson v. Berry*, 8 Howard, 595; *Norment v. Wilson*, 5 Humphreys, 310; *Pell v. Ball*, 1 Richardson's Eq. 361; *Delaney v. Walker*, 9 Porter, 497; *Oliver v. Jernigan*, 46 Alabama, 41. These powers have since been conferred in many of the states by statute, and may be exercised whenever it appears that a sale, or what comes to the same thing, an allotment of the entire premises to that one of the parties who will give the most for it, will be less injurious than an actual division; *Thompson v. Hardman*, 6 Johnson's Ch. 436; *Higginbotham v. Short*, 3 Cushman, 160; *In the matter of Skinner's Heirs*, 2 Dev. & Batt. Eq. 63; *Royston v. Royston*, 13 Georgia, 425; *Stedman v. Weeks*, 2 Strobbart Eq. 145; *Welsh v. Freeman*, 21 Ohio, N. S. 402; *Graham v. Graham*, 8 Bush, 334; *M'Call's Appeal*, 6 P. F. Smith, 363; *Thruston v. Minke*, 32 Maryland, 571; *Wilson v. Duncan*, 44 Mississippi, 642. *Codman v. Tinkham*, 15 Pick. 364; *Wood v. Little*, 35 Maine, 107; *Higgin-*

botham v. Short, 3 Cushman, 160.

In determining between a sale and an actual partition, the court inclines to the latter alternative, as not precluding the enjoyment of the inheritance in its existing form, and will not adopt the latter, unless the balance of convenience preponderates on that side; *Graham v. Graham*, 8 Bush, 334; *Thruston v. Minke*, 32 Maryland, 572; *Davidson v. Thompson*, 7 C. E. Green, 83. It is not enough that a division cannot be made without loss, it must appear that the loss arising from that course will be greater, as measured by a pecuniary standard, than that occasioned by parting with the property to the highest bidder; *Clason v. Clason*, 6 Paige, 547; *Smith v. Smith*, 10 Id. 476; *Arsdale v. Drake*, 2 Barb. 591.

The burden of proof is consequently on him who asks for a sale, to show that the land will be worth less after it has been divided than as a whole, *Clason v. Clason*; and in this case the chancellor said that "the true question is whether the aggregate value of the several parts after partition, will be materially less than the value of the whole as one parcel, and not whether would it be better for the infants who are parties to the bill, to have their property in a form to yield an income, instead of being locked up in unproductive real estate;" *Clason v. Clason*, 6 Paige, 541.

It has been held repeatedly in accordance with the opinion expressed in Story's Equity, sec. 655,

that where a tenant in common has laid out money in erecting buildings, or making other substantial improvements, the court may in entering a decree in partition, direct that the portion of the premises, which has thus been enhanced in value, shall be assigned to him, or if this cannot be done conveniently, and it becomes requisite to proceed to a sale, that the purchase-money shall be so apportioned as to reimburse him for his outlay. *Green v. Putnam*, 1 Barbour, 500; *Conklin v. Conklin*, 3 Sandford Ch. 64; *St. Felix v. Rankin*, 3 Edward's Ch. 323; *Wilson v. Duncan*, 44 Mississippi, 642; *Dean v. O'Meara*, 47 Illinois, 120; *Courts v. Hibner*, 55 Id. 514; *Louvalle v. Meanagh*, 1 Gilman, 39; *Boragh v. Archer*, 7 Dana, 176; *Hall v. Piddock*, 6 C. E. Green, 311; *Obert v. Obert*, 1 Halsted's Ch. 397; *Doughady v. Crowell*, 3 Stockton, 201; *Kurtz v. Hilme*, 53 Illinois, 514; *Martindale v. Alexander*, 26 Indiana, 104; See *Swan v. Swan*, 8 Price, 518.

In *Hall v. Piddock* (6 C. E. Green, 311), the owner of the land in question died, and the title descended to his four sons. Three of them conveyed to the complainant, who erected valuable buildings on the premises. The assignee of the fourth son brought ejectment, and having obtained judgment brought an action of partition. The complainant thereupon filed a bill asking that the proceedings at law should be enjoined, and that an equitable partition should be made between him and the plaintiff in the action of ejectment, with a due

allowance for the improvements. It was in doubt under the evidence and debated by counsel, whether the complainant knew that his title was defective when he erected the buildings. The chancellor held that this was immaterial. The only good faith required on the part of a tenant in common, in making improvements, is that he should honestly believe that they would enhance the value^o of the property to all concerned. If this appears, he is entitled to remuneration for the increase of value resulting from his act. It followed that the case must be referred to a master, to inquire and report what would have been the value of the land, if no improvements had been made upon it, and whether some part of the land which would be equal to one-fourth of the unimproved value of the whole could not be set off to the respondent, or whether the end would be better attained by allowing or charging a reasonable sum for owelty.

A different view was taken in *Scott v. Guernsey*, 48 New York, 106; where it was held that there is no equitable or legal ground for allowing a tenant in common, compensation for improvements which he makes with a full knowledge of the title of his co-tenants, and without their consent. Where, as in *Conklin v. Conklin*, the complainant is under the erroneous idea that he is the sole owner, or where he has obtained the assent of the owners, or where they stand by and do not object, the case is a different one, and a chancellor may

properly take the increased value of the land into view, in making the partition. See *Green v. Putnam*, 1 Barbour, 500.

In giving judgment in this instance, the court cited the case of *Putnam v. Richards*, 6 Paige, 390. There one who had taken an assignment of a lease in fee from a mother as guardian of her infant children, under the belief that she was authorized to convey, and erected valuable buildings on the premises, filed a bill to enjoin an ejectment which had been brought by the wards, and that they should be restrained from obtaining judgment, without compensating him for the increased value of the premises. Chancellor Walworth said, "agreeably to the civil law, one who built houses or made other improvements on land, under the sincere though erroneous belief, that it belonged to him, was entitled to remuneration for what he had done, after deducting a fair compensation for any benefit that he had derived from the property, while it was in his possession. This principle was constantly acted upon where the legal title was in the person who made the improvements, and the equitable owner was obliged to come into chancery for relief, and the court might then require him to do equity, as the price of its assistance. But there was no instance in this country or in England, where a court of chancery had assumed jurisdiction to give relief to a complainant, who had made improvements upon land belonging legally as well as equi-

tably to the defendant, and where the latter was not chargeable with fraud or laches. The only relief therefore to which the complainant was entitled, was to restrain the defendants from taking possession of the lot under their recovery in ejectment, until they paid or tendered the complainant the ground rent, which he had discharged since he took the assignment of the lease."

The principle is well established in accordance with this decision; but it does not necessarily apply to the case of a co-tenant, who is unable to use the property in its existing condition, and may be compelled to put up fences or erect buildings, in order to render it available to himself and the other owners. His position is therefore different from that of one who, though it be innocently, holds and improves property to which he has no right.

Agreeably to the case of *Teasdale v. Sanderson*, 33 Bevan, 534; a co-tenant is not entitled in England, to an allowance for substantial repairs, or lasting improvements, except as an offset to a charge for use and occupation, during the time he has been in possession of the premises.

It seems that as the law formerly stood in Massachusetts, a tenant in common had no remedy for the improvements, which he had made on the estate. But this defect is now supplied by the act of 1850, c. 278. See *Marshall v. Crehore*, 13 Metcalf, 462.

The jurisdiction of equity is peculiarly applicable where the sub-

ject matter is an incorporeal hereditament, and may be exercised for the purpose of parting a right of turbary, or common, or to enter on a beach and collect and remove the sea-weed; *Bailey v. Sisson*, 1 Rhode Island, 233.

A partition may be decreed in equity, although it is not legally compellable, as where a tenant for life of the whole estate is also a joint tenant or tenant in common of the fee. Here a writ of partition will not lie, because, as in the case of other real actions, it must be brought against the tenant of the freehold, who cannot sue himself; although he may file a bill in equity and make the co-tenants of the reversion parties; *Otley v. McAlpin's Heirs*, 2 Grattan, 340. In *Otley v. McAlpin's Heirs*, a tenant by the curtesy, purchased the reversionary interest of one of the three children of his wife, and the court held that he was entitled to a decree for a partition, although the defendants were under age. It would, nevertheless, appear that the complainant must have an estate in possession; and partition will not be made at the instance of a tenant in common of an estate in remainder or reversion, *ante*.

In general, a mortgagee or judgment creditor is not a proper party to a proceeding in partition. The lien is not divested by the division of the premises, but stands after the execution of the partition deeds as it did before; *Wooten v. Copeland*, 7 Johnson's Ch. 140; *Thruston v. Minkie*, 32 Md. 572, 574; *Harwood v. Kirby*, 1 Paige, 469; although, where the holder of an

undivided interest gives a mortgage, and his share is then set off to him in severalty, the holders of the other shares may require that it shall be taken to satisfy the incumbrance; *Harwood v. Kirby*; *Sebring v. Monroe*, Hopkins, 501. See *Bavington v. Clark*, 2 Penna. R. 124; *Jackson v. Pierce*, 10 Johnson, 414; *Longwell v. Bentley*, 11 Harris, 103. In *Longwell v. Bentley*, Lewis, C. J. said, "The existence of a judgment or a mortgage against an undivided interest, presents no obstacle to a partition, because the encumbrance attaches upon the part set out for the one against whom it was entered;" *Bavington v. Clark*, 2 Penn. Rep. 124; *Jackson v. Pierce*, 10 Johnson, 414, 417.

It is, nevertheless, held in some of the States, that the court may, in the exercise of a sound discretion, direct that the property shall be sold free of incumbrance, and remit the lien creditors to the purchase money; *Kilgore v. Crawford*, 21 Ill. 249. *Cradlebaugh v. Cradlebaugh*, 8 Ohio, N. S. 646; See *Thruston v. Minke*; and such is the invariable course in Pennsylvania, where incumbrances are, with rare exceptions, discharged by a judicial sale; *Girard Ins. Co v. The Farmers' & Mechanics' Bank*, 7 P. F. Smith, 388.

In this aspect of the rule it would seem to follow that as a mortgagee may be affected by the

decree, he should be made a party to the bill, and the law was so held in *Milligan v. Poole*, 35 Indiana, 64.

"After some conflicting decisions, it was settled in equity, that the cost of issuing and executing the commission in partition, and of making out the title to the several parts of the estate, should be borne by the parties in the proportions in which they were respectively entitled to the estate; *Calmady v. Calmady*, 17 Ves. 555, note 1; *Agar v. Fairfax*, 17 Ves. 533. But no costs were given up to the hearing of the bill; *Baring v. Nash*, 1 Ves. & Bea. 554. For it was thought that one party ought not to bear any portion of the charges incurred in respect to previous collateral questions raised by the other; *Whaley v. Dawson*, 2 Sch. Lefr. 371. In accordance with this rule, it would seem to be clear, that where the bill was dismissed on the ground that the plaintiff had no interest in the estate, or no right to partition, he could have no claim upon the defendant for any portion of the cost. But whatever may be the rule in equity, it was settled in *Stewart v. Baldwin*, 1 Penn. Rep. 461, that where a defendant obtains a verdict in a writ of partition at law, on the plea of *non tenant insimul*, he cannot recover costs from the plaintiff;" *Shaw v. Irwin*, 1 Casey, 348.

[*484]

*WOOLLAM v. HEARN.

MAY 24, 25; JUNE 3, 1803.

REPORTED 7 VES. 211.

DISTINCTION BETWEEN SEEKING AND RESISTING SPECIFIC PERFORMANCE, AS TO THE ADMISSION OF EVIDENCE.]—*Though a defendant resisting a specific performance, may go into parol evidence to show that, by fraud, the written agreement does not express the real terms, a plaintiff cannot do so; for the purpose of obtaining a specific performance with a variation.*

WILLIAM HEARN, being possessed of a house in Ely place, under an agreement for a lease of seven, fourteen, or twenty-one years, from the 25th of December, 1794, agreed to let the house to Penelope Woollam, for seventeen years; and a memorandum, dated the 11th of December, 1793, was executed by them, stating an agreement for a lease to the plaintiff from the defendant for seventeen years to commence at Christmas next, at the yearly rent of 73*l.* 10*s.*, the tenant paying all taxes except the laud-tax, which Hearn agreed to pay: the lease to contain all usual covenants, and also covenants that no public trade should be carried on in the premises: and that no alterations should be made in the front: that the lessee should leave the premises in tenantable repair, with other covenants relative to the situation of Ely Place, as being extra-parochial.

The bill was filed by Mrs. Woollam against Hearn, stating, that the rent of 73*l.* 10*s.* was inserted by mistake, or with some unfair view; the real agreement being, that the plaintiff was to have the lease upon the same rent as the defendant paid to his lessor, and that *he did not pay more than 60*l.*; and in [*485] confidence that a lease would be executed to her, she paid 60*l.* to the defendant at the time of executing the agreement, being the moiety of the sum which the defendant alleged he had laid out in repairs. She also paid 33*l.* 15*s.* 6*d.* for fixtures.

The bill prayed a specific performance, and that the defendant may be decreed to execute a lease according to the agreement, at the rent of 60*l.*, or such other rent as the defendant paid his lessor.

The defendant by his answer denied that 73*l.* 10*s.* was inserted by mistake, or with any unfair view; or that the agreement was, that the plaintiff should pay the same rent as the defendant paid, which he admitted to be 63*l.* He stated that he believed he might say, in the course of the treaty, that she would have the premises upon the same terms as the defendant had; not meaning that she was to have them at the same rent, but that

she would, on the whole, have them upon terms of equal advantage with the defendant, considering the money he had expended upon them. He admitted that the payment of 60*l.* stating, that it was not a moiety of the money laid out by him, though at the time of payment it might have been so called.

On the part of the plaintiff, her son stated by his depositions, that when he treated with the defendant for a lease of the house, he said he got a lease of it, but could not at that moment lay his hands upon it: that he did not exactly know what the rent was, but it was somewhere about 70*l.* a year, that he did not want to get anything by her, and she should have the house upon the same terms he had it himself, which he repeated several times afterwards. The plaintiff's solicitor stated, that the defendant repeatedly said, upon being pressed to execute a lease, that the plaintiff held the house upon the same terms upon which he held; but, when the deponents proposed to execute an assignment of the original lease, he objected, that it was always his maxim not to part with the original *lease, but to hold it in his own [*486] possession for his security.

Mr. Romilly and Mr. Wetherell, for the plaintiff.—To the objection, that the plaintiff cannot vary the written agreement, the answer is, that this is a case of fraud, upon which you must have recourse to parol evidence, otherwise it cannot be made out; and that takes it out of the statute;¹ *Shirley v. Stratton*,² *Young v. Clerk*,³ *Buxton v. Lister*.⁴ These are cases of defendants resisting the performance on the ground of fraud, but the same principle must apply to the case of a plaintiff complaining of fraud. The rule *caveat emptor* does not apply in this instance. A person buying an estate has no right to ask the vendor what he gave for it. But this is very different, amounting to a warranty. Though there is no case precisely similar, the result of all, which are collected by Mr. Fonblanque,⁵ is, that upon fraud or mistake, parol evidence is admissible. There are several cases before Lord Thurlow, in which it is laid down that a party may alter a term in the agreement, in the case of fraud: *Lord Irnham v. Child*,⁶ where it was taken as clear, that, if the clause had been omitted by fraud, a redemption would have been permitted: so in *Lord Portmore v. Morris*,⁷ before Lord Kenyon. In *Joynes v. Stutham*,⁸ and *Walker v. Walker*,⁹ Lord Hardwicke intimates an opinion that the plaintiff might have done so, if the parties had been reversed. *Rich v. Jackson*¹⁰ was determined upon the ground that it was not a case of fraud. If the bill had been filed against this plaintiff, upon all the author-

¹ Stat. 29 Car. 2, c. 3.

² 1 Bro. C. C. 440.

³ Prec. Ch. 538. See the references in the notes by Mr. Finch.

⁴ 3 Atk. 388.

⁵ 1 Fonb. 122.

⁶ 1 Bro. C. C. 92.

⁷ 2 Bro. C. C. 219.

⁸ 3 Atk. 388.

⁹ 2 Atk. 98.

¹⁰ 4 Bro. C. C. 514; 6 Ves. 334, in a note to *The Marquis of Townshend v. Stanngroom*, 6 Ves. 338; where all these cases are fully discussed.

ities she might have insisted upon this variation, for the Court would not assist a plaintiff coming to enforce an agreement by his own fraud, not according to the true contract. There can be no principle why a man may set up a fraud defensively, which he cannot offensively. The defendant must go the length of saying, that no proof of fraud, however clearly it may be made out that the written agreement was not the actual agreement, will be adequate. Certainly a plaintiff must make out a stronger case.

[*487] The consequence *of refusing this relief would be, that the person who contrived the fraud, and who, if he filed a bill, would not be permitted to set it up, may secure the advantage by refusing to perform the agreement, driving the other to be the actor, and to file a bill. In many of these cases the fraud has not been clear. This is, beyond a doubt, misrepresentation from first to last; not only *suppressio veri*, but also *suggestio falsi*. How is it to be distinguished from a purchase of an estate, represented by the vendor at a certain number of acres, and turning out to be less? There is a similar reference here to the rent. The defendant's construction of his words is impossible.

Mr. *Leach*, for the defendant.—The cases cited proceed upon a principle wide of the Statute of Frauds. The plaintiff signed this agreement under the notion that the rent specified was paid by the plaintiff to his landlord. Assume that fact. She undertook it with full knowledge. This is not within the principle upon which the Court permits a written agreement to be varied by parol. The meaning of that rule is, that the writing must differ from the intention of the party when signing it. This plaintiff intended, and knowing it, bound herself to pay, 73*l.* 10*s.* per annum. She does not insist that she signed the agreement by mistake, but she contends, upon the suppression of the fact, not merely that she is to be discharged from the written agreement, which might be done if the case was made out, but beyond that, to set up another agreement, existing only in parol. That is the distinction. If she meant only to pay a rent of 63*l.*, and the other by fraud inserted 73*l.*, the Court would correct it; but this is an attempt to repeal the Statute of Frauds. The danger of admitting such evidence must be attended to; persons supporting their own case: and affecting to state the very words, that passed. By the alteration of a word the witness alters the whole conversation. But, admitting the evidence, it by no means supports their own case. If the understanding was, that the plaintiff was to stand in the same relation to the *original landlord as the

[*488] defendant, how was it, that she was to pay 60*l.* in consideration for the lease? He meant nothing more than what he states in his answer, that she should have it upon terms of equal advantage. The supposed fraud consists in this, that, having expended money, he must, therefore, have an increased rent.

Mr. *Romilly*, in reply.—With respect to the statute, I cannot state any case exactly like this; but where a party by a fraudulent representation of the facts has obtained a contract, it has been

decided in many instances, that a case of fraud is always an exception out of the statute.¹ If the party undertakes to show, that by fraud he was induced to sign an agreement different from the actual agreement, he may read evidence to that. This extends to cases of every description, deeds executed with the most solemn form. In *Filmer v. Gott*,² evidence was admitted to prove a consideration in the deed different from that stated—a pecuniary consideration: the deed expressing natural love and affection. This was followed by *The King v. The Inhabitants of Scammandon*,³ and various other cases. *Lord Irnham v. Child* and *Portmore v. Morris*,⁴ are as strong cases as can be produced, being not only to vary the written agreement, but to have a specific performance of the agreement so varied. There can be no difference whether the party producing the evidence is plaintiff or defendant: the question being as to the rule of evidence, and a positive rule of evidence being equally applicable to both cases. In *Doe v. Allen*,⁵ a very strong case, upon a will, evidence was admitted, upon this ground, that if you so rigidly adhere to the statute, it would be, not a statute for the prevention, but for the protection and futherance of fraud.

In this case the rent of 73*l.* 10*s.* was agreed on, only because the defendant said he paid that rent to his landlord. The defendant, the only person who knew the rent, refused to produce his lease. The sum inserted in the agreement has reference to something, which is substantially *the agreement. This [*489] is not, as represented, a party with knowledge consenting to pay this rent. She never agreed to pay more than he paid. Suppose a person, owner of the fee, and likewise occupier, contracts to sell the estate at so many years' purchase, telling the party with whom he contracts, that it is 100*l.* a year. Attending to the language of the defendants, "terms" can mean nothing else than the rent. The defendant's interpretation is totally impossible.

SIR W. GRANT, M. R.—The doubt I have felt during the argument of this case, where there is any instance of executing a written agreement with a variation introduced by parol, still remains; and, as it is an important question, I wish to consider it.

SIR W. GRANT, M. R.—This bill calls upon this Court for a specific execution of an agreement for a lease, at a rent of 60*l.* a year. There is no agreement in writing for a lease at that rent; the agreement expressing a rent of 73*l.* 10*s.* The plaintiff contends, however, that she signed that agreement under a belief that such was the rent payable by the defendant: the real agree-

¹ See the references in the note, 3 Ves. 38, 39, to *Pym v. Blackburn*.

² 4 Bro. P. C. 230, 1 om. edit.

³ 3 T. R., B. R. 474.

⁴ 2 Bro. C. C. 219.

⁵ 8 T. R., B. R. 147.

ment being for a lease at the same rent he paid to his landlord. The defendant in his answer admits he might have said, she should have it upon the same terms; not meaning the same rent, but upon terms upon the whole equally advantageous; insisting that, as he had laid out a great deal of money, she would upon the whole have as good a bargain. She offers parol evidence to prove an express agreement, that she was to have it upon the same terms as he had it, and to show that nothing could be meant by that expression, but the same rent, nothing being in discussion between them but the amount of the rent. He alleges a particular reason for not stating it—that he had not his own lease at hand. The question is, whether the evidence is admissible; for, though read, it has been read without prejudice. The defendant controverts the effect of the evidence, supposing it can [*490] *be received: but I own, my opinion is, that, if received, it will make out the plaintiff's case; for taking the whole together, there is hardly a doubt that the impression meant to be conveyed was, that the rent should be the same; and, whatever he meant, that is the impression any person would have received from his language.

By the rule of law, independent of the statute, parol evidence cannot be received to contradict a written agreement. To admit it for the purpose of proving that the written instrument does not contain the real agreement, would be the same as receiving it for every purpose. It was for the purpose of shutting out that inquiry, that the rule of law was adopted. Though the written instrument does not contain the terms, it must in contemplation of law be taken to contain the agreement, as furnishing better evidence than any parol can supply.

Thus stands the rule of law. But when equity is called upon to exercise its peculiar jurisdiction by decreeing a specific performance, the party to be charged is let in to show, that, under the circumstances, the plaintiff is not entitled to have the agreement specifically performed; and there are many cases in which parol evidence of such circumstances has been admitted, as in *Buxton v. Lister*,¹ which is very like this case. There, upon the face of the instrument, a specific sum was to be given for the timber: but it was shown by parol that the defendants were induced to give that upon the representation that it was valued by two timber merchants, which was not true. So here by the agreement upon the face of it she is to pay this rent; but by the evidence she was induced to do so, because she thought, from his representation, that it was the rent he paid. If this had been a bill brought by this defendant for a specific performance, I should have been bound by the decisions to admit the parol evidence, and to refuse a specific performance. But this evidence is offered, not for the purpose of resisting, but of obtaining a decree, first [*491] *to falsify the written agreement, and then to substitute in its place a parol agreement, to be executed by the Court.

¹ 3 Atk. 383.

Thinking, as I do, that the statute has been already too much broken in upon by supposed equitable exceptions, I shall not go farther in receiving and giving effect to parol evidence than I am forced by precedent. There is no case in which the Court has gone the length now desired. But two cases are produced, in which it is said there is an intimation from Lord Hardwicke to that effect. Upon that it might be sufficient to say, it was not decided. But it is evident, from the manner in which the great Judge qualifies his own doubts that he thought it impossible to maintain such a proposition as the plaintiff is driven to maintain. In *Walker v. Walker*,¹ it is to be observed, first that the parol evidence was not offered for the purpose of contradicting anything in the written agreement. It was admitted, that, as far as it went, it stated the true meaning. But it was contended by the defendant, that there was another collateral agreement, which the plaintiff ought to execute before he could have the benefit of the written agreement. It was evidence, too, offered in defence, to resist a decree. Lord Hardwicke, after stating the ground, express himself thus:—

“The plaintiff, for these reasons, is not entitled to relief in this Court, for supplying the defect of a legal conveyance, but it is rebutted by the equity set up by the defendant. I am not at all clear, whether, if the defendant had brought his cross-bill to have this agreement established, the Court would not have done it, upon considering it in the light of those cases, where one part of the agreement being performed by one side, it is but common justice it be carried into execution on the other; and the defendant would have had the benefit of it as an agreement.”

So he states the special reason; not being at all clear that the defendant would have been so entitled. There is nothing of admitting parol evidence to contradict a written agreement, and next to set up a parol agreement, to be executed by the Court.

*The other case referred to is *Joynes v. Statham*,² referred to for the opinion expressed by Lord Hardwicke:— [*492]

“Suppose the defendant had been the plaintiff, and had brought the bill for a specific performance of the agreement, I do not see but he might have been allowed the benefit of disclosing this to the Court.”

But the reason is assigned:—

“Because it was an agreement executory only; and as in leases there are always covenants relating to taxes, the Master will inquire what the agreement was as to taxes; and, therefore, the proof offered here is not a variation of the agreement, but is explanatory only of what those taxes were. I am of opinion to allow the evidence of the omission in the lease to be read.”

The parol evidence was received for the purpose of resisting performance of the agreement, and received likewise, not to contradict it, but to show, that, as it stood, it did not fully express the meaning and intention of the parties, there being

¹ 2 Atk. 98.

² 3 Atk. 388.

another stipulation agreed upon, but not introduced into the written instrument. And even if that had been a bill by the defendant, to carry into execution the agreement, he would not have found it necessary to offer parol evidence to contradict anything in it; for he allowed it to contain the intention, as far as it went; but the provision, that the rent was to be clear of taxes, was omitted. And Lord Hardwicke, from the particular nature of that stipulation, expresses a doubt whether, if the defendant had been plaintiff, he might not have been permitted to give evidence, it being usual to leave that open; intimating that it would be merely explanatory as to the taxes.

But this is evidence to vary an agreement in a material part; and having varied it, to procure it to be executed in another form. There is nothing to show that ought to be done; and my opinion being, that it ought not, I must dismiss the bill, but without costs.

The plaintiff then applied for a decree according to the [*493] *written agreement, with a covenant for quiet enjoyment, as he had not power to grant such a lease.

THE MASTER OF THE ROLLS said, the bill was not for that purpose; expressly objecting to a lease at the rent of 73*l.* 10*s.*

The bill was dismissed without costs, and without prejudice to another bill for a lease at the rent of 73*l.* 10*s.*

The important distinction, now so well established, between a plaintiff *seeking*, and a defendant *resisting* specific performance, is well laid down by Sir William Grant in the principal case. The plaintiff, it will be observed, filed the bill for the specific performance of a written agreement, with a variation supported only by parol evidence, alleging that by mistake or fraud the written agreement without the variation did not contain the real agreement; the parol evidence, however, was very properly rejected; but his Honor observes, that had the bill been brought by the defendant for a specific performance, he would have been bound by the decisions to have admitted the parol evidence, and to have refused a specific performance.

Lord Hardwicke, in *Joyes v. Statham*, 3 Atk. 388, which is referred to and commented on in the principal case, seems to have thought, that by possibility, a plaintiff might be permitted to show, by parol evidence, an omission, either by mistake or fraud, in the written agreement. It is, however, by no means improbable that his Lordship has been misreported. Lord Redesdale, in commenting upon this case, observes that it is true that Mr. Atkyns makes Lord Hardwicke say, "Suppose the defendant had been the plaintiff, and had brought the bill for a specific performance of the agreement, I do not see but he might have

been allowed the benefit of disclosing this to the Court." That passage was cited for the purpose of showing that Lord Hardwicke thought there might be an addition to the agreement by parol. He had found a reference to a note of the same case by Mr. Brown, who was King's counsel in Lord Hardwicke's time, and in great business; and the manner in which he had put the case is thus:—"But query, if on a bill for performance of an agreement, and an attempt to add to the agreement by parol, whether plaintiff can do it in that case?" Therefore, Mr. Brown certainly did not understand Lord Hardwicke as saying that it could *be done; and, looking attentively at the words used by Atkyns, he did not think they imported anything positive: *Clinan v. Cooke*, 1 S. & L. 38. [*494]

By the rule of law, as observed by the Master of the Rolls in the principal case, independent of the Statute of Frauds, parol evidence could not be received to contradict a written agreement, for to admit it for the purpose of proving that the written agreement does not contain the real agreement would be the same as receiving it for every purpose; and it was for the purpose of shutting out that inquiry that the rule of law was adopted. Though, therefore, the written instrument does not contain the terms, it must in contemplation of law be taken to contain the agreement, as furnishing better evidence than any parol can supply. This rule, even before the Statute of Frauds, was equally binding in equity upon a plaintiff seeking specific performance: *Parteriche v. Powlet*, 2 Atk. 384; *Tinney v. Tinney*, 3 Atk. 8; *Binsted v. Coleman*, Bunb. 65; *Hogg v. Snaitth*, 1 Taunt. 347; *Martin v. Pycroft*, 2 De G. Mac. & G. 795.

At law, however, the operation of a written agreement may be suspended by a contemporaneous oral agreement. See *Wallis v. Littell*, 11 C. B. (N. S.) 369; there, by a written agreement, the defendant agreed to assign to the plaintiff a farm with immediate possession, upon the same terms as he held of his landlord, but at the time of making such agreement an oral agreement was entered into between the plaintiff and the defendant that the written agreement should be void if the landlord refused to assign. It was held by the Court of Common Pleas, in an action for not assigning, that the oral agreement was admissible, as it was in analogy with the delivery of a deed as an escrow, and neither varied nor contradicted the writing, but suspended the commencement of the obligation.

"The foundation of the rule," observes Lord Chief Baron Eyre, "in which parol evidence has been holden to be admissible, is in the general rules of evidence, in which writing stands higher in the scale than mere parol testimony; and when treaties are reduced into writing, such writing is taken to express the ultimate sense of the parties, and is to speak for itself. Indeed, nothing is so familiar as this idea. At Nisi Prius, when an agreement is spoken of, the first question always asked is,

whether the agreement is in writing: if so, there is an end of all parol evidence; for when parties express their meaning with solemnity, this is very proper to be taken as their final sense of the agreement. In the case of a contract respecting land, this general idea receives weight [*495] from the circumstance, that you *cannot contract at all on that subject but in writing; and this, therefore, is a further reason for rejecting parol evidence. In this way *only* is the Statute of Frauds material, for the foundation and bottom of the objection is in the general rules of evidence. I take this rule to apply in every case where the question is, what is the agreement?" *Davis v. Symons*, 1 Cox. 402.

Accordingly, it will be found that parol evidence on the part of a plaintiff seeking a specific performance of a written contract, with a variation supported by such evidence, will, where there are no acts of part performance, be invariably rejected, notwithstanding the difference of the written, from the real, agreement, was, as in the principal case, the result of fraud, accident, or surprise. Thus, a plaintiff cannot adduce evidence to prove that lands comprised in a written agreement were, by parol, agreed to be left out of a lease (*Lawson v. Laude*, 1 Dick. 346; *Fell v. Chamberlain*, 2 Dick. 484); nor to prove verbal declarations at an auction, in opposition to printed conditions of sale. Thus, in *Jenkinson v. Pepys*, cited 1 V. & B. 528, which was a very hard case for the vendor (who clearly intended that a plantation in a nursery should be valued distinctly from the timber which the defendant was to take with the estate), it was given in evidence that, at the auction, a distinct statement was made, that there was to be a separate valuation of the nursery, and that the defendant, or his agent, was present, and heard that declaration; but the opinion of the Court was clear, that evidence of that declaration for the vendor could not be received, being offered to supply a defect, to alter in some respect the written import of the contract: *S. C.*, stated 15 Ves. 521. See also *Higginson v. Clowes*, 15 Ves. 516; *Humphries v. Horne*, 3 Hare, 276.

Nor is evidence admissible to prove that a written agreement to sell to two jointly was in reality an agreement to sell to one of them, and that the other was to have some interest in the premises by way of security for such part of the purchase-money as he might advance; for that would be to set up a perfectly distinct contract: *Davis v. Symonds*, 1 Cox, 402; and see *Lord Townshend v. Stangroom*, 6 Ves. 328; *Clinan v. Cooke*, 1 S. & L. 30; *Besant v. Richards*, Toml. 509.

Where, however, a parol variation has been in *part performed*, a specific performance of the written agreement with the variation will be decreed: *Anon.*, 5 Vin. Abr. 522, tit. 38; *Legal v. Miller*, 2 Ves. 299; *Pitcairn v. Ogbourne*, 2 Ves. 375; ante, Vol. i. p. 783.

The jurisdiction, however, of a Court of equity to decree a specific

performance is peculiar, and discretionary, *since the refusal to exercise it will not preclude the plaintiff from seeking damages [*496] at law. Moreover, before the Statute of Frauds, parol evidence was admissible as a defence to a bill for specific performance, and it has not been rendered inadmissible by that statute. "It should be recollected," says Lord Redesdale, "what are the words of the statute: 'No person shall be charged upon any contract, or sale of lands, &c., unless the agreement, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.' No person shall be charged with the execution of an agreement who has not, either by himself or his agent, signed a written agreement; but the statute does not say, that if a written agreement is signed, the same exception shall not hold to it that did before the statute. Now, before the statute, if a bill had been brought for specific performance, and it had appeared that the agreement had been prepared contrary to the intent of the defendant, he might have said, 'That is not the agreement meant to have been signed.' Such a case is left as it was by the statute: *it does not say that a written agreement shall bind, but that an unwritten agreement shall not bind:*" *Clinan v. Cooke*, 1 S. & L. 39. And see *Rann v. Hughes*, 7 T. R. 350, n.

As a *defence*, however, to a bill for a specific performance, parol evidence is admissible to show, not only that by fraud, but by mistake, or even surprise, the written agreement does not contain the real terms. In the leading case of *Joynes v. Statham*, 3 Atk. 388, a bill was filed by a lessee for the specific performance of a written agreement for the lease of a house at the rent of 9*l.* a-year. The defendant, who was a marksman, by his answer insisted that it ought to have been inserted in the agreement, that the tenant should pay the rent *clear of taxes*: but the plaintiff, having written the agreement himself, had omitted to make it clear of taxes; and that the defendant, unless this had been the agreement, would not have sunk the rent from 14*l.* to 9*l.*; and offered to read evidence to show that this was part of the agreement. It was insisted for the plaintiff, that the defendant ought not to be admitted to add by parol to the written agreement, which was expressly guarded against by the Statute of Frauds. Lord Hardwicke, however, admitted the evidence. "I permitted," said his Lordship, "this point to be debated at large, because it is decisive in the cause; for I am very clear the evidence ought to be read. This has been taken by way of *objection* to the plaintiff's bill. The constant practice of the Court is, that it is in their **discretion*, whether in such a bill they will decree specific performance, or leave the plaintiff to [*497] his remedy at law. Now, had not the *defendant* a right to insist, either on account of an *omission*, *mistake*, or *fraud*, that the *plaintiff* shall not have a specific performance? It is a very common *defence* in this

Court, and there is no doubt that it ought to be received, and quite equally whether it is insisted on as a *mistake* or a *fraud*."

In *Clarke v. Grant*, 14 Ves. 519, Sir W. Grant, M. R., admitted parol evidence of the defendant, in opposition to a bill filed for specific performance, showing that, at the time he entered into the written agreement, he made a verbal stipulation for certain alterations in the agreement, upon the faith of which, being consented to, he executed it.

In *Winch v. Winchester*, 1 V. & B. 375, the defendant purchased at a sale an estate, described in the particulars as containing, by estimation, forty-one acres, be the same more or less; whereas, it turned out on admeasurement to amount only to thirty-five or thirty-six acres. On a bill being filed for specific performance, the defendant stated by his answer, that, previous to the sale, the auctioneer publicly told him that the farm was forty-one acres, and if it was less, an abatement would be made; but he submitted to perform the agreement with an abatement. Sir W. Grant, Mr. R., admitted evidence to prove the declaration of the auctioneer, and dismissed the bill, unless the plaintiff would make an abatement.

In *Manser v. Back*, 6 Hare, 443, premises were advertised to be sold according to certain printed particulars and conditions of sale. Before the sale took place, several of the printed copies were altered by the vendor's solicitor, who introduced in writing a reservation of a right of way to other premises belonging to the vendor. Several of the altered copies of the particulars were laid on the table in the auction-room, without any remark with regard to the alteration, and an altered copy was delivered to the auctioneer, who read the same aloud before the biddings commenced; but the party who became the purchaser did not hear or notice the alteration. The contract was signed by the auctioneer inadvertently, and by the purchaser, on a copy of the particulars of sale not containing the reservation. After the purchase-money was paid and possession given, the purchaser filed his bill for a specific performance of the contract, by a conveyance from the vendor, without a reservation of the right of way. But Sir J. Wigram, V. C., considering that the evidence of the vendor clearly shewed the mistake made by the auctioneer, dismissed the bill; but his Honor said, that if the vendors *had been plaintiffs asking a decree for specific per-
[*498] formance, with an addition to the paper signed by the purchaser, such as they said ought to have been introduced, it was clear that no such decree could have been made. The evidence to prove the additional term would have been inadmissible.

The important case of *Lord Townshend v. Stangroom*, 6 Ves. 328, affords a good illustration of the distinction here discussed. In that case, the lessor filed a bill for a specific performance of a written agreement for a lease, with a variation as to the quantity of land to be included in the lease, supported by parol evidence. The lessee also filed

a bill for specific performance of the written agreement simply. Lord Eldon dismissed both bills; the first, because the parol evidence was not admissible on behalf of the lessor seeking specific performance; the second, because it was admissible when adduced by him as a defendant, for the purpose of showing that, by mistake or surprise, the written agreement did not contain the terms intended to be introduced into it. See *Hosier v. Read*, 9 Mod. 86. *Vouillon v. States*, 2 Jur. N. S. 845; *Wood v. Scarth*, 2 K. & J. 33; *Barnard v. Cave*, 26 Beav. 253; *Webster v. Cecil*, 30 Beav. 62; *Price v. Ley*, 4 Giff. 235, S. C., affirmed on appeal, 32 L. J. N. S. Ch. 530.

Where the terms of a written agreement have been ambiguous, so that, adopting one construction, they may reasonably be supposed to have an effect which the defendant did not contemplate, the Court has, upon that ground only, refused to enforce the agreement: *Calverley v. Williams*, 1 Ves. jun. 201, n. 48; *Jenkinson v. Pepys*, 15 Ves. 521, 1 V. & B. 528, 6 Ves. 330; *Clowes v. Higginson*, 1 V. & B. 524; *Neap v. Abbott*, C. P. Coop. 333, and cases there collected. In the first three cases, the plaintiff was the author of the ambiguity; but in the last the vendor, the author of the ambiguity, had the benefit of the principle, although it was certain the purchaser supposed he was buying all he claimed: 6 Hare, 447. See also *Callaghan v. Callaghan*, 8 C. & F. 374; *Baxendale v. Seale*, 19 Beav. 601; *Swaishland v. Dearsley*, 29 Beav. 430. And see *Watson v. Marston*, 4 De G. Mac. & G. 230; there a mortgagee with power of sale, obtained a foreclosure decree, and then entered into an agreement to sell the estate, with a clause providing that as the vendor was mortgagee with power of sale, she would only enter into the usual covenant that she had not incumbered. The purchaser objected to the validity of the foreclosure decree, and insisted upon having the conveyance under the power of sale; and on the vendor declining to convey in that form, instituted a suit for specific performance, in which the vendor adduced evidence showing *that the clause was inserted by inadvertence, and that the defendant [*499] never intended to incur the risk of opening the foreclosure by conveying under the power. It was held by the Lord Justices that the misapprehension on the part of the defendant was a sufficient defence to the enforcement of a conveyance under the power. "The Court," said Lord Justice Turner, "does not refuse specific performance on the arbitrary discretion of the judge. It must be satisfied that the agreement would not have been entered into if its true effect had been understood."

Sir Thomas Plumer, in *Clowes v. Higginson*, 1 V. & B. 524, seems to have been disposed to overrule the distinction which the authorities have clearly settled in favour of admitting evidence in defence against specific performance, upon the grounds which have been before mentioned. He admits, indeed, that a defendant is permitted to show

fraud, mistake, or surprise, *collateral to and independent of the written contract*; but he thought that there was considerable difficulty in the application of evidence under this head, calling for great caution, especially upon sales by auction, lest under the idea of introducing evidence of mistake, the rule should be relaxed, by letting it in to explain, alter, contradict, and, in effect, get rid of, a written agreement; that, in sales by auction, the real object of introducing declarations by the auctioneer, or other person, was to explain, alter, or contradict the written contract—in effect, to substitute another contract: and that, independent of authority, he should be much disposed to reject such declarations, as open to all the mischief against which the statute was directed, and also violating the rule of law which prevailed previously, whether offered by a plaintiff seeking a performance, or by a defendant, to get rid of the contract: a distinction which it was, he thought, difficult to adopt, where evidence was introduced to show, that the writing purporting to be the contract was not the contract, and that there was no contract between them, if that which was proved by parol did not make a part of it. See also *Price v. Ley*, 4 Giff. 235; *S. C.*, affirmed on appeal by the Lords Justices, 32 L. J. (N. S.) Ch. 530.

It is, however, clear, that, as a *defence*, parol evidence upon the ground of fraud, accident, surprise, or mistake, is admissible not only as collateral to and independent of the written agreement, but in contradiction to it. See *Ramsbottom v. Gosden*, 1 V. & B. 165; *Winch v. Winchester*, 1 V. & B. 375.

In a recent case a bill was filed for specific performance of a written agreement to grant a lease, but the defendant having proved by evidence in writing that by mistake the agreement did not [*500] include a stipulation as to payment of a premium, the bill was dismissed with costs by Sir W. Page Wood, V. C., but without prejudice to an action for damages, and to the costs of the suit being included in such action. "That a person," said his Honor, "shall not be compelled by this Court specifically to perform an agreement which he never intended to enter into, if he has satisfied the Court that it was not his real agreement, is well established. Perhaps, no case better illustrates the principle than *The Marquis of Townshend v. Stangroom* (6 Ves. 328), which shews that an agreement will not be specifically performed by this Court with a parol variation; and on the other hand, that this Court will not decree specific performance without such variation, if it be relied on as a defence:" *Wood v. Scarth*, 2 K. & J. 33.

Although it will be a good defence to a bill for specific performance to show that a written agreement does not contain a provision verbally agreed upon between the parties, nevertheless if the plaintiff submits to perform the omitted provision, and there has been no fraud or mistake with reference to it, the Court will make a decree in favour of the plaintiff. See *Martin v. Pycroft*, 2 De G. Mac. & G. 785, there the defend-

ant agreed in writing to grant the plaintiff a lease at a specified rent, and for a specified term, subject to the same covenants, clauses, and agreements as were contained in an expiring lease under which he then held the property, and the plaintiff filed a claim for specific performance, stating the written agreement, and also that it was further agreed verbally that he should pay a premium of 200*l.*, which, by his claim, he offered to do. It was held by the Lords Justices, reversing the decision of Sir James Parker, V. C., that the additional verbal agreement did not render the Statute of Frauds a valid defence to the claim. "Our opinion," said Lord Justice Knight Bruce, "is, that when persons sign a written agreement, upon a subject obnoxious, or not obnoxious to the statute that has been so particularly referred to, and there has been no circumvention, no fraud, nor (in the sense in which the term 'mistake' must be considered as used for the purpose) mistake, the written agreement binds at law and in equity, according to its terms, although verbally a provision was agreed to, which has not been inserted in the document: subject to this, that either of the parties, sued in equity upon it, may perhaps be entitled, in general, to ask the Court to be neutral, unless the plaintiff will consent to the performance of the omitted term." See also *Leslie v. Tompson*, 9 Hare, 268; *Barnard v. Cave*, 26 Beav. 253.

In *Croome v. Lediard*, 2 My. & *K. 251, by a written agreement between the plaintiff and the defendant, the plaintiff [*501] agreed to sell, and the defendant agreed to purchase, a certain property called the Leigh estate; and by the same agreement the defendant agreed to sell and the plaintiff agreed to purchase, another estate called the Haresfield estate; both estates were to be valued by the same person, and both purchases were to be completed on the same day; but *it was not expressed that the two contracts were to be dependent on each other*. Sir John Leach held, that the plaintiff was entitled to a specific performance of the contract as to the Leigh estate, although the defendant was unable to make a good title to the Haresfield estate, and he refused to admit evidence on the part of the defendant, to show that an exchange was intended. "The intention of the parties," said his Honor, "must be collected from the expressions in the written instrument; and no evidence aliunde can be received to give a construction to the agreement contrary to the plain import of those expressions." This decree was affirmed by Lord Brougham, on appeal, without hearing the respondent's counsel in reply. "It had been argued," said his Lordship, "that although evidence of matter dehors was not admissible for the purpose of raising an equity, it might be given for the purpose of rebutting an equity, and that, therefore, it was competent to the defendant in a suit for specific performance to avail himself of such evidence, though it was not competent to the plaintiff to do so. The distinction was sound within certain limits, and within those limits the

rule might be safely adopted. Parol evidence of matter collateral to the agreement might be received, but no evidence of matter *dehors* was admissible to alter the terms and substance of the contract ;” and after commenting on *Clarke v. Grant*, 14 Ves. 519, his Lordship added :— “ In the present case the purpose for which the parol evidence was tendered on the part of the defendant was not to enforce a collateral stipulation, but to show that the transaction was conducted on the basis of an exchange ; a circumstance which, if true, was totally at variance with the language and plain import of the instrument. Nothing could be more dangerous than to admit such evidence ; for if the agreement between the parties was in part conducted upon the basis of an exchange, why was the instrument so drawn as to suppress the real nature of the transaction ? ”

Lord St. Leonards has remarked, that though the decision in this case was probably well founded, it is not, perhaps, placed altogether upon its true grounds ; that the evidence was inadmissible, not because it was not to enforce a collateral stipulation, *but because it did [*502] not prove that by *fraud, mistake, or surprise, the agreement did not state the alleged real contract*, viz., for an exchange between the parties. The defendant was an attorney, and fraud was not alleged, nor indeed was mistake or surprise, for he had himself prepared the agreement ; and he preferred making it a mutual contract for sale and purchase, instead of an exchange, and of course he could not be permitted to alter its character by parol evidence of the mode in which the negotiation was conducted, and of the views of the parties, in order to avoid the consequences which attached to the nature of the contract which the parties with their eyes open, having regard to other objects, had thought it proper to adopt. Sugd. V. & P. 163, 14th edit. The principle upon which, therefore, *Croome v. Lediard* may safely be put, seems to be the same as that upon which Lord Thurlow decided *Lord Irnham v. Child*, 1 Bro. C. C. 92. See *Lord Townshend v. Stangroom*, 6 Ves. 332.

The inadvertent omissions to propose an intended term to an agreement is not a sufficient ground for the Court declining to grant specific performance. Thus, in *Parker v. Taswell*, 2 De G. & Jo. 559, where an occupant of land had, under an expiring tenancy, always paid the tithe rent-charge, afterwards entered into a written agreement with the landlord for a lease at the old rent, but without any stipulation being introduced as to the tithe rent-charge. It was held by Lord Chelmsford, C., that the landlord could not insist on such a stipulation being inserted, as a condition of specific performance being enforced against him. “ In all the cases,” said his Lordship, “ which have been cited on this point, there was clear evidence of mistake. Here there is no evidence that the parties intended anything except to leave the payment

of the rent-charge to be made according to act of Parliament." See, however, *Broughton v. Hutt*, 3 De G. & Jo. 501.

So a mistake as to the purpose for which the property is to be used: *Mildmay v. Hungerford* (2 Vern. 242); or, as to the legal consequences of an act (*Great Western Railway Co. v. Cripps*, 5 Hare, 91); or the legal effect of the agreement: *Powell v. Smith*, 14 L. R. Eq. 85, will not be a sufficient defence to a bill for specific performance: Dart 965, 4th ed.

A parol waiver of a written contract, amounting to a complete abandonment, and clearly proved, will bar a specific performance: *Price v. Dyer*, 17 Ves. 356; *Inge v. Lippingwell*, 2 Dick. 469. And see *Jordan v. Sawkins*, 1 Ves. jun. 404; *Rich v. Jackson*, 4 Bro. C. C. 519; *Filmer v. Gott*, 6 Ves. 337, n.; *Coles v. Trecothick*, 9 Ves. 250; *Robinson v. Page*, 3 Russ. 119: and see *Legal v. Miller*, 2 Ves. 299.

Where a written agreement is **afterwards* varied by parol, upon a bill being filed for specific performance with or without [*503] the variation, the Court will, it seems, put the defendant to his election, and, if he declines to elect, will decree specific performance of the written agreement without the variation: *Robinson v. Page*, 3 Russ. 114. And see *Price v. Dyer*, 17 Ves. 356. But it seems that if an agreement is correctly put into writing, and at the *same time* the parties add a term by parol, evidence of it is not admissible even as a defence to specific performance: *Ormerod v. Hardman*, 5 Ves. 722; see *Jenkins v. Hiles*, 6 Ves. 654, 655.

Although, however, parol variations of a written agreement verbally agreed upon, are not sufficient to prevent the execution of the written agreement, they clearly will, if the parol variations are so acted upon, that the original agreement could be no longer enforced without injury to one party, who, as before observed, will be entitled to specific performance, with the parol variations: *Anon.*, 5 Vin. 522, pl. 38, 4 Geo. 1; *Legal v. Miller*, 2 Ves. 299; *Pitcairn v. Osbourne*, 2 Ves. 375. And see *Price v. Dyer*, 17 Ves. 356; *Van v. Corpe*, 3 My. & K. 277.

It will depend, however, upon the particular circumstances of each case, whether the evidence, when admitted to prove a variation in the contract, will entirely defeat the plaintiff's title to specific performance, or whether the Court will perform the contract, taking care that the subject-matter of the parol agreement is also carried into effect, so that all the parties may have the benefit of what they contracted for. Thus, in *Ramsbottom v. Gosden*, 1 V. & B. 165, where, by the mistake of the solicitor, the written agreement only required the purchaser to bear the expense of the conveyance, whereas the real agreement was, that he should also bear the *expense of making out the title*, Sir W. Grant, M. R., admitted parol evidence of the mistake, and held that the plaintiff must either submit to have the agreement performed in the way contended for by the defendant, or his bill, which was for the specific per-

formance of the written agreement, dismissed. And see *The London and Birmingham Railway Company v. Winter*, 1 Cr. & Ph. 57, in which suit a parol variation, not set up by answer, came out on the cross-examination of the defendant's agent, who was one of the plaintiff's witnesses. Lord Cottenham seemed to think that it might have been a proper subject for inquiry before the Court finally disposed of the case, but as the plaintiff consented to adopt it as part of the contract, a specific performance of the contract with the parol variation was decreed, with costs. In *Lord William Gordon v. Marquis of Hertford*, 2 Madd. 122, where parol evidence was admitted *as [*504] a defence to specific performance, Sir T. Plumer, V. C., gave the plaintiff the option, either to have specific performance of the agreement, as proved by the parol evidence, or to have an issue, in which the person giving the evidence might be examined, or to have his bill dismissed. And see *Gerrard v. Grindling*, 2 Swanst. 244; *Flood v. Finlay*, 2 Ball. & B. 9; *Clarke v. Grant*, 14 Ves. 519.

Upon the principle that it is in the discretion of Courts of equity, whether they will decree specific performance or leave the plaintiff to his remedy at law, unless he comes with perfect propriety of conduct (*Harnett v. Yielding*, 2 S. & L. 554; *Cadman v. Horner*, 18 Ves. 10; *Robinson v. Wall*, 10 Beav. 61; 2 Ph. 372), clear from all circumvention and deceit (*Davis v. Symonds*, 1 Cox, 407; *Reynell v. Spyre*, 8 Hare, 222; 1 De G. Mac. & G. 660), and the agreement is certain (*Tillett v. The Charing Cross Bridge Hospital*, 26 Beav. 419; *Darbey v. Whittaker*, 4 Drew. 134), fair and just in all its parts (*Underwood v. Hitchcock*, 1 Ves. 279; *Buxton v. Lester*, 3 Atk. 383, 386; *Ellard v. Lord Llandaff*, 1 Ball. & B. 241; *Martin v. Mitchell*, 2 J. & W. 413; *Stanley v. Robinson*, 1 Russ. & My. 527; *Warde v. Dickson*, 10 W. R. (V. C. K.) 148; 28 L. J. N. S. (Ch.) 315), specific performance will not be decreed.

If a definite representation be made, affecting the value of the subject of the contract, and it turn out to be untrue, the person deceived, especially if he had no means of ascertaining the truth of the representation, will be entitled to resist the specific performance of the contract. Thus, in *Lord Brooke v. Rounthwaite*, 5 Hare, 296, a vendor filed a bill for the specific performance of a contract to purchase a timber estate, where the particulars of sale described it as comprising a certain wood "with upwards of sixty-five acres of fine oak timber trees, the average size of which approached fifty feet," and in the particulars of the lot, described it only as "sixty-five acres, two roods, and twelve perches of growing timber." It appeared on the evidence for the plaintiff, that the average size of the trees was about thirty-five feet, but on that for the defendant, that it was only about twenty-two feet, and the defendant moreover alleged, that it was sold at a time when he had no means of seeing the wood, and that he relied on the particulars of sale.

It was held by Sir J. Wigram, V. C., that as the representation on the particulars of sale had proved to be incorrect, and as it was not shown that the defendant knew it to be incorrect at the time of making the contract, the Court would not, at all events, enforce the specific performance of the contract without compensation; and that (inasmuch as the particulars of sale did not express what *number of trees or quantity of timber the wood contained), it was not a case in [*505] which the Court could measure the extent of the deficiency, or ascertain the amount of compensation; and that the bill must therefore be dismissed. And see *Brealey v. Collins*, Younge, 317; *Lowndes v. Lane*, 2 Cox, 363; *Stewart v. Alliston*, 1 Mer. 26; *Harris v. Kemble*, 1 Sim. 11; 5 Bligh, N. S. 730; 2 D. & C. 463; *Cox v. Middleton*, 2 Drew. 209; *Price v. Macaulay*, 2 De G. Mac. & G. 339; *Rawlins v. Wickham*, 1 Giff. 355; 3 De G. & Jo. 304; *Higgins v. Samels*, 2 J. & H. 460; *Farebrother v. Gibson*, 1 De G. & Jo. 602; *Leyland v. Illingworth*, 2 De G. F. & Jo. 248. But see *Johnson v. Smart*, 2 Giff. 151; *Cook v. Waugh*, 2 Giff. 201.

A party obtaining an agreement by a partial misrepresentation, is not entitled to a specific performance on waiving the part affected by the misrepresentation, as the effect of partial misrepresentation is not to alter or modify the agreement pro tanto, but to destroy it entirely, and to operate as a personal bar to the person who has practised it: *Lord Clermont v. Tasburgh*, 1 J. & W. 112. In *Cadman v. Horner*, 18 Ves. 10, where the purchaser was plaintiff, the specific performance was resisted by the vendor, on the ground that the plaintiff, who was his agent, had misrepresented the value of the estate, and also represented to him that the houses had been injured by a flood, and would require between 50*l.* and 60*l.* to repair them, whereas, in truth, the premises at the time of the contract required no more than 40*s.* to put them in complete repair. Sir W. Grant, M. R., although he thought the evidence of the inadequacy of the price considerably shaken by the defendant's admission of the clear rent of the premises, dismissed the bill, observing, that, upon the evidence, the plaintiff had been guilty of a degree of misrepresentation, operating to a certain, though a small extent; this misrepresentation disqualified him from calling for the aid of a Court of equity, where he must come, as it is said, with clean hands. He must, to entitle himself to relief, be liable to no imputation in the transaction; that it was not a case where the Court was called upon to rescind an agreement, and to decree the conveyance executed in pursuance of it to be delivered up to be cancelled, which would admit a different consideration. See 1 J. & W. 120.

But a mere indefinite misrepresentation, such as ought to put a person upon inquiry, will not be a sufficient ground for his resisting specific performance of a contract. Thus, a representation that only a small fine was payable upon the renewal of leaseholds, and that they

were of nearly equal value with freeholds, was held not to be a sufficient defence to a suit for specific *performance, as it ought to have [*506] put the purchaser upon inquiry, though connected with certain circumstances, such representation might have been fraudulent, and therefore a good ground for rescinding the contract: *Fenton v. Browne*, 14 Ves. 144; and see *Lowndes v. Lane*, 2 Cox, 363; *Scott v. Hanson*, 1 Sim. 13; 1 Russ. & My. 128; *Trower v. Newcome*, 3 Mer. 704; 5 Russ. 215; *Abbott v. Swooner*, 4 De G. & Sm. 448; *Colby v. Gadsden*, 34 Beav. 416,

And not only where there has been actual misrepresentations, but also where there has been a suppression of the truth, specific performance will not be decreed. See *Young v. Clerk*, Prec. Ch. 538; *Maddeford v. Austwick*, 1 Sim. 89; *Bonnett v. Sadler*, 14 Ves. 526; *Drysdale v. Mace*, 2 Sm. & G. 225; 5 De G. Mac. & G. 103, and *Shirley v. Stratton*, 1 Bro. C. C. 440, in which case, a bill was filed for the specific performance of an agreement for the purchase of an estate in marsh land at Barking in Essex, and for payment of a sum of 1000*l.*, the purchase-money. The defence was, that the estate being represented to the defendant as clearing a nett value of 90*l.* per annum, and no notice was taken to him of the necessary repair of a wall to protect the estate from the river Thames, which would be an outgoing of 50*l.* per annum, and it appearing that there had been an *industrious concealment* of the circumstance of the wall during the treaty, Lord Thurlow dismissed the bill. In *Bascombe v. Beckwith*, 8 L. R. Eq. 100: the owner of an estate put up the whole estate, except a small piece of land, for sale in lots, subject to conditions which provided that no public-house should be built and no trade carried on upon the property. In the particulars of sale, the property was described as the "Manor House Estate," and there was nothing to show that any part of the vendor's estate was not included, and in the plan annexed to the particulars the different lots were coloured, and the excepted piece of land was uncoloured, but was not marked with the vendor's name, though the names of the adjoining owners were printed. It was improbable that a public-house would be built on any of the adjoining estates. It was held by Lord Romilly, M. R., that a purchaser of one of the lots, consisting of a mansion-house, a hundred yards distant from the excepted piece of land, who had purchased on the belief that the whole of the vendor's estate was included in the particulars of sale, and consequently would be subject to the restrictive conditions, could not be compelled to complete his purchase unless the vendor would enter into restrictive covenants as to the excepted piece of land. "It is," said his Lordship, "of the greatest [*507] importance that it *should be understood, that the most perfect truth, and the fullest disclosures should take place, in all cases where the specific performance of a contract is required, and that, if this fails, even without any intentional suppression, the Court will grant

relief to the man who has been thereby deceived, provided he has acted reasonable and openly." And see *Lucas v. James*, 7 Hare, 410 ; *Denny v. Hancock*, 6 L. R. Ch. App. 1.

The mere suppression of acts having been done by the plaintiff when the defendant must have known that they were done by somebody, is not a sufficient reason for refusing specific performance. See *Haywood v. Cope*, 25 Beav. 140. There the plaintiff had worked the coal under his estate, but abandoned it as unprofitable. Twenty years afterwards the defendant cleared the pit and examined the coal in the shaft with other persons, and subsequently contracted for a lease. The Colliery turned out to be worthless. It was held by Sir John Romilly, M. R., that the defendant could not resist a specific performance, on the ground of the plaintiff not having communicated the fact of his having worked the mine and found it unprofitable.

Equity will not decree specific performance of an agreement made by a person in a state of intoxication, although the plaintiff may neither have drawn him in to drink nor have taken advantage of his situation (*Cragg v. Holme*, cited 18 Ves. 14) ; but the Court might under such circumstances decree specific performance as against a second purchaser taking with notice of the first agreement (*Shaw v. Thackray*, 1 Sm. & G. 537), but where a plaintiff has by contrivance induced the defendant to take too much drink, and afterwards taken advantage of his condition by entering into an agreement with him, not only would specific performance be refused, but the agreement would be rescinded (*Cooke v. Clayworth*, 18 Ves. 12). And see *Say v. Barwick*, 1 V. & B. 95 ; *Lightfoot v. Heron*, 3 Y. & C. Exch. Ca. 586 ; *Nagle v. Baylor*, 3 D. & War. 60.

Although a Court of equity will not, in the absence of fraud or undue advantage, except in the case of the sale of reversionary interests (*Playford v. Playford*, 4 Hare, 546 ; *Chesterfield v. Janssen*, ante, vol. i., p. 541, but see sec. 31 & 32 Vict. c. 4,) refuse specific performance merely because the price is inadequate or the contract improvident, (*Sullivan v. Jacob*, 1 Moll. 477,) yet as specific performance is discretionary, it will not enforce a contract where it would subject a person to great *hardship*, but will leave the plaintiff to obtain damages at law, which might, under the circumstances, be very small. Thus, in *Wedgewood v. Adams*, 6 Beav. 600 ; 8 Beav. 103, trustees*joined their cestui que trust in a contract for sale, and personally [*508] agreed to exonerate the estate from any incumbrances thereon. There were considerable incumbrances, and it did not appear whether the purchase-money would be sufficient to discharge them, or what would be the extent of the deficiency. Lord Langdale, M. R., refused to decree a specific performance against the trustees, so as to compel them to exonerate the estate, but left the purchaser to his remedy by action for damages. "I conceive," said his Lordship, "the doctrine of the

Court to be this, that the Court exercises a discretion in cases of specific performance, and directs a specific performance, unless it should be what is called highly unreasonable to do so. What is more or less reasonable, is not a thing that you can define: it must depend upon the circumstances of each particular case. The Court, therefore, must always have regard to the circumstance of each case, and see whether it is reasonable that it should, by its extraordinary jurisdiction, interfere and order a specific performance, knowing at the time that if it abstains from so doing, a measure of damages may be found and awarded in another Court. Though you cannot define what may be considered unreasonable, by way of general rule, you may very well, in a particular case, come to a balance of inconvenience, and determine the propriety of leaving the plaintiff to his legal remedy by recovery of damages." And, on a subsequent day, his Lordship gave judgment, observing—"After consideration, I think I cannot order a specific performance of the agreement; and with regard to its being a mere money objection, I could not, when this case was argued, call distinctly to my mind a case of that sort, of which I had some recollection, and which came before Lord Hardwicke. It is a case not actually reported, but is cited in the argument in *Ramsden v. Hyllton* (2 Ves. 307). There a person being entitled to a small estate under the will of his father, on condition, that, if he sold it within twenty-five years, half the purchase-money should go to his brother, sold it within the time, and the question was, whether the agreement should be specifically performed; Lord Hardwicke thought not, because, by the specific performance of it, he would lose half the purchase-money. I think that comes very nearly to a case of mere pecuniary objection." And see *Faine v. Brown*, cited 2 Ves. 307; *Pope v. Harris*, cited Lofft, 791; *Costigan v. Hasler*, 2 S. & L. 160; *Howell v. George*, 1 Madd. 1; *White's case*, 3 Swanst. 108, n.; *Coote v. Coote*, 1 Sauss. & Scui. 393; *Kimberley v. Jennings*, 6 Sim. 340; *Talbot v. Ford*, 13 Sim. 173; *Ryan v. Daniell*, 1 Y. C. C. C. 60; *Webb v. The Direct London and Portsmouth *Railway Company*, 1 De G. Mac. & G. 521; 9 Hare, 129; *Watson v. Marston*, 4 De G. Mac. & G. 230, 239; *Browne v. Coppinger*, 4 Ir. Ch. Rep. 72; *Williamson v. Wooton*, 3 Drew. 210. So in a recent case the defendant agreed to take from the plaintiff a lease of an unfinished house, containing covenants on the part of the defendant to repair and keep in repair, and the plaintiff agreed to finish the house. Sir John Romilly, M. R., refused to compel the defendant to take the lease upon the ground that the house had been finished in such a defective manner as to make it unreasonable so to do: *Tildesley v. Clarkson*, 30 Beav. 419. See and consider *Oxford v. Provand*, 2 L. R. P. C. 135.

The Court, however, will not upon the ground of hardship, refuse to compel a person who was merely an agent, specifically to perform a

contract to purchase: *Saxon v. Blake*, 29 Beav. 438; and see *Chadwick v. Maden*, 9 Hare, 188.

Upon the same principle Courts of equity will not decree specific performance of an agreement of which the consequence would be a forfeiture. *Faine v. Brown*, 2 Ves. 307, cited; *Peacock v. Penson*, 11 Beav. 355.

But when a defendant sets up the consequence of forfeiture as a defence to a bill for specific performance, the Court must be well satisfied before it admits the validity of such a defence, that forfeiture will follow from specific performance of the agreement, and it must look also at the fact by whose act and conduct the forfeiture would be occasioned. The Court will not permit a defendant to put himself in such a position as that his performance of his agreement shall create a forfeiture, and then to turn round and say that the plaintiff shall not have a specific performance of the agreement, because the defendant has by his own act enabled the landlord to enter, upon the agreement being performed. *Helling v. Lumley*, 3 De G. & Jo. 463, 498, 499.

Nor will specific performance be decreed where there is uncertainty (*Swaishland v. Dearsley*, 29 Beav. 430; *Tillett v. The Charing Cross Bridge Company*, 26 Beav. 419; *Morrison v. Barrow*, 1 De G. F. & Jo. 633; *Taylor v. Portington*, 7 De G. Mac. & G. 328; *Price v. Salusbury*, 32 Beav. 446; 32 L. J. (N. S.) Ch. 441), or a mistake as to what forms the subject-matter of the contract. See *Harnett v. Yielding*, 2 S. & L. 549, 554; *Neap v. Abbott*, C. P. Coop. 333; *Butterworth v. Walker*, 13 W. R. (M. R.) 168; *In re Tottenham's Estate*, 15 Ir. Ch. Rep. 308; *Hood v. Oglander*, 34 L. J. (N. S.) Ch. 528; *Denny v. Hancock*, 6 L. R. Ch. App. 1; *Bray v. Briggs*, 26 L. T. Rep. (N. S.) 817; 20 W. R. (M. R.) 962, and *Malins v. Freeman*, 2 Kee, 25, where a person who had purchased an estate at an auction, under a mistake as to *the lot put up, was not compelled to complete his contract; and in *Colyer v. Clay*, 7 Beav. 188, where, at the time of the [*510] sale of a sum of money as a reversionary interest, neither of the parties were aware that it had fallen into possession by the death of the tenant for life, Lord Langdale, M. R., held, that as both of the parties had entered into the contract under a common mistake, it would be manifestly unjust to enforce it as it stood. So, when a vendor, believing by mistake that he had given the auctioneer a discretion to sell, but not to let the property go under a reasonable sum, and in consequence of such belief told a friend not to bid for him; and the property sold for a less sum than he intended to accept, specific performance was refused: *Day v. Wells*, 30 Beav. 220. And see *Cochrane v. Willis*, 34 Beav. 359; 1 Law Rep. Ch. App. 58.

So, a Court of Equity will not decree specific performance when from the circumstances it is doubtful whether the party meant to contract

to the extent that he is sought to be charged, (per Lord Redesdale, in *Harnett v. Yielding*, 2 Scho. & Lef. 554, and see *Leyhmann v. M'Arthur*, 3 L. R. Ch. App. 496,) or if the parties cannot be put into the condition for which they stipulated when the agreement was entered into. *In re The Mercantile and Exchange Bank*, 12 L. R. Eq. 268.

Surprise is a ground upon which specific performance may be refused: *Willan v. Willan*, 16 Ves. 72; 19 Ves. 590; 2 Dow. 275; *Magrave v. Archbold*, 1 Dowl. 107; *Blakeney v. Baggott*, 1 D. & C. 405; 3 Bligh, N. S. 237. In *Twining v. Morrice*, 2 Bro. C. C. 326, the vendor's agent bid, and purchased the property for the plaintiff, but specific performance was refused by Lord Kenyon, as the transaction was a surprise upon third parties; for it might appear to the persons present as a bidding for the vendor, and as that might damage the sale, it proved such an impediment to specific performance, that the party should be left to law. See 6 Ves. 338; 10 Ves. 313; and *Mason v. Armitage*, 13 Ves. 25; *Hill v. Buckley*, 17 Ves. 394.

If an agent contract to sell property in a manner not authorised by his principal, the contract will not be enforced. Thus, in *Daniel v. Adams*, Amb. 495, where an agent had authority to sell by auction, and he sold by private contract, although for more than the price required, it was held that the purchaser could not compel specific performance. And see *Helsham v. Langley*, 1 Y. & C. C. C. 175; *White v. Cuddon*, 8 C. & F. 766; *Manser v. Back*, 6 Hare, 443.

So, likewise, where one of two executors erroneously believing that he was acting with the authority of the other, contracted to sell a leasehold house, part of the *testator's estate, it was held by the [*511] Lords Justices, affirming the decision of Sir W. Page Wood, V. C., that the purchaser could not enforce a specific performance of the contract: *Sneesby v. Thorne*, 7 De G. Mac. & G. 399.

Nor will specific performance of a contract be decreed, which would involve a breach of trust (*Mortlock v. Buller*, 10 Ves. 292; *Ord v. Noel*, 5 Madd. 438; *Bridger v. Rice*, 1 J. & W. 74; *Turner v. Harvey*, Jac. 169; *Neale v. Mackenzie*, 1 Kee. 474; *Wood v. Richardson*, 4 Beav. 174; *Thompson v. Blackstone*, 6 Beav. 470; *Bellringer v. Blagrove*, 1 De G. & S. 63; *The Shrewsbury and Birmingham Railway Company v. The London and North-Western Railway Company*, 4 De G. Mac & G. 115; *Maw v. Topham*, 19 Beav. 576; *Law v. Urlwin*, 16 Sim 377; *Rede v. Oakes*, 13 W. R. (L. J.) 303), render a person liable for a devastavit, (*Sneesby v. Thorne*, 7 De G. Mac. & G. 399), or which would give a benefit to a person in a fiduciary position, or to a firm of which he is member, as against the persons or company in relation to whom he stands in such position. *Flanagan v. Great Western Railway Company*, 7 L. R. Eq. 116.

A mere contract between a trustee for sale and himself as a purchaser,

to sell with one hand and buy with the other, is not such a contract as can be specifically enforced at the instance of his heir-at-law, for the purpose of converting his personal estate into real estate, and thus altering the mode of descent: *Ingle v. Richards*, 28 Beav. 361, 365. See vol. i. p. 845.

Nor will Courts of equity compel a person specifically to perform an act which he is not lawfully authorised to do, otherwise he would be exposed to a new action of damages at the suit of the person injured by such act: and, therefore, if a bill is filed for a specific performance of an agreement made by a man who appears to have a bad title, he is not compellable to execute it, unless the party seeking performance is willing to accept such title as he can give: and that only in cases where an injury would be sustained by the party plaintiff, in case he were not to get such an execution of the agreement as the defendant can give: *Harnett v. Yielding*, 1 S. & L. 554; *Lawrenson v. Butler*, 1 S. & L. 19; *Ellard v. Lord Llandaff*, 1 Ball & B. 241; *Peacock v. Penson*, 11 Beav. 355; *Howe v. Hunt*, 31 Beav. 420.

Nor will a Court of equity enforce a contract, where, though the Court considers the title good, yet considers it sufficiently doubtful, that it might reasonably give rise to litigation at a future time between the purchasers, and persons not bound by the decree of the Court in the suit for specific *performance: per Sir John Romilly, M. R., in *Parkin v. Thorold*, 16 Beav. 67. And to force a title [*512] upon a purchaser, the opinion of the Court must be so clear that it does not apprehend that another judge would form a different opinion: *Rogers v. Waterhouse*, 4 Drew. 329. And see cases collected, Dart, 4th ed., p. 967, n.; *Dowson v. Solomon*, 1 Drew. & Sm. 1; *Collier v. M'Bean*, 14 W. R. (L. J.) 156.

Upon the same principle a Court of equity will not decree specific performance of the contract for the purchase of a lease, where from pending and threatened litigation, it is impossible to ascertain to whom the ground-rent is payable, and the purchaser must be involved in immediate litigation: *Pegler v. While*, 33 Beav. 403.

So, where a person having a contract for an underlease, entered into possession of the premises, and committed acts which would have been a forfeiture of the original lease, specific performance of the contract to grant the underlease was refused: *Lewis v. Bond*, 18 Beav. 85.

Nor will specific performance be decreed of a contract which it is impossible to perform (*Green v. Smith*, 1 Atk. 573), or which the Court has it not in its power to enforce: *Waring v. Manchester, Sheffield, and Lincolnshire Railway Company*, 7 Hare, 492.

Amongst other defences to suits for specific performance may be mentioned want of mutuality in the contract, that it is illegal or ultra vires. See Fry on Specific Performance.

Where a contract is reduced to writing, the writing is not only the best, but the only evidence of the contract; *Martin v. Berens*, 17 P. F. Smith, 459, 463. This results from the natural inference that the parties intend the instrument to be the repository of their purpose, and omit nothing which it is material to introduce. Although founded in fact, the presumption is drawn by the law, and will not yield to anything short of clear proof of fraud or mistake; *Coughenhour v. Suhre*, 21 P. F. Smith, 462; *Locke v. Whitney*, 10 Pick. 279; *Carter v. Hamilton*, 11 Barb. 147; *Hull v. Adams*, 1 Hill, 601. Or as the rule was stated by Ch. J. Taney in *Selden v. Myers*, 20 Howard, 506, "parol testimony is altogether inadmissible to show that the contract was different from the one reduced to writing, unless it can also be shown that the party was fraudulently deceived and misled as to the contents of the written instrument."

In *Parkhurst v. Van Cortland*, 1 John Ch. 273, 293, Chancellor Kent said, "that a contract cannot rest partly in writing and partly in parol;" but this dictum must be understood as referring to the agreement before the court, which was for the sale of land under the statute of frauds; and there is no principle of law which precludes the parties from reducing part of the contract to writing, and leaving another and distinct part to be established orally. *Potter v. Hopkins*, 25 Wend. 417. The true statement of the rule seems to be, that where the contract is written, there

is a presumption that the writing contains the entire contract, which cannot be overcome by parol, nor unless it appears from the terms of the instrument, or on applying it to the subject matter, that the intention was that it should only include part; *Van Ostrand v. Reed*, 1 Wend. 424; *McClure v. Jaffrey*, 8 Indiana, 79; *Oiler v. Gard*, 23 Id. 212; *Houghtailing v. Lewis*, 10 Johnson, 267; *Crotzer v. Russel*, 9 S. & R. 78.

It follows that one who has put his hand or seal to an instrument, cannot allege that he did so on the faith of an assurance that a contemporaneous or antecedent oral stipulation should be as obligatory as if it appeared in the writing. The answer is, that if the instrument is not worded in accordance with his intention, he should withhold his assent until the mistake is rectified, and cannot ask the court to regard that as erroneous, which he deliberately adopted as correct. The motive for reducing the agreement to writing, which is to guard against the uncertainty of oral testimony, and afford a sure and lasting memorial of what has been resolved on either side, would fail if it were possible to set the matter at large by an allegation that the contract is partly oral and partly written, contrary to the natural and legal inference that the instrument covers the entire ground; see *Lewis v. Jones*, 4 B. & C. 506; *Holley v. Younge*, 27 Alabama, 204, 207; *Townsend v. Weld*, 8 Mass. 146; *Erwin v. Saunders*, 1 Cowen,

249; *Hull v. Adams*, 1 Hill, 601; *Reed v. Moore*, 3 Iredell, 310; *Mead v. Steger*, 5 Porter, 498; *Vanderkarr v. Thompson*, 19 Michigan, 82; *Hakes v. Hotchkiss*, 23 Vermont, 231; *Carter v. Hamilton*, 11 Barbour, 147; *Ridgway v. Bowman*, 7 Cushing, 268.

The question arose in *Brigham v. Rogers*, 17 Mass. 571. The declaration was in assumpsit on a promise, alleged to have been made by the defendant cotemporaneously with the execution of a written lease, that the water on the demised premises would not fail, and that if there was any deficiency, he would remedy it. This evidence was rejected at the trial, and a nonsuit entered. Putnam, J., said, "if the contract which the plaintiff proposes to prove is an independent one, and collateral to the lease which the parties made and sealed, the testimony ought to have been received. On the other hand, if it cannot stand alone, but is to be considered as a part of the contract which was reduced to writing, the nonsuit ought to stand. It is conceded on the authority of *Preston v. Lerceau*, 2 Wm. Blackstone, 1249, that the landlord could not prove that the tenant was to make payments or perform services in addition to the stipulated rent. If so it is but a fair and equitable counterpart, to refuse the tenant permission to show that the landlord was to make repairs, or afford a greater or other consideration than that specified by the lease."

In *Howard v. Thomas*, 12 Ohio, N. S. 201, the suit was brought to

recover damages for the breach of an alleged oral agreement on the part of the defendant, to repair the roof of a house which he had demised to the plaintiff by a written lease, and the plaintiff offered to prove that he had refused to sign unless the plaintiff would consent to put the roof in good order; that such a promise was made; and that he then in consideration, and on the faith thereof executed the lease. The court held, that there was nothing in the evidence to take the case out of the general rule, that a written instrument cannot be altered, added to, or contradicted by parol. In like manner, a purchaser cannot prove that he bought on the faith of an oral warranty, which was left out of the written contract, at the vendor's instance or with his consent; *Smith v. Dallas*, 35 Indiana, 255.

In like manner a tenant who has covenanted to rebuild in case of any accident whatever, cannot prove that it was agreed orally at the execution of the instrument, that he should be exonerated if the premises were destroyed by fire; *Martin v. Berens*, 17 P. F. Smith, 459.

The rule is not less applicable to unsealed agreements than to specialties; *Heinricks v. Gehrke*, 56 Missouri, 79; *The State v. Lefaivre*, 53 Id. 470; *Long v. The New York Central R. Rd. Co.*, 50 New York, 76; *Thorp v. Ross*, 4 Abbot's Appeal Cases, 416; 1 Smith's Lead. Cases, 911, 7 Am. ed. Hence parol evidence is inadmissible that a bill of exchange or

promissory note was executed as a memorandum or receipt, and not as the absolute undertaking which it imports; see *Adams v. Wordley*, 1 M. & W. 374; *Billings v. Billings*, 10 Cushing, 178.

In like manner a bill of sale containing an inventory of certain articles, and describing them as subject to certain mortgages therein specified, is a bill of sale of all the property in the inventory, although some of the articles are not covered by the mortgages; and cannot be controlled by parol evidence, that the words "being subject," &c., were added for the purpose of limiting the sale to the mortgaged articles. Nor does it vary the case that the mortgaged articles are the only ones delivered to the vendee, and that the vendor declares in so doing that he does not deliver the others; *Ridgway v. Bowman*, 7 Cushing, 268.

It results from these decisions, that one who knowingly permits a stipulation to be excluded from the writing, is estopped from setting it up as part of the contract. Such testimony cannot be received on the ground of fraud, where it is the only evidence of the alleged deceit, nor unless a foundation is laid by other proof; *Proctor v. Ghilson*, 49 New Hamp. 62; *McElderry v. Shipley*, 2 Maryland, 25; *Broughton v. Coffey*, 18 Grattan, 184; *Beers v. Beers*, 22 Michigan, 42; *Fulton v. Hood*, 10 Casey, 365, 374.

Where the writing is manifestly partial, and intended not to cover the whole contract, but only to carry portions of it into effect, or

reduce them to order and certainty, other portions which are not covered by the writing, may be established by parol evidence. See *Cobb v. Wallace*, 5 Coldwell, 539; *Winn v. Chamberlain*, 32 Vermont, 318; *Moss v. Green*, 41 Missouri, 389; *Webster v. Hodgkins*, 25 New Hamp. 128; *Willis v. Fernald*, 4 Vroom, 206; *Suffern v. Butler*, 6 C. E. Green, 410; *Vanderkarr v. Thompson*, 19 Michigan, 82; *Lytle v. Bass*, 7 Coldwell, 303; *Bonney v. Morrell*, 57 Maine, 368.

It is of frequent occurrence, that what one of the parties to an agreement grants or promises is in writing, while the obligation of the other party remains in parol. Thus the consideration of a deed may be shown orally, because the object of the instrument is to pass the estate, and not to show what or how much the grantor is to receive. See *Elysville Man. Co. v. The Okisko Man. Co.*, 1 Maryland Ch. 392; *Collins v. Tillou*, 26 Conn. 368; *Linsly v. Lovely*, 26 Vermont, 121; *Bowers v. Bell*, 20 Johnson, 338; *McCrea v. Purmont*, 16 Wend. 460; 1 Smith's Lead. Cases, 399; 7 Am. ed.; 2 Id. 722. So witnesses may be called to prove a promise to pay at the end of a year, in consideration of receiving a present release, although the writing is absolute and does not set forth the provision; *Clark v. Tappin*, 32 Conn. 56. In like manner, a receipt for purchase money, is *prima facie* intended to protect the vendee by showing that he has paid the price, and not to define the obligation of the vendor; and it may consequently be shown that

he warranted the goods, or entered into other stipulations which do not appear in the receipt; *Terry v. Wheeler*, 25 New York, 520; *Filkins v. Whyland*, 24 Id. 338.

So, it is a good defence to a promissory note or other absolute obligation for the price of the machinery and fixtures of a mill, that the plaintiff gave an oral warranty which has not been fulfilled; *Lytle v. Bass*, 7 Caldwell, 303; *Batterman v. Perie*, 3 Hill, 171.

No case can be better fitted for the application of this principle, than where a written instrument is executed for the purpose of carrying part of an anterior oral agreement into effect; and the rest of the contract will then remain, as it was in the first instance, open to the whole range of proof; *Potter v. Hopkins*, 25 Wend. 417; *Crane v. The Library Co.*, 5 Dutcher, 302, 306; *Witbeck v. Waine*, 16 New York, 532; *Barker v. Bradley*, 42 Id. 316.

For like reasons, a memorandum of the nature and amount of the articles embraced in a contract of sale, and of the time and place at which they are to be delivered, will not preclude either party from proving the consideration by oral testimony. See *Lapham v. Whipple*, 8 Metcalf, 59; *Holden v. Parker*, 110 Mass. 324. And it may be said in general that where the written evidence of a contract is fragmentary, consisting of detached memoranda which do not cover the whole ground, the outline may be completed by parol; *The Mobile Marine Dock Ins. Co. v. McMillan*, 31 Alabama, 711; *Hart v. Miller*,

3 Dutcher, 338; *Pinney v. Thompson*, 3 Iowa, 174. The question is nevertheless, one of law, to be determined from an inspection of the documents, in view of all the circumstances, and where several papers executed in the course of the same transaction are in fact one contract, the writing will be as conclusive as if the whole was contained in a single instrument. See *Hull v. Adams*, 1 Hill; *Bell v. Bruen*, 1 Howard, 169, 183; 1 Smith's Lead. Cases, 497, 7 Am. ed.; 2 Id. 259.

It is generally conceded that a writing which purports to be a recital or memorandum of a particular fact or stipulation, will not preclude the right to establish the existence of other and collateral facts and stipulations, or even to contradict or explain the facts alleged in the memorandum; *Allen v. Pink*, 4 M. & W. 140. Receipts and bills of lading fall within this principle, and may be varied or explained by parol evidence; *The Steamship Co. v. Brown*, 4 P. F. Smith, 77; *Skarfe v. Jackson*, 3 B. & C. 421. So parol evidence is admissible to establish a contract which is distinct from that set forth in the deed, although made at the same time, and relating to the same subject matter; see *Howard v. Thomas*, 12 Ohio, N. S. 207; and a grantor may consequently prove that the grantee let the premises to him orally, at the execution of the conveyance.

A written instrument is not, however, necessarily less conclusive as to what it embraces, because it does not profess to include all

and parol evidence may be as inadmissible to contradict or vary a memorandum of part of an entire contract, as if the whole were set down; *Potter v. Hopkins*, 25 Wend. 417; *Cram v. The Library Co.*, 5 Dutcher, 302, 306; *Wimple v. Knoopf*, 15 Minnesota, 440. In *Wimple v. Knoopf*, the defendant gave a written order for goods, which he afterwards refused to take. An action having been brought for damages, he offered to prove that he gave the order at the plaintiff's request, and on the faith of an assurance that it might be recalled at any time during the ensuing month. The court said that if, as had been contended, the case was one where part only of the agreement had been reduced to writing, it was also true that the evidence went to vary that part, and was consequently inadmissible. The engagement set forth in the writing was absolute and could not be shown to be revocable by parol.

The question is one of intention to be gathered from the language of the instrument, and when a receipt is so worded as to indicate that it is meant to be a memorandum of the stipulations on either side, it will be as conclusive as if the contract were set forth formally and at large; *Knickerbocker v. Eagleston*, 6 Carb. 458; *Miles v. Culver*, 8 Iowa; *Colt v. Come*, 107 Mass. 85.

A written contract may be qualified or enlarged by a contemporaneous memorandum, because either writing has an equal claim to belief, and the meaning of the par-

ties must be sought in both; *Davis v. Jones*, 17 C. B. 625; *Innes v. Monroe*, 1 Excheq. 473.

The recent course of English decision tends to qualify and restrict, rather than enlarge the operation of the rule that a written contract cannot be varied or controlled by a contemporaneous oral stipulation; *Davis v. Jones*, 17 C. B. 625. In *Pym v. Campbell*, 6 Ellis & Bl. 370, evidence was received that the plaintiff and defendant signed the agreement which was the cause of action, subject to an understanding which was declared in words at the time, that it should not be binding, unless it was approved of by a mutual friend on whom they both relied. So in *Davis v. Jones*, 17 C. B. 625, testimony was admitted that a written contract without date, was not to go into effect until a future and uncertain event took place. A written instrument, said Jarvis, C. J., "does not necessarily operate from delivery; it is competent to show that it was delivered as an escrow, and though appearing on its face to be presently operative, is not really to operate until the happening of a given event. In *Wallis v. Littell*, 11 C. B., N. S. 366, suit was brought upon an agreement to transfer a farm on the terms and conditions under which the defendant held it of Lord Sidney, and a plea that the agreement was made upon condition that it should be null and void if Lord Sidney did not within a reasonable time give his consent, was held to be a good defence."

In these instances the evidence

may have been admissible as showing that the delivery was in escrow, and not absolute; but this can hardly be said of *Lindley v. Lacy*, 17 C. B., N. S. 578. In *Lindley v. Lacey*, the defendant, Lacey, went into possession under a written agreement to buy the goodwill and fixtures of a shop from the plaintiff, Lindley, for the sum of £145; the right of property to remain in the plaintiff until payment. The writing contained a recital that the defendant was authorized to settle an action which had been brought against the plaintiff by one Chase. Before signing the instrument, the plaintiff said to the defendant: "Am I to understand that Chase's bill is to be settled, because that is the ground work of the whole?" The defendant replied, that "he would see it settled." The defendant having failed to pay Chase's bill, he issued a *fi. fa.* under which the goods were sold, and the suit was brought to recover damages for the non-fulfilment of the promise. It was contended for the defence that the memorandum did not contain any such stipulation, and that oral evidence was inadmissible to vary a contract which had been reduced to writing. Erle, C. J., said, that the cases which had been cited during the argument, depended on a preliminary question of fact, as did almost every case which turned upon the construction of a written contract. "If the instrument shows that it was meant to contain the whole bargain between the parties, no extrinsic evidence can be admitted to introduce a term which

does not appear there. But, if it be clear that the written instrument does not contain the whole, and the jury find that there was a distinct collateral verbal agreement between the parties, not inconsistent with the contract, the law does not prohibit such distinct collateral agreement from being enforced. In some of the cases, as in *Harris v. Rickett*, 4 Hurlst. & N. J. 1, there was a prior verbal agreement. In *Davis v. Jones*, 17 C. B. 625, the oral and the written agreement were contemporaneous. So, in *Wallis v. Littell*, 11 C. B., N. S. 369, there was a contemporaneous oral agreement that the farm was not to be transferred unless Lord Sidney consented to accept the plaintiff as his tenant. It is clear, therefore, that if there be a distinct collateral oral agreement between the parties, it is immaterial whether it precedes or is cotemporaneous with the written agreement. I think it is clear, from the evidence here, that there was a distinct collateral agreement that Chase's action should be settled by the defendant, and that evidence of that agreement, which was perfectly consistent with the written agreement, was admissible."

Notwithstanding the language held in *Davis v. Jones*, *ante*, 949, the weight of authority appears to be that a deed or bond, becomes absolute at law, on delivery to the grantee or other party in interest, notwithstanding any declaration that may be made to the contrary by the grantor, or even by the person who receives the instru-

ment, and that if relief can be had under such circumstances, it must be sought in a court of equity. See *Ward v. Lewis*, 4 Pick. 518; *Hubby v. Hubby*, 5 Cushing, 519; In *Hubby v. Hubby*, parol evidence was held inadmissible, to show that a mortgage purporting to be made to three persons to secure the payment of debts due severally to each of them, was delivered to one of the mortgagees exclusively for his use, and not for the use of the others. Shaw, C. J., said, "several interests may be created by a mortgage to secure several debts, but an instrument to two or more is a joint instrument, *Burnett v. Pratt*, 22 Pick. 556. This being the character of the instrument, signed and sealed by the plaintiff, the court are of opinion, that by the delivery of it to one of the grantees, to enure as his deed to such grantee, it thereby became the deed of the grantor for all the purposes expressed in it; and that it was not competent for the grantor to restrain the operation of it as his deed, by the use of words, so as to give it effect as his deed to one of the grantees, and prevent it from having effect as to the others. Any other construction would seem to be opposed to the settled rules of law, one of which is, that the effect and operation of a deed, must be ascertained from its terms, and cannot be varied by parol evidence. No doubt evidence *aliunde*, parol, as well as written, may be given to prove that the deed was not delivered, that it got into the hands of the grantee by accident,

which if satisfactory will prove that it was not the party's deed.

The deed could not be delivered as an escrow, because an escrow must be delivered to a stranger, and not to the grantee, and if delivered to a grantee, it is absolute, whatever intent may be shown in words to make it an escrow. It could not be delivered to the grantee conditionally, to take effect upon the happening of a contingency, for that would be contrary to the provisions of the instrument itself, *Ward v. Lewis*, 4 Pick. 518. We think it is a general rule, that the delivery of a valid instrument to one of several grantees named in it, makes it the grantees' deed, and is in law a delivery to the use of all according to its terms."

Wherever a writing is alleged as evidence of a contract, there is a preliminary question whether the maker executed the instrument voluntarily, and with the means of knowing what it contained. The obligation depends on his assent, and if that is procured through fraud or duress, the contract is invalid. His seal or signature is *prima facie* evidence, but it is not conclusive.

A grantor or obligor may consequently aver, that he was induced to put his hand to the instrument, by a false representation of its effect or purport. If the allegation is substantiated by proof, it will appear, that what he agreed to was, not the writing, but something else, which it does not contain, and the inference is inevitable that it is not his deed. See *Edwards v. Brown*, 1 Tyrwhitt, 182;

Thoroughgood's Case, 2 Coke, 435; *Manser's Case*, Ib. 1; *Green v. North Buffalo Township*, 6 P. F. Smith, 110; *The County v. Copley*, 17 Id. 386; *Stoever v. Weir*, 10 S. & R. 25; 1 Smith's Lead. Cases, 689, 7 Am. ed. Or as the principle was stated by Spencer, C. J., in *Dorr v. Munsell*, 13 Johnson, 431, "If the deed be fraudulently misread, the defendant may plead, *non est factum*; and so if there is a fraudulent substitution of one deed for another, and the signature be put to that which the party did not intend to execute." See *Anthony v. Wilson*, 14 Pick. 305.

In *Thoroughgood's Case*, the defendant in an action of trespass, *quare clausum fregit*, pleaded a deed whereby the plaintiff released his estate in the premises to one Wm. Chicken, by whom the land was subsequently conveyed to the defendant. Issue having been joined on a special replication of *non est factum*, the jury found a special verdict, "that at the time of the making of the said release, an annuity issuing out of the said land was behindhand and unpaid, that the plaintiff was a layman, and not lettered, and that the writing was never read to him; that one Thomas Ward, had begun to read it to the plaintiff; when one John Ward, took the writing out of his hands, saying to the plaintiff, Goodman Thoroughgood, you are a man unlearned, and I will declare it unto you, and make you understand it better than you can by hearing of it read, and then said further to him, Goodman

Thoroughgood, the effect of it is this, that you do release to William Chicken all the arrearages of rent, that he doth owe you, and no otherwise, and then you shall have your land again, to which the plaintiff answered, if it be no otherwise, I am content, and thereupon the plaintiff giving credit to the said John Ward, delivered the said release to the said William Chicken, and whether this upon the whole matter be the plaintiff's deed, the jury referred to the court. And it was adjudged, that it was not the plaintiff's deed; and in this case three points were resolved; first, that although the party to whom the writing is made, or other by his procurement, doth not read the writing, but a stranger of his own head read it, in other words than in truth it is, yet it shall not bind the party who delivereth it; for it is not material who readeth the writing, so as he who maketh it be a layman, and being not lettered, be (without any covin in himself) deceived; and that is proved by the usual form of pleading in such case, that is to say, that he was a layman, and not learned, and that the deed was read to him in other words, &c., generally, without shewing by whom it was read. And if a stranger, menace A. to make a deed to B., A. shall avoid the deed which he made by such threats, as well as if B. himself had threatened him, as it is adjudged. 45 E. 3, 6 a., Vide 39, H. 6, 36 a.

Secondly, that such layman, not learned, is not bound to deliver the deed, if there be not one pres-

ent which can read the deed unto him, in such language that he who should make the deed may understand it; and that is the reason that if it be read to him in other words than are contained in the writing, it shall not bind the party who delivereth it, for it is at the peril of the party to whom the writing is made, that the true effect and purport of the writings be declared, if it be required, but if the party who should deliver the deed, doth not require it, he shall be bound by the deed, although it be penned against his meaning.

Thirdly, although the writing be not read to the party, yet if the effect be declared to him in other form than is contained in the writing, and upon that he deliver it, he shall avoid the deed, for it is all one in law to read it in other words, and to declare the effect thereof in other manner than is contained in the writing, if the party who maketh the writing (being not learned) desire one to read the writing to him, and he read it, or declare the effect thereof to him, in other manner than the writing doth purport, it (unless there be covin betwixt them) shall not bind him.

The question was again mooted in *Pigott's Case*, 11 Coke, 26 b., 28 a., where it was said to have been declared in *Schulter's case*, that "every deed ought to have writing, sealing and delivery, and when anything shall pass from one who has not understanding, but by hearing only, it ought to be read also, and it is true that he who is not lettered, in law, is as he that

cannot see but hear only, and all his understanding is by his hearing. And so a man who is lettered and cannot see, is as to this purpose taken in law as a man not lettered, and therefore, if a man is lettered and is blind, if the deed is read to him in another manner, he shall avoid the deed."

It was held in *Manser's Case*, 2 Coke, 1, in accordance with this principle, that a refusal to execute a deed until it is read in some language which the grantor can understand, is not a breach of a covenant to convey, or for further assurance, although if the deed be read to the covenantor in compliance with his demand, he cannot ask for time to consult counsel whether it is in accordance with the obligation imposed by the covenant, because "ignorance in reading or ignorance of the language *quæ sunt ignorantia facti* may excuse, but as is commonly said *ignorantia juris non excusat*."

Although one cannot ordinarily allege his ignorance of the legal effect of a writing as a reason why he should not be bound, the case is widely different, where he is fraudulently led into the error by the misrepresentations of the grantee, and he may then be as much entitled to relief, as if the misstatement were of a fact. *Doe v. Bennett*, 8 Carr, and Payne, 124; *The Chestnut Hill Reservoir Company v. Chase*, 14 Conn. 123; *Edwards v. Brown*, 1 Tyrwhitt, 182; *Coger v. McGee*, 2 Bibb, 321. In *The Chestnut Hill Reservoir Company v. Chase*, Williams, C. J., said, "the question is whether a representation

of the legal effect of an instrument which is false and fraudulently made, and which is the procuring cause of the execution of the instrument, shall avoid it. It is said to be simply an assertion of what the law is, which as every one is supposed to know the law, cannot mislead when both parties are acquainted with the facts. How far a mere mistake of the law is a ground for setting aside a contract seems to be somewhat doubtful; *Champion v. Brown*, 6 Johnson's Ch. 189, 202. When the terms of a contract are just as they were intended to be, in the absence of all fraud, it has been held that Chancery cannot interfere, because this would be rather to make contracts than to rectify them; *Wheaton v. Wheaton*, 9 Conn. 96. But we know of no decision, that where a man ignorant of law, has been induced to do an act injurious to himself, or to others, by the false and fraudulent assertions of his better informed opponent, he is not entitled to relief." The right to relief against such a fraud was also conceded in *Edwards v. Brown*, but it was at the same time held, that where the defence is not, that the terms of the instrument were misstated, but that the grantor was misled as to their legal effect, it must be specially pleaded, and cannot be given in evidence under *non est factum*.

The judgment in *Thoroughgood's Case* illustrates the principle that one, although innocent, shall not enforce or profit by a grant obtained through fraud; *Huguenin v. Baseley*, 14 Vesey,

273, *post*; *Irwin v. Keen*, 3 Wharton, 347; *Davis v. Calvert*, 5 Gill & J. 269, 302; *Harris v. Delamar*, 3 Iredell Eq. 219; *Whelan v. Whelan*, 3 Cowen, 537. It was not alleged that the grantee instigated or procured Ward, to misstate the purport of the deed, or that he was cognizant of, or a party to the deception, nor could the court draw such an inference from a special verdict. The first resolution accordingly declares "that although the party to whom the writing is made, or another by his procurement doth not read the writing, but a stranger of his own head reads it in other words than in truth it is, yet it shall not bind the party who delivereth it." The same thing is implied by the terms of the third resolution, which are that "if the party who maketh the writing being not learned, desires one to read the writing to him, and he read it or declared the effect thereof, it (unless there be covin between them) shall not bind him."

This result may be justified on two grounds, one that the assent which is essential to the obligation of a contract, does not exist where the party is deceived as to the effect of what he signs, the other that one who takes advantage of a wrong becomes *particeps criminis*, however free from blame he may have been originally.

The resolutions in *Thoroughgood's Case* imply that the deceit practiced on the plaintiff would not have invalidated the deed if he had not been illiterate, and therefore obliged to rely for infor-

mation on others. It may be said in support of this conclusion, that if one can examine for himself, and does not, it is his own folly, and the law ought not to relieve him from the consequences. The argument ought not to prevail in any case where the grantor was fraudulently misled by the party who seeks to enforce the instrument. One is not chargeable with negligence, for not using that excess of care which refuses to take anything on trust that is susceptible of verification. Such a principle would impede the transaction of business, which a reasonable confidence promotes. If there were no other ground for setting aside a deed obtained by fraud, it would be enough that public policy require that one should not be allowed to profit by his own wrong. It was accordingly declared by Frowike and Kingsmil in an anonymous case in Keilwey, 70 b. pl. 6, that "if I desire one to enfeof me of an acre of land in Dale, and he directs me to make a deed or letter of attorney for one acre, and I make the deed for two acres and present it to him as being only for one, and he seals the deed, the deed is merely void whether the feoffer be lettered or not lettered, because he gave credence to me and I deceived him."

Agreeably to the second resolution in *Thoroughgood's Case*, "if the party who should deliver the deed doth not require the effect and purport to be declared, he shall be bound, although it be penned against his meaning." This rule is well founded in common sense

and justice, and is not less applicable in a court of equity than it is at law. There would be no security for title, if a grantor could play fast and loose by simply ignoring the contents of the deed. His ignorance is nothing to the purpose, unless he is misinformed; see *Pin dar v. The Resolute F. Ins. Co.*, 47 New York, 114; *Barrett v. Union M. F. Ins. Co.*, 7 Cushing, 175; *Greenfield's Estate*, 2 Harris, 489, 496, 504; *Kimball v. Eaton*, 8 New Hamp. 391; *Swift v. Fitzhugh*, 9 Porter, 39.

In *Greenfield's Estate*, Gibson, C. J., said: "If a party who can read, will not read a deed put before him for execution, or if being unable to read, will not demand to have it read or explained to him, he is guilty of supine negligence, which, I take it, is not the subject of protection, either in equity or at law. At law it certainly is not. If the party that is to seal the deed can read himself, and doth not, or being illiterate or blind, doth not require to hear the deed read, or the contents thereof declared, in these cases, albeit, the deed is contrary to his mind, yet it is good and unavoidable; Touch, 56. But, adds Mr. Preston, the editor, equity may correct mistakes, frauds, &c. For this he refers to Manser's case, 2 Co. 3 b, in a note in which there is a reference to *Bennett v. Wade*, 2 Atk. 324; which was the case, however, of a conveyance by a man on the verge of insanity, who had even been married at the instigation of others, without proposal made to him, or without being conscious that

he was so, who had been cautioned by a friend not to sign papers, and who stood so much in awe of the grantee, that the bare name of the latter would reduce him to submission when he was furious. That was a case of undue influence.

The principle of Mr. Preston is asserted also by Mr. Thomas in a note to *Thoroughgood's Case*, 2 Coke 9 b., for which he refers to *Jones v. Crawley*, Finch's Rep. 161, which was a case of positive misrepresentation, and the *Attorney General v. Sothom*, 2 Vern. 497, which was a case of compulsion, neither of which sustain the principle for which they were quoted, and the dicta of these respectable editors have to encounter authorities which bear the other way without the benefit of adventitious aid. In an anonymous case in Skin, 159, one who could read made an agreement for a lease for twenty-one years, the lessor drew a lease for one year, but read it twenty-one, and equity refused to relieve the lessee, because he could read and would not, and in this it certainly carried the principle of non-intervention a great way. But in *Willes v. Jernegan*, 2 Atk. 251, equity refused to relieve against a hard bargain made by a man with his eyes open, because there was no fraud. Nor will a party be relieved merely because he put an unguarded confidence in another; *Langley v. Brown*, Id. 202. * *

* * * The defendants are not charged with fraud, imposture or deceit. The complainant

relies exclusively on the abstract effect of the fact, if it be a fact, that the deeds were not read to the grantor at the time of execution, or the contents made known to her at any time before; yet, as she could read, and did not, my opinion is that the complainant be not relieved on that ground without superadded proof of management and surprise."

An appeal was subsequently taken, and the case reargued before the court in banc, which concurred with the opinion of the Chief Justice on this point, although a decree was rendered for the complainant on the ground of undue influence.

In *Bauer v. Roth*, 4 Rawle, 83, the suit was brought on a bond conditioned to indemnify the plaintiffs, Peter Roth and John Roth, against a liability which they had incurred as sureties for a third person. The defendants pleaded that before and at the time of the making of the said writing obligatory, they had assented and agreed to indemnify the said Peter Roth, but had refused to become bound to John Roth; that they were unlettered men, not understanding the English language, and that when the said writing was presented to them for execution, they signed and sealed the same, believing that it was in favor of the said Peter, and not of the said John, according to the form and effect of the said agreement, and then and there delivered the bond to the said Peter Roth as their deed to him, and not to the said John. Kennedy,

J., said, that the plea contained no averment that the writing was misread, or the contents of it misstated. This, according to *Thoroughgood's Case*, was the very gist and essence of such a defence, and the want of it rendered the plea defective. If it appeared that a deed was drawn through fraud or mistake, in such wise that the purport and effect were materially different from what had been agreed, and was then presented to and signed by one of the parties in ignorance of the error, it might be a ground for relief in equity, although there was no misreading or false representation at the time.

In *Pindar v. The Resolute Fire Insurance Company*, 47 New York, 114, the plaintiff wrote to the defendants enclosing a policy issued by another insurance company, in which the plaintiff's stock was described as "such as is usually kept in country stores," with a request that the defendants would forward a policy by mail, insuring the plaintiffs to the amount of \$3,000, in exactly the same terms. The defendants in reply sent a policy omitting the descriptive words prescribed by the plaintiffs, and conditioned to be void if any extra-hazardous goods were kept in the store. A fire occurred, and the defendants relied on a breach of the condition, as an answer to a suit brought to recover compensation for the loss. The plaintiff offered to prove that he had accepted the policy without reading it, in the belief that it was in the terms proposed by his letter. The court

held that the failure of the insured to read the policy, could not enlarge the liability of the insurers. It was an established rule that prior understandings and agreements were merged in the writing as finally executed.

The principle is clear, but we may doubt whether it was correctly applied. Sending the policy in response to the plaintiff's letter without explanation or comment, might well induce him to believe that the terms which he proposed were accepted; and if so the transaction operated as a surprise, which if not fraudulently intended had the effect of fraud. See *Moliere v. The Penn F. Ins. Co.*, 5 Rawle, 346; *The Susquehanna Ins. Co. v. Perrine*, 7 W. & S. 348, 353.

It has accordingly been held that where one makes an application for a policy of insurance, as the agent of a known or of an undisclosed principal, and the insurers accept the application and agree to prepare the policy, it is incumbent upon them to draw the instrument in a way to give effect to the agreement by describing the insurance as made in favor of the agent as such, or for the account of whom it may concern, and if they fail to do this, and the error is not discovered until after the policy has been accepted, a bill may be filed to rectify the error; *Phenix Ins. Co. v. Hoffheimer*, 46 Miss. 645; *Oliver v. Mutual Ins. Co.*, 2 Curtis, 277.

In *Oliver v. The Mutual Ins. Co.*, it was held not to be conclusive against such relief, that the

policy was prepared in accordance with memoranda which had been drawn or assented to by the party who effected the insurance, and which did not disclose that he was acting for another, and had no interest in the vessel. Curtis, J., said, "parties who contract for policies of insurance are not expected to insert in the contract every particular needful to be inserted in the policy. The underwriters, on their part, agree to effect insurance; the numerous limitations of their liability as insurers, which appear in the different memorandums and other special printed clauses in the policy are not mentioned. Their obligation is understood to be to make out a policy in the usual form, and containing the usual clauses, adapted to the case made by the agreement of the parties. So if one who applies for insurance, makes known that he is an agent only, and the company agrees to effect the insurance, or, as the president of this company expresses it, to write the risk, it is a necessary implication that such words shall be inserted in the policy as are usually inserted in such cases, and as are necessary to make a binding contract. It is to be presumed that the underwriters intend to earn their premium, and therefore that they expect and desire that the insurance should attach upon some interest, and understand and agree, if a known agent applies for insurance, that the formula usually inserted when an agent obtains insurance, and which is necessary to the assumption of the risk, shall be in the

policy when it is drawn. I think it may be safely laid down, that when a contract is made for a policy, whatever clause is usually inserted in policies, by reason of a given state of facts, and which it is necessary to insert to adapt the policy to that state of facts, both parties will be understood as agreeing to have inserted, if they are both apprised of that state of facts, and contract in reference to it." It was at the same time held that if the error was fraudulent or wilful on the part of the agent, it would preclude the principal, however ignorant he might be of the deceit.

In *Motiere v. The Penna. Fire Ins. Co.*, the plaintiff applied orally for insurance on certain ice houses, stating that they were built partly of brick and partly of wood; but the secretary of the insurance company wrote the order down as being for insurance on brick ice houses, and they were so described in the policy, which was prepared by him and delivered to the plaintiff who accepted it in ignorance of the mistake. Sergeant, J., said, "a mistake in a policy may be rectified when it clearly appears from the label, or other satisfactory evidence, that it was reduced to writing in terms not conformable to the real intention of the parties. *Motteau v. London Ass. Co.*, 1 Atk. 545; *Henckle v. Royal Exch. Ass. Co.*, 1 Ves. 317. I see no reason why the same thing may not be done in the present instance by correcting the policy according to the verbal description furnished to the secretary, if the

evidence shows that he omitted a material part of that description. The memorandum, which has been termed the order, possesses no greater efficacy than the policy, and may itself be corrected in the same manner. It is immaterial whose act it was; it is sufficient if the evidence shows that it did not conform to the intention of the parties, whether by the mistake or inadvertence, of the person who drew it up. It may be remarked, however, that by the conditions annexed to the policy, the secretary is designated as the person to whom the description is to be furnished. If he, acting in this capacity, undertakes to reduce the verbal particulars to writing, and files them as a memorandum or order, the insured has a right to expect he will insert all that is material, and if he omits to do so, I should deem it his act, and not the act of the insured, and that the company would, in equity, be precluded from setting up this omission, as an objection to a recovery in case of loss, in the same manner as where the policy is not made conformably to the order."

Whatever the rule may be where the grantor's ignorance of the true nature and operation of the deed is wholly due to his own laches, and there is no covin or malpractice on the part of the grantee, a complaint that the deed was fraudulently prepared, is not answered by an allegation that nothing was said to mislead the grantor, and that he sealed the instrument without reading it, or asking what it contained. His negli-

gence in this regard may facilitate, but does not excuse the deceit. This is conceded where the grantee misstates the contents of the instrument, and the case is substantially the same, where one instrument is fraudulently substituted for another. If a conveyance in fee is drawn and presented to the owner of the premises, instead of the lease which he has agreed to execute, the imposition is not less real, because no false representation is made at the time, and he affixes his seal without inquiry.

It would, nevertheless, appear, that where the purport or contents of the deed are not misrepresented at the time of execution, and the allegation is that it was not prepared in accordance with the instructions given by the grantor, or the terms to which he had agreed, the case lies beyond the line which divides law from equity, and relief must be sought in the latter jurisdiction; *Barrett v. Union Mut. Ins. Co.*, 7 Cushing, 175; *Swift v. Fitzhugh*, 9 Porter, 39. Under these circumstances it may be doubtful whether the variance is due to mistake or fraud, and although a legal tribunal may proceed on the latter ground, it cannot take cognizance of the former. Moreover, the remedy at law is limited to setting the instrument aside, and does not reach far enough to correct the error, and then carry the contract into execution as reformed; *Barrett v. The Union M. Ins. Co.*, 7 Cushing, 175.

In *Swift v. Fitzhugh*, 9 Porter,

39, the action was detinue for a slave, and the defendant sought to set aside the post nuptial deed of settlement, under which the plaintiff claimed, on the ground that it was presented to him as having been drawn in pursuance of an ante-nuptial agreement between him and his wife, and that he signed it under that belief without reading it, and had since discovered that there was a material difference. Ormond, J., said, "if a deed be obtained by duress, or by false and fraudulent practices, as if it be falsely read to the party, or he be induced to execute it whilst in a fit of drunkenness, such deed has no legal existence; and although free from the vices just specified, it may be so wholly false and fraudulent, as to be void both at law and in equity. But a court of law can hold no middle course, but must either give effect to or wholly reject a deed, whilst a court of equity, by reforming it, and making it speak the true intention of the parties, can do exact justice between them.

According to the testimony of the witnesses, it was agreed before the marriage that the lady's property should be conveyed in trust for the use of the husband and wife, and their issue. By the settlement actually made the property was conveyed in trust for the separate use of the wife, with a power of appointment after her death.

If this were a proceeding in chancery by the husband to reform the deed of settlement, so as to give him the joint use of the prop-

erty during his life, it would be, to say the least, exceedingly difficult on this proof, to decree in his favor. It would be entirely consistent with this proof, that the mother of the young lady understood the ante-nuptial agreement to be as set forth in the deed afterwards executed, and that if she had not so understood it, the marriage would not have taken place. It is not stated that any representations were made at the execution of the deed, of its contents, or of the terms of the ante-nuptial agreement; and it is not perhaps too much to say, that such supine negligence on the part of the husband in signing an instrument, the contents of which he did not know, or seek to know, must be considered as giving the mother a *carte blanche*, as to the terms of the marriage settlement."

In *Barrett v. The Union Mut. M. & F. Ins. Co.*, the suit was brought on a policy of insurance conditioned to be void if any insurance had been effected which was not mentioned in the policy, and the defendants relied on the existence of such an insurance as a breach. The plaintiff offered to prove that the previous insurance was communicated to them, and that they assented to it and prepared the policy and delivered it to him, and that he accepted the instrument without reading it, in the belief that it was drawn according to the truth and in a way to satisfy the condition. It was contended on his behalf, that this was a sufficient excuse for the breach. Whether the failure to note the

previous insurance arose through design or negligence, the defendants were responsible for it, and the plaintiff should not suffer from their fault. The court said, that the plaintiff had abundant opportunity to read the policy, and need not have accepted it if it was not satisfactory to him, or did not set forth what had occurred between him and the defendants. If he chose to take it without looking at it, or knowing what it contained, he was himself chargeable with the negligence of which he complained. Where from mistake or fraud a writing is so defective that instead of conveying the meaning of the parties it expresses something else, if the case is one for relief, it can only be had in a court of equity. A court of law must take the instrument as it is without change, diminution, or addition. The parol evidence was therefore clearly not admissible, and the plaintiffs could not recover on the policy as it stood."

The need of equitable aid in such cases is the more apparent, because if any part of a contract is not attested by a seal, the whole will be regarded by a court of law as parol, and the covenantee must not only prove the consideration, but will lose the benefit of the estoppel; *Newcomer v. Kline*, 11 Gill. & J. 457. In *Newcomer v. Klein*, the word "dollars" was accidentally omitted in a bond executed by a principal and surety for money advanced to the principal, and it was held that the obligee might file a bill against both obligors for the correction of the

error, and to compel the payment of the amount due. The court said, "according to contract, the plaintiff was entitled to a security of higher dignity than a mere parol promise. He was entitled to a sealed instrument, the consideration of which could not be inquired into, and although he might have a remedy for his money in a court of law, in a different form of action, it might not be so full, adequate, and complete as the one contemplated by the parties; *Montville v. Houghton*, 7 Conn. Rep. 549. In that case a bond was intended to be executed, but the seal was omitted by accident, and relief was granted in equity, although it was contended that the party had his remedy in law; the judge in delivering his opinion observing that the plaintiffs were entitled to a bond, the consideration of which could not be inquired into by law. No doubt can be entertained as to the jurisdiction of a court of equity to correct the mistake in this case, nor that such relief may be granted even in the case of a surety; see 1 Johnson Ch. 609."

A consideration is not essential to the validity of a covenant or bond, nor can a failure of consideration be pleaded as a defence on legal grounds to an action brought to enforce the contract; *Key v. Knott*, 9 Gill & Johnson, 342; *Newcomer v. Kline*, 11 Id. 457. Hence the instrument will not be invalidated by a misrepresentation, however gross, with regard to the nature or value of that which the covenantor or obligor is to have in return for what he agrees to

give. Such at least seems to have been the rule at common law; and it has been applied in numerous instances in the United States; *Vrooman v. Phelps*, 2 Johns. 177; *Dorr v. Munsell*, 13 Id. 430; *Franchot v. Leach*, 5 Cowen, 506; *Jackson v. Hills*, 8 Id. 290; *Dale v. Roosevelt*, 9 Id. 307; *Stevens v. Judson*, 4 Wend. 471; *Taylor v. King*, 6 Munford, 358; *Wyche v. Macklin*, 2 Randolph, 426; *Burrows v. Alter*, 7 Missouri, 24; *Donaldson v. Benton*, 4 Dev & Bat. 435; *Rogers v. Colt*, 1 Zabriske, 18; *Stryker v. Vanderbilt*, 1 Dutcher, 482; *Hartshorn v. Day*, 19 Howard, 222; *Mordecai v. Tankersley*, 1 Ala. 100; *Stokes v. Jones*, 18 Id. 734; *Thompson v. Drake*, 32 Id. 99, 103; *Gant v. Hunsucker*, 12 Iredell, 259; *Canoy v. Troutman*, 7 Iredell, 155. The appropriate remedy is in chancery, which may either rescind the obligation, or reduce the recovery of the obligee in the ratio of the failure of the consideration. See *Selden v. Myers*, 20 Howard, 516; *Bauer v. Roth*, 4 Rawle, 83, 94; *Gordon v. Jefferies*, 2 Leigh, 410.

It results from these decisions, that fraud in the treaty or negotiation through which a deed is obtained, does not avoid the grant at law. To have that effect, the fraud must vitiate the execution of the instrument, and be such that the grantor can aver that it is not his deed. This conclusion is entirely consistent with the right to set aside a grant or contract which has been made in pursuance of an illegal or corrupt design, at the in-

stance of a creditor or other party to whom it is injurious; see *Coltins v. Blantern*, 2 Wilson, 341; 1 Smith's Lead. Cases, 690, 7 Am. ed.

In *Swift v. Fitzhugh*, 9 Porter, 39, the court cited and relied on the case of *Taylor v. King*, 6 Munf. 366, where it was declared that fraud may be given in evidence to avoid a deed, where it relates to the execution of the instrument, as if it is misread to the party, or his signature be obtained to an instrument which he did not intend to sign; but that it would be too much to vacate a bond at law, because the obligor was imposed on in a settlement of accounts, and thus led to believe that the amount was due, or because of the misrepresentation or concealment of an antecedent or collateral fact, which was the inducement for the execution of the bond.

It was held in *Belden v. Davies*, 2 Hall, 433, 447, on the strength of the authorities above cited, that "the only fraud which can be pleaded at law to avoid a deed, is fraud in its execution; such as a fraudulent reading of it, or the substitution of one instrument for another, or the obtaining by some device, such an instrument as the party did not intend to give." This seems to be an accurate statement of the rule, if limited to the case where a grantor or obligor seeks to avoid the deed as having been fraudulently procured. Oakley, J., said, "in *Franchot v. Leach* (5 Cowen, 506), the action was covenant on an agreement by

the plaintiff, to sell and convey a lot of land for a certain sum of money agreed to be paid by the defendant. The defendant offered to prove that he purchased the lot for the purpose of a distillery which the plaintiff knew, and falsely represented to the defendant that a stream of water running through the lot was sufficient for that purpose, knowing the contrary to be the truth. The evidence was rejected, and the court held that it was properly rejected. They said that the case of *Dorr v. Munsell*, was in point, and they state the principle to be, that the fraud which "avoids a deed, is not a fraudulent representation as to the consideration, but a fraud relating to the execution of it as a fraudulent misreading, or obtaining such an instrument as the obligee did not intend to give."

"In *Jackson v. Hills*, 8 Cowen, 290, the plaintiff sought to recover by virtue of a lease under seal from the defendant. The defence was, that the lease was obtained by certain fraudulent representations as to a part of the consideration or inducement to the making of the lease. The court held that this defence could not prevail, and they adopt the principle in terms, that "if the consideration of a specialty be *unlawful or corrupt*, it is void *ab initio*, and may be pleaded, but that the mere failure or want of consideration, is not sufficient at law to avoid a specialty." The court, in that case, revised all the preceding cases, and recognized the principles upon which they were decided, and in

reference to the case then before them, Sutherland, J., who delivered the opinion, said that the lease in question was executed upon an adequate consideration, "with full knowledge on the part of the lessee of what she was doing, and of its legal effect and operation, but under a misapprehension as to a collateral circumstance, occasioned by the false and fraudulent representations of the lessee. I know of no principle," says the Judge, "on which such a lease can be avoided at law."

The English authorities point in the same direction; *Feret v. Hill*, 15 C. B. 207; *D'Aranda v. Houston*, 6 Carr & P. 511; *Mason v. Ditchbourne*, 1 M. & Rob. 460; and although the case of *Evans v. Edmonds*, 13 C. B., looks the other way, it is one of the rare instances in which the point has been mooted in Westminster Hall, and it is difficult to believe that if the courts of common law possessed such a jurisdiction, they would not have been more frequently called on to exercise it. The question is not, however, free from doubt; and in *Phillips v. Potter*, 7 Rhode Island, 289, it was broadly asserted that "fraud vitiates every contract, or at least that every fraudulent contract may be avoided as well at law as in equity; and that in cases of fraud, courts of law exercise concurrent jurisdiction with courts of equity."

The jurisdiction of the courts of common law in this regard, has been enlarged in some of the States by statute, and is now concurrent with that of chancery, *Greathouse*

v. Dunlap, 3 M'Lean, 303, 306; *Smith v. Busby*, 15 Missouri, 387; *Leonard v. Bates*, 1 Blackford 173; *Huston v. Williams*, 3 Id. 171; *Case v. Boughton*, 11 Wend. 106; and the same result has been attained in others, through the gradual infusion of equitable principles, which are now constantly administered in England and the United States through legal forms. See *Evans v. Edmonds*, 13 C. B. 777; *Hoitt v. Holcomb*, 3 Foster, 535; *Tomlinson v. Mason*, 6 Randolph, 169; *Phillips v. Potter*, 7 Rhode Island, 289; *Baring v. Shippen*, 2 Binney, 154; *McCulloch v. McKee*, 4 Harris, 290; *Gray v. Handkinson*, 1 Bay. 278; 2 American Leading Cases, 431, 5 ed.

Chancery powers not having been granted by the Legislature in Massachusetts and Pennsylvania, until a comparatively recent period, were assumed by the courts in order to prevent a failure of justice; and it has long been held in those States, that one who is induced to enter into an obligation by fraud, is entitled to equitable relief in the ordinary course of law, although the instrument is under seal, and the false statement relates to the consideration of the contract, and not to its purport or effect. *Baring v. Shippen*, *McCulloch v. McKee*, *Bliss v. Thompson*, 4 Mass. 488; *Boynton v. Hubbard*, 7 Id. 119; *Somes v. Skinner*, 16 Id. 348; *Hazard v. Irwin*, 18 Pick. 95; *Partridge v. Messer*, 14 Gray, 182.

It is universally conceded, that a misrepresentation with regard

to the consideration of an unsealed agreement, is a sufficient ground for setting it aside, or compensating the party who is injured by the fraud; *Creery v. Holly*, 14 Wend. 26. But parol evidence is as inadmissible to vary such a contract, as if it were under seal, *ante*.

The rules of evidence are the same in equity as at common law, and although a written contract may be set aside or reformed for fraud or mistake, it cannot be varied or contradicted by evidence that the instrument was executed on the faith of an assurance that an oral stipulation should be as obligatory as if it appeared in the writing; see *Stevens v. Cooper*, 1 Johnson, Ch. 425; *Towner v. Lucas*, 13 Grattan, 705; 282; *Ware v. Cowles*, 24 Alabama, 446; *Dwight v. Pomeroy*, 17 Mass. 303; *Broughton v. Coffey*, 18 Grattan, 184; *Knight v. Bunn*, 7 Iredell, Eq. 77; *Westbrook v. Harbeson*, 2 McCord, Ch. 112; *Thomas v. McCormack*, 9 Dana, 108. Such a promise is merely honorary, and if the party who trusts to it is deceived, he must bear the consequences of his ill-placed confidence, and cannot ask that a rule of great moment to the community, should be disregarded in order to relieve him from a risk which he has deliberately incurred, *ante*, *Portmore v. Morris*, 2 Brown C. C. 219; *Lord Irnham v. Child*, 1 Id. 92.

In the case last cited Lord Irnham agreed to sell an annuity to Child, with a proviso that it should be redeemable on certain terms.

When, however, the time arrived for the execution of the deed, this stipulation was omitted by mutual consent, in consequence of an impression that it would render the transaction usurious. The complainant subsequently filed his bill to redeem, alleging that such was the agreement although it did not appear in the instrument. Lord Thurlow held, that where there is a deed in writing, it admits of no stipulation that is not part of the deed. Whether it adds to or deducts from the contract, it cannot be received on general grounds. If the stipulation had been left out fraudulently or through mistake, there would have been a case for equitable relief, but it appeared from the evidence that the stipulation was intentionally excluded from the deed.

The weight of authority is in accordance with this judgment, that when the complainant does not allege fraud or mistake in the preparation of the writing, and it appears that he knew its effect and purport, there is no ground for the equitable reformation of the contract.

In *Broughton v. Coffey*, 18 Grattan, 184, the bill alleged that the plaintiff agreed to buy a tract of land containing 450 acres for a given price, and that the defendant tendered a deed for 378 acres, described by metes and bounds, alleging as an excuse for not conveying the residue that there was some difficulty as to the title, but that he would make it right and execute a conveyance in conformity with the agreement, and that

the plaintiff accepted the deed and paid the purchase-money on the faith of this assurance, which the defendant subsequently refused to fulfil. Joynes, J., said, "it would not be pretended that there was any mistake in the deed. It conveyed precisely what both parties understood it to convey when it was executed. The evidence could not be received on the ground of fraud because it was itself the only proof of fraud; *Towner v. Lucas*, 13 Grattan, 705, Nor was it admissible to prove that the deed was intended to be only a partial execution of the original parol contract. All previous negotiations were merged in the deed, which in the absence of fraud and mistake must be alone looked to for the final agreement of the parties. The bill should consequently be dismissed."

The rule that the writing is the best and only evidence of the contract, applies to the contract as such, or in other words, to the stipulations made on either side, and does not preclude the right to prove any fact or circumstance that has a legal or equitable bearing on the obligation of the deed or bond. Hence the consideration of a written contract, or the nature of the transaction on which it is based, may be shown by parol or extrinsic evidence, although the effect is to vary the operation of the instrument and make it other than the parties designed. A contract innocent on its face, may in this way be proved to be illegal and void; *Martin v. Clarke*, 8 Rhode Island, 389; *Paxton v*

Popham, 9 East, 421; 1 Smith's Leading Cases, 676, 7 Am. ed. A resulting trust may be raised by evidence that the purchase-money of a conveyance was paid by a third person, and not by the grantee, *ante*, vol. 1. 333. And proof that the consideration was a loan, necessarily converts an absolute deed into a mortgage, notwithstanding any recital or stipulation to the contrary which may be introduced into the deed; *Strong v. Stewart*, 4 Johnson Ch. 167; *Jackson v. Lodge*, 36 California, 28; see *Jones v. Statham*, 3 Atkyns, 387; *Houser v. Lamont*, 5 P. F. Smith, 311; *Harper's Appeal*, 14 Id. 315; *Sweitzer's Appeal*, 21 Id. 264; *Slee v. The Manhattan Co.*, 1 Paige, 418; *Van Buren v. Olmstead*, 5 Id. 10; *Roach v. Cosine*, 9 Wend. 227; *Kunkle v. Wolfersberger*, 6 Watts, 126; *Hudson v. Isbell*, 5 Stewart & Porter, 67; *De-shazo v. Lewis*, Ib. 91; *English v. Lane*, 1 Porter, 328; *Johnson's Ex'or v. Clarke*, 5 Arkansas, 321; *Yarbrough v. Newell*, 10 Yerger, 376; *Lane v. Dickerson*, Ib. 373; *Streator v. Jones*, 3 Hawks. 423; *M'Donald v. M'Leod*, 1 Iredell Equity, 221; *Taylor v. Luther*, 2 Sumner, 228; *Randall v. Phillips*, 3 Mason, 378; *Wright v. Bates*, 13 Vermont, 341; *Morris v. Nixon*, 1 Howard, 118; *post*, notes to *Howard v. Harris*.

It does not follow from these decisions, that an absolute conveyance can be converted into a mortgage, by evidence which leaving the consideration untouched, varies or contradicts the agreement as set forth in the deed; and the

weight of authority seems to be that it cannot, except in subordination to the rules by which chancery is governed in modifying or reforming contracts on the ground of fraud and mistake; *Thomas v. McCormick*, 9 Dana, 108; see *Newton v. Fay*, 10 Allen, 505. Where there is no sufficient proof of deceit or undue influence, or that the purchase-money was in truth a loan, a defeasance should not be engrafted by parol in opposition to the terms of the deed; see *Wesley v. Thomas*, 6 Harris & J. 24, 28; *Watkins v. Stockett*, Ib. 435; *Harper's Appeal*, 14 P. F. Smith, 315; *Franklin v. Roberts*, 2 Iredell Eq. 560; *Kelly v. Bryan* 6 Id. 283; *Bright v. Wagle*, 3 Dana, 252; *Thompson v. Patton*, 5 Littell, 74. This is not inconsistent with the right to prove that a conveyance which purports to be in satisfaction of an antecedent debt, was made on the faith of an oral stipulation that the debt should subsist, and the grantor be at liberty to redeem. There is a manifest distinction between parol evidence to contradict the writing, and parol evidence of facts which control its operation; see *Sweet v. Parker*, 7 C. E. Green, 453; *Phillips v. Hulsizer*, 5 Id. 308; notes to *Howard v. Harris*, *post*.

The doctrine that an equity of redemption may be set up in opposition to the language of the deed, seems to have originated in the apprehension that the debtor may be unduly influenced by his needs, and the exactions of the creditor, which lies at the foundation of the usury laws. In general every one may

renounce a right given for his benefit, but a chancellor will not tolerate a restraint on the equity of redemption, although imposed in express terms and with an opportunity for deliberation. And as this rule is dictated by a policy which is irrespective of the intention of the parties, it cannot be evaded by putting a security for money in the shape of an absolute deed; *Harper's Appeal*, 14 P. F. Smith, 315; *Ring v. Franklin*, 2 Hall, 1; *Richardson v. Thompson*, 1 Humphreys, 151. It is always admissible to contradict a deed for the purpose of showing that the real nature of the transaction is at variance with principles that have been established for the common good; *Collins v. Blantern*, 2 Wilson, 341; 1 Smith's Lead. Cases, 690, 7th ed. Such decisions rest on grounds which are peculiar to themselves, and do not warrant a recourse to parol evidence where the private right is alone involved.

Decisions, nevertheless, exist, which are not reconcilable with the rule of evidence laid down in *Lord Irnham v. Child*. Thus in *Keisselback Livingston*, 4 Johnson Ch. 144, it was decided that a written agreement for a lease, to contain "the usual clauses, restrictions and reservations in leases given by the defendant," might be varied by a verbal stipulation that the complainant should not be subject to a condition which the defendant had invariably imposed on his tenants, although the plaintiff by his own showing, knew what the instrument contained when he affixed

his signature. The chancellor said that the prayer of the petition was, that the writing should be made to speak what the parties intended it should speak when they executed it, and that he saw no objection to the admission of parol evidence in the case before him, that would not apply to every attempt to correct a defect in a deed by parol." It would, nevertheless, appear that the complainant was estopped from alleging mistake with regard to an instrument which he had executed, with a full knowledge of its contents; and the case hardly stands better on the other ground taken by the chancellor, that as parol evidence was requisite to show what clauses were "usual," it might be carried far enough to show what the parties understood by that term.

The courts of Pennsylvania have gone further in this direction, than those of any other part of the Union. It is well settled in that state, that a stipulation by one of the parties to a written agreement, on the faith of which it is executed by the other, may control the writing, although there is no evidence that it was made with a fraudulent design; *Christ v. Dittenbach*, 1 S. & R. 464; *Miller v. Henderson*, 10 Id. 290; *Hultz v. Wright*, 16 Id. 345; *Clark v. Partridge*, 2 Barr, 13; *Clark v. Partridge*, 4 Id. 166. These decisions overrule the doctrine of *Lord Irnham v. Child*, and proceed on the ground that the violation of such a promise is a breach of good faith, which a chancellor may redress by a decree of specific

performance; *Campbell v. M'Clenachan*, 6 S. & R. 171; *Miller v. Henderson*, 10 Id. 260; *Lyon v. The Huntingdon Bank*, 14 Id. 283; *Oliver v. Oliver*, 4 Rawle, 141; *Renshaw v. Gans*, 7 Barr, 119; *Rea-
rich v. Swineheart*, 1 Jones, 233. "It is doubtless a general principle of law," said Rogers, J., in *Oliver v. Oliver*, that parol evidence shall not be admitted to destroy, control, add to, or alter a written instrument, but the exceptions to the rule are equally well settled. Ever since the case of *Hurst v. Kirkbride*, cited in 1 Binn. 616, it has been the practice to receive parol evidence of what passed at the time of the execution of deeds, or at and before the execution. When the fairness of the transaction is impeached, it is immaterial whether the party intended a fraud, at the time of the contract, or whether the fraud consists in the fraudulent use of the instrument; *Hultz v. Wright*, 16 S. & R. 345; *Lyon v. Huntingdon Bank*, 14 Id. 283; *Thomson v. White*, 1 Dall. 424, are of this description. In *Thompson v. White*, the fraud consisted in Lawrence Saltar's obtaining a conveyance of his wife's estate under a solemn promise to make a settlement, which he afterwards neglected to do. It has never been doubted that he entered into the contract with good faith. In his last sickness, he expressed uneasiness at leaving no will, because, as had always been supposed, he thereby intended to comply with his promise. The fraud consisted in the fraudulent use which was attempted to be made

of the deed, in the exclusion under the general rule of law, of Mary. Thompson, the sister of Mr. Saltar, and to whom Lawrence Saltar promised to assure the property. "As to fraud," said Justice Tod, who delivered the opinion of the court, in *Hultz v. Wright*, "it is not supposed to be necessary to have proof express, that a writing has been obtained fraudulently, in order to admit parol evidence against it, on that score; but parol evidence may be permitted to resist the fraudulent use of a writing in the obtaining of which no fraud can be made to appear." That was a case where, in debt for rent, parol evidence was admitted to show, that in making a lease for nine years, rendering rent, it was understood and agreed by all parties, that for the last nine months no rent should be payable. So also in an action on a single bill, the defendant, under the plea of payment, is permitted to prove, that the bill was taken subject to a parol agreement, made long before its date; *Lyon v. Huntingdon Bank*, 14 S. & R. 283. In *Robinson v. Eldridge*, 10 Id. 142, as well as in the case just cited, the defence consisted of a number of facts, which took place at different times, and which all tended to make one whole. It is difficult to discover any difference between the evidence offered, and the evidence which was received in *Campbell v. M'Clenachan*, 6 S. & R. 172. Parol evidence was given of what passed between the parties, at, and immediately before the execution, when the plaintiff was

induced to execute the articles of agreement, by the defendant's promises. The case of *Campbell v. M'Clenachan*, was an action on the case, on a parol contract, in which the defendant promised the plaintiff to permit him to take as much timber from the lands purchased by the defendant from the plaintiff, as would be sufficient to build a boat to go down the Ohio. The same defence as has been urged here, was then taken, but without avail. As is justly observed, to refuse performance of a verbal promise, after having made use of it to get the plaintiff's signature to the agreement, is a trick, of which the law will not permit the defendant to avail himself. If we are to take what the plaintiff offers to prove to be true, what are we to think of the defendants' conduct? Surely every person must see they are attempting to avail themselves of the legal advantage, at the expense of every principle of honor and common honesty. It may be a difficult matter in some cases, to prevent the fraudulent use of an instrument, except through the medium of parol evidence. For the same principle I also cite, 1 Ld. Raym. 464; *Christ v. Diffenbach*, 1 S. & R. 464; *Lessee of Dinkle v. Marshall*, 3 Binn. 587.

"I do not feel myself at liberty to reason on the policy of the rule, or the exceptions to it. It is sufficient for me, that the point has been settled by a train of authorities, which it is now too late to overturn."

The same view has been taken

in some of the other States: *Murray v. Dake*, 46 California, 644; *Coger's Exor's v. Magee*, 2 Bibb. 321; *Taylor v. Gilman*, 25 Vermont, 411. In *Taylor v. Gilman*, a suit was brought on the covenants of warranty and against incumbrances in a deed from the defendant; the breach declared on being that part of the land conveyed had been taken for the purposes of a railway before the deed was executed. The defendant filed a bill setting forth that the appropriation of the land was well known to the plaintiff when he accepted the conveyance, and that it was then agreed orally that the plaintiff should receive a certain proportion of the damages awarded as compensation for the land, and forego his claim on the defendant. Isham, J., said, "it would seem from the testimony, that there is no ground for relief in consequence of any accident or mistake, for the deed and its covenants were drawn as they were understandingly; the attention of the parties and the scrivener was called at the time to this matter of which they now complain; so that they intentionally neglected to make these covenants conformable to the true contract of the parties. There was, therefore, no accident or mistake, either in fact or law, existing in the case. Neither does the bill set up any mistake or accident of the parties in the drawing or execution of the deed or covenants, as a ground of equitable interference. The only ground, therefore, upon which testimony can be received, to control the legal effect and operations of these cove-

nants, is the fraud of the party in attempting to enforce them in violation of his agreement. The evidence is regarded as sufficiently certain and clear, in the proof of that contract, that the damages to be paid by the railroad for their right in the premises, were to be divided between these parties in specified proportions, and that no claim was to be made on the grantor, on his covenant in this deed, for any matter arising out of that negotiation ; and evidently it was in confident reliance upon this understanding, that the grantor neglected so to qualify his covenant, that no right of action should arise thereon for that matter. Regarding these facts, therefore, as sufficiently proved, and the bill as sufficiently setting up the fraud and asking for relief on that ground, we think the case is brought within the general rule upon which relief is granted." An injunction was accordingly issued to restrain the prosecution of the suit at law.

In *Murray v. Dake*, the defendant was induced to execute a written lease of a house and lot by an oral promise that he should be allowed to add another story to the building, and to occupy it as a dwelling. He erected the story and took possession of it without objection from the lessees, but the latter subsequently brought an ejectment, and relied on the writing as conclusive that his title extended from the ground *usque ad cælum*. The court held that there had been no mistake as to the contents of the lease, because the lessor knew

what the lease contained when he executed it. Nor did it appear that the lessees had any fraudulent design at that time ; and it might on the contrary, be inferred, that the idea of breaking their promise did not occur to them until after the second story had been erected. It was nevertheless established under the authorities in Pennsylvania and Vermont, that a court of equity might interfere to prevent the unconscientious use of a paper, for a purpose not contemplated when it was made ; although the execution of the instrument was not vitiated by mistake or fraud ; *Parks v. Chadwick*, 81 W. & S. 96 ; *Renshaw v. Gans*, 7 Barr, 117 ; *Taylor v. Gilman*, 25 Vermont, 415. It had been declared in *Parks v. Chadwick*, that to obtain an instrument for one purpose, and use it for an another and different purpose, was as much a fraud as to obtain it by fraudulent statements. It followed, the plaintiffs were not entitled to recover the upper story of the house from the defendants.

Whatever may be thought of the reasons assigned by the court, the judgment was undoubtedly correct, because, there was a part performance of the contract, which corroborated the parol evidence, and took the case out of the Statute of Frauds.

The decisions above cited, may be referred to the doctrine of equitable estoppel ; that one who induces another to change his position for the worse, by a representation or assurance shall be compelled to make his declaration good : see *Wheelton v.*

Hardisty, 8 Ellis & Bl. 231, 262. It does not, therefore, apply, unless the oral promise was a determining cause, without which the instrument would not have been executed; *Martin v. Berens*, 17 P. F. Smith, 459; *Clark v. Partridge*, 2 Barr, 13; 4 Id. 166; *Hain v. Kahlbach*, 14 S. & R. 59; see Pothier on Obligations, part 1, ch. 1, art. 3, sect. 3. Accordingly, in *Hain v. Kahlbach*, evidence that the obligee in the bond sued on, had declared that he would require nothing more than the interest during his life, and that the instrument should be null and void when he died, was held inadmissible unless the obligor was thereby induced to execute the bond.

In *Clark v. Partridge*, 2 Barr, 13; 4 Id., it was alleged in the declaration that a material clause had been left out in drawing the agreement, and that the omission was discovered when the parties met to execute the instrument, but not corrected in consequence of the assurance of the defendant that he would not take advantage of the mistake. Rogers, J., said, that the count was defective in not averring fraud. It was not enough to set forth the facts from which fraud might be inferred. This dictum hardly consists with the doctrine of pleading. The gist of an action for deceit is wilful falsehood, and where this is sufficiently alleged, it is superfluous to add that the misstatement was fraudulent. All that the declaration need aver is, that the defendant made the representa-

tion knowing it to be false. In like manner, if obtaining an instrument for one purpose and using it for another be a fraud entitling the injured party to relief, it is needless to couple the allegation of the wrong with an injurious epithet.

In *Fulton v. Hood*, 10 Casey, 365, 374, the court below excluded evidence that it had been verbally agreed at the execution of a bond and warrant of attorney, that judgment should not be entered on the bond for a certain period, unless in a specified contingency; and this ruling was affirmed on error by the court above. Strong, J., said "the principle of the Pennsylvania cases is that obtaining a writing for one purpose, and using it for another and unfair purpose is fraudulent, and the subsequent abuse opens the door to parol evidence of what took place at the execution of the instrument. If the principle goes as far as the plaintiff in error contends, the rule which excludes parol evidence when offered to alter, add to, or contradict a written instrument, would be utterly annihilated. The offer of such evidence presupposes that the instrument which it attempts to reform is used for a purpose not originally contemplated, and that it is so used the parol evidence proposes to prove. If it must be admitted on the ground that such an abuse of the instrument constitutes a fraud, then the very fact is assumed before the evidence is given, which it is introduced to prove. The misuse or perversion

must consequently be established in the first instance, to make way for the reception of the parol evidence." So in *Blakesley v. Blakesley*, 10 Harris, 237, it was held inadmissible to prove that a marriage settlement had been executed on the faith of an assurance that it should pass the title to land which the instrument did not purport to convey. Black, Ch. J., said that when "one claims land not embraced by the instrument on which he sues, he is encountered not only by the statute of frauds, but by the unbending rule of law that the deed is conclusive evidence of the contract."

It was said in like manner in *Fisher v. Dybert*, 4 P. F. Smith, 463, that "a writing may be reformed on account of fraud, accident or mistake; that is to say, where something has been inserted or omitted contrary to the true meaning and intent of the contracting parties, parol proof may be adduced to correct the error, whether it comes under one or the other of these heads. So parol proof is sometimes admitted to explain latent ambiguities, local terms, and terms of art in writings, but it may safely be asserted that there is no ground for and no case of its admission when none of these grounds exist." The cases of *Collins v. Baumgardner*, 2 P. F. Smith, 461; *Harbold v. Kuster*, 8 Wright, 392; and *Miller v. Freschorm*, 7 Casey, 252, are to the same effect.

In the *Powelton Coal Company v. McShane*, 25 P. F. Smith, 238; the court reverted to the ground

taken in the earlier decisions. There suit was brought to recover damages for the breach of an alleged stipulation, to furnish 10,000 tons of coal, to the plaintiff, on or before October 1st, 1868, to be transported in his vessels. It appeared at the trial, that the contract as reduced to writing, was that the plaintiff would transport the coal at such times as the defendants might desire; but the plaintiff offered to prove that when the paper was shown to him, he refused to sign it, unless the defendants would deliver the coal by the 1st of October; that such an assurance was given; and that he then affixed his signature. This evidence was received, and a verdict and judgment given for the plaintiff, which was sustained by the court above. Gordon, J., said, that "to hold that a contract might be enforced without regard to the express parol stipulation under which it was signed, would be to disregard long and well established legal principles, as well as the plainest demands of common honesty."

Where a deed is executed by a man of sound mind, with a knowledge of its contents, there is obviously no room for an allegation of mistake; *Clark v. Partridge*, 2 Barr, 14; *Tyson v. Passmore*, Ib. 122, 124, while fraud can hardly exist without concealment or misrepresentation; *Taylor v. Gilman*, 25 Vermont, 411, 414; yet in *Chew v. Gillespie*, 6 P. F. Smith, 308, the grantor was permitted to show that the deed was not drawn in accordance with

his instructions, although it was read to him, and he sealed and delivered it without objection. And the recent case of *Woolford v. Herington*, 24 P. F. Smith, 311, goes to the full extent of the proposition, that one who induces another to act or to refrain, by a promise that the contract shall be reduced to writing, or shall be as valid as if it were a part of an instrument which is prepared and executed at the time, is thereby precluded from alleging the want of written evidence as a reason why the contract should not be enforced, although the subject-matter is within the statute of frauds. When, said Sharswood, J., "it is a part of the agreement that the trust shall be declared in writing, or it is shown that the trust was not inserted in the deed under a stipulation to that effect, in consequence of a verbal promise to perform it, a fraudulent intent at the time of the agreement need not be shown in order to establish the trust. The fraud consists in the fraudulent use of the instrument." It may be observed that *Thompson's Lessee v. White*, 1 Dallas, 447, which was cited and relied on as an authority for this judgment, was decided before the re-enactment of the 7th section of the statute of frauds, which is now in force in Pennsylvania; see *Barnet v. Dougherty*, 8 Casey, 371; The true ground of the decision, in *Thompson v. White*, seems to be that a volunteer who obtains a gift through a promise that it shall be held wholly or in part for another whom the donor intends to

benefit, is affected with a trust *ex maleficio*, if he does not keep his engagement, vol. 1, 352. It does not apply to a purchaser for value, nor unless the promise is made to the donor, and is a moving cause without which he would not have made the deed or will; *ante*, 970.

If the language held in *Fulton v. Hood*, conflicts with the course of decision in Pennsylvania, it is sustained by the authorities elsewhere, which establish that when the writing purports to contain the contract, the parties are estopped from setting up any stipulation which does not appear in the writing, and that the case cannot be taken out of this rule by alleging that the writing was executed on the faith of an assurance that the stipulation should be as valid as if it had been inserted in the instrument, *ante*, 945; *Ruse v. The Life Ins. Co.*, 23 New York; *M'El-derry v. Shipley*, 2 Maryland, 25; *Wilson v. Watts*, 9 Id.; *Smith v. Williams*, 1 Murphy, 426; *Howard v. Thomas*, 12 Ohio, N. S. 201, 205.

It has also been held in Pennsylvania, that the stipulation set up as modifying the writing, must be so far cotemporaneous, as to rebut the presumption that it was excluded by mutual assent, or merged in the contract as finally made; *Cozzens v. Stevenson*, 5 S. & R. 421. In this instance Ch. J. Tilghman said that such evidence must be confined to what takes place at the time of sealing and delivery, and that antecedent declarations cannot be received, unless they are reiterated when the par-

ties meet to execute the deed. It would, notwithstanding, appear that if the intention can be sought dehors the instrument, the question is not when the declaration was made, but whether the complainant was misled by the declaration. In *Wood v. Dwarrris*, 11 Excheq. 493, the defendant pleaded to an action on a policy of insurance, that the policy was issued on the express condition that if any statement in the application for insurance was untrue, the contract should be void, and that the application did contain a false and untrue statement. The plaintiff replied on equitable grounds, that before the policy was executed, the defendants published a prospectus containing a statement that all policies effected by them should be indisputable, except on the ground of fraud. The rejoinder was, that the policy was issued on the basis of the application mentioned in the plea, and there was not at the time of the making of the policy, any such promise or declaration on the part of the defendants, nor did they make such a promise or declaration at any time, except in the prospectus alleged in the replication. The plaintiff demurred, and judgment was entered in his favor on the ground of the insufficiency of the rejoinder, and that the replication was a good equitable answer to the plea. The point was elaborately discussed not long afterwards in *Wheelton v. Hardisty*, 8 Ellis & Bl. 231; but the case went off on other grounds.

In *Ruse v. The Ins. Co.*, 23

New York, 516, suit was brought on a policy conditioned to be void, if the annual premiums were not paid on or before the days therein named. It appeared in evidence that the plaintiff received a prospectus containing the following clauses: "Every precaution is taken to prevent a forfeiture of the policy." "A party neglecting to settle his annual premium *within thirty days after it is due*, or paying assessments within the sixty days, specified within the charter, or refusing to give satisfactory security upon the note, forfeits the interest he has in the policy." It was contended that these clauses excused a forfeiture arising from a failure to pay at the day. The court held that they did not, and that the case came under the rule that when the "parties enter into a written contract, all previous negotiations and propositions in relation to such contract, whether parol or written, are to be regarded as merged in the writing."

The case of *Wood v. Dwarrris*, may be reconciled with this doctrine, by the aid of a principle to which the court did not advert in giving judgment. Ordinarily the declarations on either side, anterior to the contract, are merged in the writing as finally prepared and executed, and what that does not contain is presumed to have been deliberately excluded; *Ruse v. The Life Ins. Co.*, 23 New York, 516; *The Cincinnati R. Rd. v. Pearce*, 28 Indiana, 502; *Wilson v. Sherburne*, 6 Cushing, 68; *Doyle v. Dixon*, 12 Allen, 576. It was on this ground that C. J. Tilghman re-

lied in *Stevenson v. Cozzens*, ante, 972. But this inference will not be drawn in opposition to the manifest design. When a preliminary contract is so worded as to indicate that a particular clause is to remain in force, it may modify or control the operation of the deed; *Backenstross v. Stahler*, 9 Casey, 251; *Harbold v. Kuster*, 8 Wright, 392. *Willick v. Haine*, 16 New York, 532. The prospectus in *Wood v. Dwarrris*, was a declaration of the principle on which the insurance company proposed to do business. Being addressed to all the world, and designed to attract customers, those who dealt with them were entitled to believe that they would not deviate from the rule which it set forth, without announcing their intention to make the change. If the language of the policy admitted of two interpretations, the plaintiff might justly require that to be preferred which accorded with the rule laid down in the prospectus. Strictly speaking, that is untrue which is not consonant with truth, but untrue is often used in a harsher sense. A charge of untruth is in the popular signification of the term equivalent to an accusation of wilful falsehood or deceit. The replication was therefore good, as showing the true meaning of the condition, and that the plea should have averred not only that the application for insurance contained statements which were untrue, but that the plaintiff knew them to be false.

If the distinction on which parol evidence is received in Pennsylvania, be not airdrawn, it is

so thin, that the courts have not been consistent in its application. The judgment in *Fulton v. Hood*, ante, cannot well be reconciled with that in *Miller v. Henderson*, 10 S. & R. 290, where a surety was allowed to prove that he had been induced to execute the bond by an assurance that he would not be required to pay it.

It is well settled, under the general course of decision, that bills of exchange and promissory notes obey the general rule that the tenor of a written contract cannot be varied by parol evidence, ante, and such are also the cases in Pennsylvania; *Hill v. Gaw*, 4 Barr, 493; *Mason v. Graff*, 11 Casey, 448; *Anspach v. Bast*, 2 P. F. Smith, 356; but it is not easy to discern from the language held in these instances, whether the evidence was excluded in view of the greater sanctity of commercial instruments, or because it did not sufficiently appear that the maker executed the note on the faith of the promise that it might be renewed if he did not find it convenient to pay.

Whatever the rule may be under other circumstances, it is well settled that where written evidence is required by statute, the case will not be taken out of the statute by a promise to give a writing, nor by a promise that a writing which is given shall have a greater or other effect than its terms import. See *Montacute v. Sir George Maxwell*, 1 Peere Williams, 618. It may be that a false representation of the contents or operation of a writing will authorize the interven-

tion of a chancellor to reform the instrument, although the subject matter is within the statute of frauds. As against the person who is guilty of the deceit, the contract shall be as it is represented to be; *Tyson v. Passmore*, 2 Barr, 122. This depends on the established principle that a statute passed for the prevention of fraud shall not be used as a means of fraud. See *Lincoln v. Wright*, 4 De Gex & Jones, 16, 20, 22; *Taylor v. Luther*, 2 Sumner, 219, 232. But the violation of a promise is not a fraud, unless the promise is made with a fraudulent design; *Montacute v. Maxwell*; *Batturs v. Sellers*, 6 Harris & Johnson, 249; *Lambert v. Watson*, Ib. 252; *Wilson v. Watts*, 9 Maryland; *Walker v. Hill*, 6 C. E. Green, 191. It is well settled that a breach of warranty does not authorize a rescission of the contract, or the return of the goods, unless the vendor knew that the warranty was false. So an unpaid vendor cannot reclaim the goods on the ground that he was induced to make the sale by the confident assurance of the purchaser, that the price would be paid at the appointed time. For a like reason the breach of a parol promise will not justify the intervention of a chancellor, even where it disappoints the just expectations of one who has parted with value or varied his position for the worse on the faith of the promise, unless the change is great and irretrievable, and does not admit of compensation; *Glass v. Hulbert*, 102 Mass. 24, 39; *Purcell v. Miner*, 4 Wallace, 513.

The rule applies whether the bill is filed to supply the want of a writing, or to add a new term to an instrument which has been executed and delivered; *Glass v. Hulbert*; *Batturs v. Sellers*; *Wilson v. Watts*; *Walker v. Hill*. No case can well present a stronger claim for relief than where the purchase-money of land is paid in the confident belief that the vendor will fulfil his undertaking to give a deed, and yet it is well settled that the vendee must seek redress by a suit for money had and received, and is not entitled to a decree for specific performance, because he is presumed to know the law, and it is his own folly to rely on the good faith of the vendor instead of the written proof which the statute requires.

The rule in this regard was clearly stated in *Wilson v. Watts*, 9 Maryland, 436. "Where there is a written contract in relation to land, and some of the terms or provisions in the verbal agreement of the parties are not included in the writing, but omitted by design, even on the express understanding that such provisions shall be carried into effect in the same manner as if they constituted part of the written instrument, if there is no fraud, undue influence, surprise or mistake, either in the making of such contract, or in reducing it to writing, parol evidence, will not be admitted to enforce the omitted provisions, or for the purpose of contradicting, adding to or varying the written instrument; although subsequently to its execution one of the parties has

fraudulently refused to comply with the omitted provisions, and in open violation of good faith and fair dealing, insists upon his right, under the statute of frauds, to have the contract, as written, carried into effect."

A false representation that a conveyance has been executed, or of its purport, may require the application of a different principle. The vendor may induce the vendee to pay the price by stating untruly that a deed has been placed in escrow, or that it embraces land which is not in point of fact conveyed. The purchaser may rescind the contract and recover back the money, but this is an incomplete remedy which may be frustrated by the vendor's insolvency, and no full or adequate redress can be afforded without affecting him with a trust *ex maleficio*. Such a case would be an eminently proper one for the application of the dictum, attributed to Lord Chancellor Parker in *Maxwell v. Montacute*, 1 Precedents in Chancery, 526, and repeated by Lord Thurlow in *Whitchurch v. Bevis*, 2 Bro. C. C. 559, 565, that "if there was an agreement for reducing the contract into writing, and that is prevented by the fraud and practice of the other party, equity would relieve." It is accordingly said by Mr. White, in the notes to *Lester v. Foxcraft*, in the first volume of this work, "that a contract will be taken out of the statute of frauds where the provisions of the statute have not been complied with, in consequence of the fraud of the person against whom de-

cree for specific performance is sought; for which he cites, *Maxwell v. Montacute*, Prec. Ch. 526; *Whitchurch v. Bevis*, 2 Bro. C. C. 559, 565; *Walker v. Walker*, 2 Atkins, 98; *Lincoln v. Wright*, 4 De G. & Jo. 16, 22; *Joynes v. Statham*, 3 Atkins, 389." See *Wolford v. Herrington*, 24 P. F. Smith, 311. The point was not, however, determined in these instances.

The case of *Maxwell v. Montacute* is accurately reported in 1 Peere Williams, 618. The Lord Chancellor said: "In cases of fraud, equity should relieve even against the words of the statute. As if one agreement in writing should be proposed and drawn, and another fraudulently and secretly brought in and executed in lieu of the former, in this or such like cases of fraud equity would relieve, but where there is no fraud, only a relying upon the honor, word or promise of the defendant, the statute making those promises void equity will not interfere; nor were the instructions given to counsel for preparing the writing material, since after they were drawn and engrossed, the parties might refuse to execute them. The bill averred, that the defendant (plaintiff's husband) before her intermarriage with him did promise, that she should enjoy all her own estate to her separate use, that he had agreed to execute writings to that purpose, and had instructed counsel to draw such writings, which not been perfected, the defendant desired this might not delay the match, in regard his friends being there it might shame him. But he

engaged, that upon his honor, she should have the same advantage of the agreement as if it were in writing drawn in form by counsel and executed; upon which the marriage took effect, and afterwards the plaintiff wrote a letter to the defendant, her husband, putting him in mind of his promise to which the defendant, her husband, wrote an answer under his hand, expressing that he was always willing she should enjoy her own fortune as if sole, and that it should be at her command." The statute was, notwithstanding, held to be well pleaded to the relief and discovery; and the plea was also sustained in *Whitchurch v. Bevis*, 2 Bro. C. C. 565.

These cases show, that a written instrument will not be reformed on the ground of fraud, except on clear and certain proof; but much less may be a defence where a chancellor is asked to go beyond the law, and specifically execute a deed or contract, and it is then admissible to show by any means consistent with the ordinary rules of evidence, that the complainant took an undue advantage, or that the writing does not accurately represent the agreement. In *Joynes v. Statham*, 3 Atkins, 388, the plaintiff had taken advantage of an illiterate man, by omitting a material stipulation which had been orally agreed to, from the writing, which the plaintiff had undertaken to prepare, and Lord Hardwicke held, that whether the omission was due to fraud, accident, or mistake, it might equally be shown by parol as a reason why the contract

should not be enforced without rectifying the error. So in *Walker v. Walker*, 2 Atkins, 98, the parol evidence was adduced to rebut an equity by showing a failure of consideration.

Some of the recent decisions transcend these limits, and virtually abrogate the Statute of Frauds. This cannot, perhaps be said of *Lincoln v. Wright*, 4 De G. & Jones, 16, which went on the three-fold ground of part performance; that the purchase-money was advanced for the complainant, and therefore virtually paid by him; and that the defendant bought from a mortgagee with a power of sale, under an arrangement with him and the mortgagor, that the conveyance should be subject to the equity of redemption, which brought the case within the rule; once a mortgage always a mortgage. But *Haigh v. Kaye*, 7 L. R. Ch. Ap. 473, does not admit of such an explanation. It was there held on the authority of *Childers v. Childers*, 4 De G. & J. 482; and *Davies v. Otty*, 35 Beavan, 208, that where a deed purporting to be for a valuable consideration, was made on the faith of an oral promise or agreement, that the grantee should hold the land for the grantor, a trust arose in favor of the latter which equity would enforce. This case is irreconcilable with *Blodget v. Hildreth*, 103 Mass. 184, and *Walter v. Locke*, 9 Cushing, 90, vol. 1, 355; but would be identical with *Murphy v. Hubert*, 7 Barr, 420, if that decision had not been pronounced before the seventh section of the Statute of Frauds was re-

enacted in Pennsylvania. A promise by a grantee to hold the land for the grantor, or to re-convey to him, is in effect a declaration of trust, and directly within the mischief which the statute was intended to prevent. It cannot be taken out of the statute by calling the refusal to fulfil it a fraud. Such a refusal is not a fraud unless the trust exists, and this is the very thing which the statute provides, shall not be proved by parol, vol. 1, 358. In the absence of fraud, mistake and undue influence, a man ought not to gainsay his own deed, or any writing which he has deliberately executed. A grantor who makes an absolute conveyance, intending that the beneficial interest shall remain in him, is guilty of a gross folly, or actuated by a sinister design, and cannot reasonably ask that the rules of law should be suspended to extricate him from the situation in which he has voluntarily placed himself; *Murphy v. Hubert*, 4 Harris, 50. The case is materially different, where the bounty of the donor is intercepted by a promise to apply the property to the use of a third person whom he intends to benefit. The latter has no opportunity to protect his interests, and a chancellor may therefore justly intervene to prevent the grantee from profiting by an abuse of confidence.

It has accordingly been held, that where a grant or bequest to a volunteer, is procured through a promise to hold the property in whole or part for a third person whom the giver desires to benefit, a trust will arise *ex maleficio*, if

the trust be not fulfilled, vol. 1, 352. notes to *Dyer v. Dyer*. "The devisee is charged with the trust, not by reason merely of the oral promise, but because of the fact that by means of such promise he had induced the transfer of the property to himself;" *Glass v. Hurlbert*, 102 Mass. 24, 39. The law is well settled to this effect, where the promise is made to a testator, and operates as a moving cause for the execution of the will; *Russell v. Jackson*, 10 Hare, 206; *Tee v. Ferris*, 2 Kay & J. 357; *Jones v. Badley*, Law Rep. 3 Ch. 362, 363; *M'Cormick v. Grogan*, Law Rep. 4 H. L. 82; and the principle is the same where the gift is made by deed. The point was, notwithstanding, determined the other way in *Robson v. Harwell and Wife*, 6 Georgia, 589, 601, apparently because fraud was not specifically charged in the bill.

It is well settled, that where the answer admits that the writing does not contain the whole agreement, or that it is subject to conditions or stipulations which are not set forth, the door is thrown open to parol evidence, and testimony may be adduced on either side; *Thomas v. M'Cormick*, 9 Dana, 108; *Moses v. Murgatroyd*, 1 Johnson Ch. 119. But it is also held, that such an admission will not take the case out of the Statute of Frauds, or preclude the defendant from relying on the want of written evidence as a reason why the contract should not be enforced. See *Harris v. Knickerbocker*, 5 Wend. 638; *Hamilton v. Jones*, 3 Gill & Johnson, 127;

Thompson v. Todd, 1 Peters, C. C. R. 380; *Esmay v. Gorton*, 18 Illinois, 483. This marks the distinction between the rule of evidence introduced by the statute, and that prevailing at common law, which does not preclude a chancellor from giving effect to a parol variation alleged in the bill, and confessed in the answer, although the admission is accompanied by a demand that the complainant shall be compelled to abide by the letter of the instrument. See *Chetwood v. Brittan*, 1 Green, 438.

"It is now settled, that if the defendant admits the agreement and insists on the statute, he can protect himself from a decree for specific performance, notwithstanding his admission; but if he admits the agreement, but neither pleads the statute nor insists on it in his answer, he is deemed to have renounced the benefit of it (6 Ves. 39.) If the bill states generally a contract which the law requires to be in writing, the court will presume that it is made with the requisite formalities to give it validity until the contrary appears. The defendant, in answering, may either plead that the contract was not in writing, or insist upon that fact in his answer. If he meets the allegation of a contract in the bill with a general denial, and the complainant is put to his proof to establish it, he must show a written contract, and if he does not, the evidence to establish the issue will be adjudged incompetent, *Cozine v. Graham*, 2 Paige, 177, 1 Marshall's Kentucky R. 437.

But if the bill set up an agreement, admitting it to be by parol, or which shall in proof turn out to be by parol, the defendant cannot avail himself of the benefit of the statute, provided the bill contains along with the agreement matter sufficient to avoid the bar created by the statute." *Harris v. Knickerbocker*, 5 Wend. 638, 643.

It has been seen that the rule which excludes oral evidence to vary or contradict a written contract, is founded on the natural presumption that the parties would not have put their hands to the instrument if it did not express the contract. *ante*, 944. The rule is therefore inapplicable when the writing is not drawn in accordance with the intention of the parties, and the complainant signs in ignorance of the mistake. Parol evidence is consequently admissible to prove the mistake, and show in what particulars the contract as reduced to writing, deviates from that actually made; *Wurzburger v. Meric*, 20 Louisiana, 415; *Chew v. Gillespie*, 6 P. F. Smith, 308; *Wyche v. Greene*, 16 Georgia, 49, 50; *Irick v. Fulton*, 3 Gratten, 193; *Mattingly v. Speak*, 4 Bush (Ky.), 316; *Mills v. Lockwood*, 42 Ill. 111; *McCloskey v. McCormick*, 44 Id. 336; *Gump's Appeal*, 15 P. F. Smith, 476; *Bradford v. The Bank*, 13 Howard, 57; *McCann v. Letcher*, 8 B. Monroe, 320; *Calverly v. Williams*, 1 Ves. 206; *Willan v. Willan*, 16 Id. 72; *Bellas v. Stone*, 14 New Hampshire, 175; *Brown v. Brown*, 8 Leigh, 1; *Blair v*

M'Donnell, 1 Halsted Eq. 327; *Chamberlain v. Thompson*, 10 Conn. 243; *Wooden v. Haviland*, 18 Id. 101; *Langdon v. Keith*, 9 Vermont, 299; *Gower v. Sterner*, 2 Wharton, 75; *Hamilton v. Asslin*, 14 S. & R. 448; *Lauckner v. Rex*, 8 Harris, 464; *Shively v. Welch*, 2 Oregon, 288; *Kuchenbeiser v. Bechert*, 41 Illinois, 172; *Cleary v. Babcock*, Ib. 271; *McDonald v. Starkey*, 42 Id. 472; *Stone v. Hall*, 11 Alabama, 557; *Larkins v. Biddle*, 21 Id. 252; *Lauderdale v. Hallock*, 7 Smedes & Marshall, 622; *Ross v. Wilson*, Ib. 753; *Bradford v. The Union Bank of Tennessee*, 13 Howard, 57, 66; *Firmstone v. De Camp*, 2 C. E. Green, 317; *Waldron v. Letson*, 2 M'Carter, 126; see vol. 1, 32.

This branch of jurisdiction requires a nice discrimination, and will not be exercised unless the mistake is established beyond a reasonable doubt; *Nevius v. Dunlap*, 33 New York, 676; *Harris v. Ruce*, 5 Gill R. 212; *Selby v. Givins*, 12 Illinois, 69.

The burden of proof is throughout on the complainant, who must rebut the presumption that the writing speaks the final agreement, by the clearest and most satisfactory evidence. It must not only appear that the parties entertained a different intention in the first instance, but that it was not changed at or before the execution of the instrument, for otherwise the legal and natural inference is that it was laid aside for that expressed in the writing; *Stine v. Shirk*, 1 W. & S. 195. There should more-

over be something to amend by. That the writing deviates from the intention of the parties, may be a reason for setting it aside, but will not justify a conjectural emendation, or the substitution of an agreement which they are not proved to have made; *Lyman v. The United Ins. Co.* 2 Johnson & Ch. 630; *Wheelton v. Hardisty*, 8 Ellis & Bl. 232, 256; *Hall v. Clagett*, 2 Maryland Ch. 153; *Philpot v. Elliott*, 4 Id. 273; *Willan v. Willan*, 14 Vesey; *Hunt v. Rousmanier*, 1 Peters; *Durant v. Bacot*, 2 McCarter, N. J. 411; "It is clear that a person who seeks to rectify a deed on the ground of mistake, must be required to establish in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable, continued concurrently in the minds of all parties down to the time of its execution, and also must be able to show exactly and precisely the form to which the deed ought to be brought;" *Fowler v. Fowler*, 4 De G. & J. 265; *Tesson v. Atlantic Ins. Co.*, 40 Missouri, 33; *Beebe v. Young*, 14 Mich. 136.

The dicta in *Fowler v. Fowler*, would seem to go too far in requiring both parties to continue of the same mind down to the execution of the instrument. *Snyder v. May*, 7 Harris, 239. If two persons come to terms, and agree that the contract shall be reduced to writing, and one of them frames the instrument differently without the knowledge of the other, who signs in ignorance of the change, the latter is entitled to have the varia-

tion rectified. And the case is substantially the same where one of the parties knows that the scrivener has missdrawn the deed and does not inform the other. *Rider v. Powel*, 28 New York, 310; *Matthews v. Terwiliger*, 3 Barb. 50.

The rule is accurately given in *Tesson v. The Atlantic M. Ins. Co.*, 40 Missouri, 33, 36. "A court of equity has jurisdiction to reform a policy of insurance or other written contract upon parol evidence, when the agreement really made by both parties has not been correctly incorporated into the instrument, through accident or mistake in the framing of it, but both the agreement and the mistake must be made out by the clearest evidence according to the understanding of both parties as to what the contract was intended to be, and upon testimony entirely exact and satisfactory, and it must appear that the mistake consisted in not drawing the instrument according to the agreement that was made; *Andrews v. Essex Fire & Mar. Ins. Co.*, 2 Mason, 6; 1 Sto. Eq. §§ 157-61; *Adams' Eq.* 171; 1 Phil. Ins. 42; 1 Arnold Ins. 51; *Delaware Ins. Co. v. Hogan*, 2 Wash. C. C. 4; *Lyman v. U. S. Ins. Co.*, 2 J. Ch. 630; *Keisselbrach v. Livingston*, 4 J. Ch. 144; 1 Duer on Ins. 71. The court cannot supply an agreement that was never made; *Graves v. Boston Ins. Co.*, 2 Cranch, 419."

It has been said that the mistake must be mutual; *Cooper v. The Farmer's Ins. Co.*, 14 Wright, 299; *Lyman v. The United Ins. Co.* 17 Johnson, 273; *Nevias v.*

Dunlap, 33 New York, 676; *Wemple v. Stuart*, 22 Barb. 152; *Lanier v. Wyman*, 5 Robertson, 147; but it is more accurate to say that there must be a mutual agreement from which the writing deviates, *ante*. See *Rider v. Powell*, 28 New York, 310; *Matthews v. Terwiliger*, 3 Barb. 50. That one of the parties to a written contract labored under a misapprehension of its terms or effect, may show that they did not come to an agreement, but will not authorize a chancellor to make an agreement for them; see *Gillespie v. Moore*, 2 Johnson Ch. 595; *Sawyer v. Hovey*, 3 Allen, 331; *Tesson v. The Atlantic M. Ins. Co.*, 40 Missouri, 33; *The Woodbury Savings Bank v. The Ins. Co.*, 31 Conn. 517, vol. 1, 33, notes to *Lord Glenorchy v. Bosville*. "If the court were to reform the writing to make it accord with the intent of one party only to the agreement, who avers and proves that he signed it as it was written by mistake, when it accurately expressed the agreement as understood by the other party, the writing when so altered would be just as far from expressing the agreement as it was before, and the court would be engaged in the singular office of doing right to one party at the cost of a precisely equal wrong to the other; *Dimond v. The Providence R. R. Co.*, 5 Rhode Island, 130, 135; *Harkle v. The Royal Exchange Ins. Co.*, 1 Vesey, Sen. 317; *The Marquis of Townshend v. Stangroom*."

It follows that a chancellor will not intervene at the instance of

one of the parties, to make the instrument conform to an intention which he may have entertained, but which was not common to both; *Townshend v. Stangroom*, 6 Vesey, 328, 333; *Coffing et al. v. Taylor*, 16 Ill. R. 457. If the owner of two adjacent houses sells one of them to a purchaser, who believes that he is buying the other, the contract may be rescinded, but it would be obviously unjust to alter the deed in conformity with the intention of the purchaser. But the mere circumstance that one party is cognizant of the mistake and fails to apprise the other, makes for rather than against the right of the latter to equitable relief, as indicating the presence of fraud; see *Wells v. Yates*, 44 New York, 552, *ante*, 981. A vendor who conveys an unimproved lot knowing that the purchaser supposes that he is acquiring the wharf or buildings, which are his object in buying, but which really stand on an adjacent lot, is chargeable with a concealment at variance with good faith, and cannot allege that the mistake was not mutual, as a reason why a chancellor should not rectify the error; *Wiswall v. Hall*, 3 Paige, 313; *De Peyster v. Hasbrouck*, 1 Kernan, 587.

The tenor of the instrument may show that it should be reformed, and in what way, without the aid of parol evidence. Accordingly, where a grant was made to trustees, their successors and assigns forever, with a covenant for further assurance to them and their heirs, the grantor was directed to

execute another deed, in which heirs should be instituted for successors; *Showman v. Miller*, 6 Maryland, 480.

Where the mistake consists in the omission of a clause which was to have been inserted, or the introduction of a clause which forms no part of the agreement, the jurisdiction of equity is clear and well defined. But there is more doubt as to the power of a chancellor to reform an instrument, which fails to accord with the intention of the parties, in consequence of a misapprehension of the legal import of the terms employed, or of their effect on an operation as a whole. Here the complaint is not that the words are not such as the parties designed to use, but that the words which they used did not express their meaning. A case of this description might be presented by a bill alleging that a grant had been made to one for life, with remainder to his heirs, in ignorance of the rule in *Shelly's Case*, or that a conveyance which does not contain the term "heirs," was designed to pass the fee; see *Clayton v. Freed*, 10 Ohio, N. S. 544. Agreeably to the weight of authority, relief cannot be afforded on such grounds, unless there are peculiar circumstances to exempt the case from the general rule. *Ruffner v. McConnell*, 17 Illinois, 212; *Selby v. Geines*, 12 Id. 69; *Harris v. Reece*, 5 Gil. R. 212; *Wood v. Price*, 46 Ill. 439; *Adams v. Robertson*, 37 Ill. 45; *The Bank v. Daniel*, 12 Peters, 32; *Millis v. Robertson*, 25 Vermont, 608; *Bentley v. Whittemore*, 3 C. E. Green, 366; *Hauralt v. Warren*, Ib, 124.

If, said Black, C. J., in *Light v. Light*, 9 Harris, 407; "contracts were binding only on those who know what construction the courts would put upon them, very few would stand. No system of jurisprudence could be administered for a year on this principle without falling to pieces. All codes therefore have adopted the maxim *ignorantia legis neminem excusat*." It is accordingly a general though not invariable rule, that in the absence of fraud and undue influence, one who executes an instrument with an opportunity for knowing what it contains, cannot rely on an alleged misapprehension of its legal effect, as a ground of equitable relief; *Lyon v. Richardson*, 2 Johnson Ch. 51; *Schmidt v. Labutut*, 1 Speer Equity, 421; *Dow v. Carter*, Ib. 414; *Garwood v. Eldridge's Ad'r.* 1 Green, Ch. 145; *Wheaton v. Wheaton*, 9 Conn. 96; *Hunt v. Rousmaniere*, 8 Wheaton, 174; 1 Peters, 1; *Watkins v. Stocket*, 6 Harris & Johnson, 445; *McEldery v. Shipley*, 2 Maryland, 35; *Showman v. Miller*, 6 Id. 479; *Dupree v. Thompson*, 4 Barbour, 279; *Leavett v. Palmer*, 3 Comstock, 19; *Rankin v. Mortimore*, 7 Watts, 372; *Martin v. Hamlin*, 18 Michigan, 354; *Dill v. Shahan*, 25 Alabama, 702.

It would nevertheless be erroneous to suppose that where the effect of the instrument is acknowledged to have been misunderstood by both parties, a court of equity is incapable of affording relief; *Hunt v. Rousmanier*, 8 Wheaton, 174, 216. See *Snyder v. May*, 7 Harris, 235, 239; *Jones*

v. Monroe, 32 Georgia, 181. A chancellor will not reform an instrument which expresses the true agreement between the parties, although they may have mistaken the legal consequences of the agreement. But an instrument which does not speak the real agreement, may be reformed whether the error arose from the ignorance or want of skill of the draftsman, or from any other cause; *Larkins v. Biddle*, 21 Ala. 252. See *Clopton v. Martin*, 11 Ala. 187; *Stone v. Hale*, 17 Ala. 557; *Huss v. Morris*, 13 P. F. Smith, 367. "If it were stipulated in an agreement for the sale of land, that the vendor should enter into certain covenants for title, a mistake as to the legal effect of the covenants would not authorize a reformation of the agreement. But if the deed were drawn by one party and accepted by the other under a mistaken impression that its terms were sufficient to create the covenants stipulated for, it might be reformed in accordance with the agreement;" *Larkins v. Biddle*.

In *Hunt v. Rousmanier*, 8 Wheaton, 174; 1 Peters, 1; it was agreed that Hunt should lend Rousmanier \$2,150, on the security of the ship Nereus. The parties called on an attorney, Hazard, for advice. He informed them that the object might be effected through a mortgage, a bill of sale, or a power of attorney. A mortgage or bill of sale would require a change in the title papers and registry, and it would also be requisite that Hunt should take possession of the vessel when it ar-

rived. A power of attorney to sell the vessel and apply the proceeds to the repayment of the loan, would not be attended with these inconveniences, and would be as good and indefeasible a security as a mortgage. Hunt accordingly declined the mortgage which Rousmanier had offered, and requested Hazard to prepare a power of attorney, which Rousmanier executed. Rousmanier died not long after, insolvent, and his executors contested the right of Hunt to sell the vessel under the power, contending that it had been revoked by Rousmanier's death. The question was argued before the Supreme Court of the United States, which decided, that although the power was irrevocable during the donor's life, it expired at his death, because no one could act in the name of, or under an authority given by a person who had ceased to exist. A bill was then filed alleging that a power of attorney had been taken instead of a mortgage by mistake, and praying that Rousmanier's executors should be compelled to join in a sale under the power.

The court held that a chancellor may reform an instrument which fails to express the intention of the parties as fixed by consent, or declared in their instructions to the scrivener. Such relief might be afforded, whether the error was due to oversight in leaving out or inserting a clause or term, or arose from an erroneous impression of the legal effect of what was written. But that a chancellor could not substitute an instrument for that

selected by the parties, although there might be reason for believing that they would have made a different choice if they had been correctly informed as to the law. If Hunt and Rousmanier had, in the case under consideration, directed Hazard to prepare a security which should be indefeasible except by payment, and he had drawn a power of attorney, there would have been more ground for the relief asked in the bill. What the evidence actually disclosed was that Hunt had fixed upon a power of attorney after mature deliberation, and although it might be inferred, that he would have taken a mortgage if he had been aware that the power would be revoked by the donor's death, this could not be known with the certainty requisite for judicial action. The bill was accordingly dismissed.

It results from this decision, and from the dicta of Lord Eldon in *The Marquis of Townshend v. Stangroom*, 6 Vesey, 228, 232, that a contract may be rectified in accordance with the intention of the parties, but not for the purpose of making it accord with an intention which it is alleged they would have had if better informed. So an accidental omission may be supplied; but a stipulation which has been designedly omitted, will not be inserted, on the ground that it would have been introduced if the parties had known the law.

In commenting on *Hunt v. Rousmanier*, Ch. J. Gibson observed, that relief might have been afforded under another head of equity jurisdiction, the accident of Rousma-

nier's death, which prevented the instrument from having the effect which the parties anticipated and designed; *Tyson v. Passmore*, 2 Barr, 125.

It is well settled in accordance with the principles enunciated in *Hunt v. Rousmanier*, that courts of equity are not limited in affording relief to mistakes of fact; and that a mistake in the legal effect of a description in a deed, or in the use of technical language, may be relieved against. *Canedy v. Marcy*, 13 Gray, 373-377; *Gillespie v. Moon*, 2 Johns. Ch. 596; *Stedwell v. Anderson*, 21 Conn. 139; *Oliver v. Mutual Commercial Marine Ins. Co.*, 2 Curt. C. C. 299; *Cook v. Husbands*, 11 Maryland R. 492; *Springs v. Harven*, 3 Jones Eq. 96; *Young v. Miller*, 10 Ohio, 85; *M'Naughten v. Partridge*, 11 Id. 223.

In *Clayton v. Freed*, 10 Ohio, N. S. 544, a husband bought and paid for land, and desired that the title should be conveyed to his wife for her life, and after her death to her children, but the grant was accidentally or ignorantly made to the wife and her heirs, and the court reformed the deed on clear proof of the mistake.

In like manner where through the ignorance of the conveyancer, the deed was so worded as to exclude the vendor's lien, which the parties had instructed him to preserve, relief was granted, although the mistake was clearly one of law. *Worley v. Tuggle*, 4 Bush, 168.

The criterion in every case, is the intention of the parties at the

time of executing the instrument, and a deed drawn in accordance with what they then designed, will not be reformed, because there is reason to suppose that they would have had a different intention, if the effect had been present to their minds at the time of executing the deed, vol. 1, 33; notes to *Lord Glenorchy v. Bosville*, *Hunt v. Rousemanier*. In *Moser v. Libinguth*, 2 Rawle, 428, the court refused to make a joint bond, several, against the executors of a deceased surety, because it did not appear that the parties contemplated or meant to provide for the contingency of his death, although the intention was to bind him absolutely.

There is an obvious difference between an allegation that the complainant mistook the legal effect of the agreement, and that he entered into the agreement under a mistaken belief in the existence of an antecedent legal right or obligation; see *The Marquis of Townshend v. Stangroom*, 6 Vesey, 328, 332; and it has been said, that relief may be given on the latter ground, though not on the former. *Gross v. Leber*, 11 Wright, 520. The case of *Lansdown v. Lansdown*, Moseley, 264, may be explained by this distinction; and it was applied in *Gross v. Leber*, on behalf of one who ignorantly gave his bond for a debt which he did not owe. See *Cabot v. Hoskins*, 3 Pick. 83.

It is immaterial as it regards the application of this principle, that the agreement purports to be a settlement of a demand or con-

troversy, if the right involved does not admit of a reasonable doubt. The object of a compromise, is to avoid the risk and uncertainty incident to litigation. If the controversy can only be determined in one way, there is no risk, and the foundation of the agreement fails. This is equally true, whether the mistake is one of fact or law. The powers of a chancellor reach far enough, to afford relief for a failure of consideration, from whatever cause. The party against whom such a bill is filed, is in this dilemma; if he says that he knew the law, his conduct is irreconcilable with good faith; if he says that he was ignorant of the law, the complainant may make a similar allegation with greater probability. The better opinion, therefore, is that a court of equity may relieve one who through misapprehension of a well defined legal principle, parts with the whole or a part of what is indisputably his own, under the name of a compromise. *Naylor v. Wynch*, 1 Simons & Stewart, 555. See *Brigham v. Brigham*, 1 Vesey, 126.

The authority of *Lansdown v. Lansdown*, was, nevertheless, denied in *M'Anich v. Loughlin*, 1 Harris, 371, and it was said that parties who deliberately put their hands to an instrument, are bound to ascertain the facts, and will be presumed to have been acquainted with the law; and such is unquestionably the rule where the right is doubtful, and not merely disputed. In this instance suit was brought on a

covenant to pay a yearly sum in consideration of the relinquishment of a right of dower which had been already lost through the widow's election to take under the will of her late husband, and the mistaken belief of the covenantor, that the right still existed, was held not to be a ground for equitable relief.

In considering the authorities, it should be remembered that there is a marked distinction between reforming a contract and setting it aside. An agreement founded upon a mistake of law, may be rescinded, because the mistake is a fact, although it relates to a principle. See *Larkins v. Biddle*, 21 Ala. 252, 256; *Light v. Light*, 9 Harris, 407, 412. The minds of the parties do not meet on a common basis, or rather the basis on which they meet fails, and the contract with it. Such was the case of *Lansdown v. Lansdown*, Mosley, 264, where the complainant had agreed to share the land which had descended to him from an ancestor, under an unfounded doubt of his right as heir at law. So in *Willan v. Willan*, 16 Vesey, 72, an agreement for a lease was ordered to be delivered up on the ground of surprise, it appearing that the legal effect of the instrument was not understood by either party. But to justify the reformation of a writing it must not only appear that it does not express the agreement, but that the parties came to an agreement, which would have been set forth in the writing, but for the misapprehension of the

person, by whom it was prepared. If this is shown with sufficient clearness, the instrument may be reformed, whether the error is one of fact or law. *Smith v. Jordan*, 13 Minnesota, 264.

It is said in *Lawrence v. Beaubien*, 2 Bailey, 623, that ignorance of the law differs from mistake of law, in this, that the former is passive and unreasoning, while the latter assumes to know what it does not, and affords palpable evidence of its existence, *Lowndes v. Chisholm*, 2 McCord, 455; *Hopkins v. Marzack*, 1 Hill Ch. 250. This distinction was criticised in *Champlin v. Layton*, 18 Wend. 407, 416; but it is so far just, that where it appears from the declarations on either side, that an unfounded belief in the existence of a right, is the moving cause for the execution of the contract, it is invalid, and may be set aside.

The reformation of a writing on the ground of a mistake of law, is a transcendent exercise of judicial power, requiring the utmost care and deliberation. The complainant asks that he may not be bound by words, which he has made his own, by putting his hand to the instrument. He must therefore, show how he came to adopt language, which did not express his meaning. As between two parties, one of whom maintains, that a writing which they executed conveys their intention, while the other contends that it does not, the burden of proof is obviously on the latter. The explanation should be so reasonable, probable and natural, as to satisfy the mind of

the existence of the mistake, and that it can be rectified without injustice. It has been truly said that one who alleges that he understood that a note payable on demand, or in a year from date, was to be renewed indefinitely, or delivered up unpaid at the death of the promisee, ought not to be believed on any amount of testimony; *Wheaton v. Wheaton*, 9 Conn. 96. The proof should moreover be such as to exclude the inference, that the complainant knew that the instrument did not conform to the true agreement, and yet authenticated it by his signature, *Lord Irnham v. Child*, 2 Brown C. C. 219, *ante*, 964. Courts of Equity do not sit for the protection of men, who, having the full possession of their faculties, deliberately express themselves in language which does not convey their meaning, *ante*, 944; nor will they readily intervene on behalf of one who seeks relief against the consequence of his own negligence or inadvertence, *ante*, 959; *Wood v. Patterson*, 4 Maryland Ch. 355; *Taylor v. Fleet*, 4 Barb. 95; *Scott v. Fink*, 53 Id. 533; *Custard v. Custard*, 25 Texas, 49. See *Dupree v. McDonald*, 4 Dessaussure, 209; *McMahon v. Spangler*, 4 Randolph, 51; *Diamond v. The Ins. Co.* 5 R. I. 130.

These difficulties do not arise where an instrument drawn in pursuance of a prior written contract, is so worded as to frustrate the intention which it was meant to effectuate, and a chancellor may then unhesitatingly make the instrument conform to the agreement, vol. 1, notes to *Lord Glen-*

orch v. Bosville; *Key v. Simpson*, 6 Iredell Eq. 452.

An erroneous description or designation of the subject-matter of the contract, may be reformed whether the mistake originated with the parties, or with the person whom they employed to draft the instrument. Under these circumstances, the error does not consist in a misapprehension of the meaning or effect of the words employed, but in supposing that they are applicable to the facts. See *Bradford v. The Union Bank*, 13 Howard, 55. If a tract of land is described, as being in a township where it is not really situate, if it be designated by a wrong number, or if the metes and bounds are incorrectly stated in the deed, so as to exclude a part of the tract which was to have been conveyed, or include what should have been excluded, a chancellor may rectify the instrument, although the scrivener adhered literally to his instructions, and the mistake arose from the vendor's lapse of memory or want of accurate information. See *Winnipisogee, &c., Co. v. Perley*, 46, New Hamp. 83; *Raines v. Calloway*, 27 Texas, 678; *Gillespie v. Moore*, 2 Johnson's Ch. 580; *White v. Wilson*, 6 Blackford, 448; *Young v. Coleman*, 43; Missouri, 179; *Stewart v. Brand*, 23 Iowa, 227; *Wiswall v. Hall*, 3 Paige, 313. In like manner where the defendant agreed to sell all the pine logs cut by them, during the winter, and marked with a particular brand, and it appeared the logs in question were marked with a different brand, the agreement

was reformed in accordance with the truth. *Smith v. Jarden*, 13 Minnesota, 264.

Whatever doubt may exist in other cases, it is clear that one who induces the execution of an instrument by a false or mistaken statement of its legal effect or operation, should not be allowed to take advantage of the error which he has contributed to produce. *Champlin v. Laytin*, 18 Wend. 407, 422. It is accordingly established, that chancery may afford relief under these circumstances, whether the mis-statement was innocent, or prompted by a wish to deceive; and although the complainant was acquainted with the contents of the instrument. See *Light v. Light*, 9 Harris, 407, 412; *Tyson v. Passmore*, 2 Barr, 122; *Snyder v. May*, 7 Harris, 235, 238; *De Peyster v. Hasbrook*, 1 Kernan, 587; *Rider v. Powel*, 28 New York, 510; *Broadwell v. Broadwell*, 1 Gillman, 899, 608; *Cathcart v. Robinson*, 5 Peters, 264, 276, *ante*; *Phillips v. Hollis-tor*, 2 Coldwell, 269; *Coger's Ex'ors v. McGee*, 2 Bibb. 411. Fraud and mistake are here so much alike in their effects, that it is difficult to draw the line, but there is this difference, that while fraud may justify the rescission of the contract, it should not be set aside for mistake, unless reformation is impracticable.

The misrepresentation need not be express, and may be implied from the conduct of the defendant in undertaking to pen the instrument, and then presenting it for execution, as if prepared in conformity

with the mutual design, *ante*, 956, 982. In *Snyder v. May*, "Gundrum, one of the parties to the lease, was intrusted by the other with the business of reducing the contract to writing. He knew that the agreement was for \$300 per year, and he undertook to reduce that agreement to writing. He produced the instrument given in evidence, as a writing which fully expressed the intention of the parties. What was this but the strongest representation that the legal effect of the instrument was in conformity to the actual agreement? If there be any truth in the aphorism, that 'actions speak louder than words,' the act of Gundrum was a distinct representation, that the writing was in exact conformity to the understanding of the parties, and that the Latin prefix to the word annual, which he had introduced either through mistake or fraud, had not the legal effect of binding the opposite party to pay double the sum actually agreed to be paid. Gundrum, as to this, was the agent of the parties, and he was bound to act in good faith."

The equity may be enforced, not only between the parties, but against judgment creditors and purchasers with notice. See *Simmons v. North*, 3 Smedes & Marshall, 67; *Gouverneur v. Titus*, 1 Edwards Ch. 480; *Cady v. Potter*, 55 Barb. 463; *White v. Wilson*, 6 Blackford, 448; *Whitehead v. Brown*, 18 Alabama, 682; *Goodwin v. Younge*, 22 Id. 553. In *Moale v. Buchanan*, 11 Gill & Johnson, 314; a deed executed in pursuance of a parol contract, to

convey two lots as security for a pre-existing debt, was reformed, by including one of the lots which had been omitted by mistake; and a similar decree was made in *Gouverneur v. Titus*, 1 Edwards, 477, 6 Paige, 347; although the debt was antecedent, and the complainant had not given time or changed his position for the worse in any respect, on the faith of the mortgage.

A deed will not be reformed as against a *bona fide* purchaser, in favor of a complainant who has not parted with value, where the effect will be to prejudice one who has; see *Williams v. Hatch*, 38 Alabama, 338; *Young v. Coleman*, 43 Missouri, 179; see *The U. S. v. Monroe*, 5 Mason, 572. For a like reason a chancellor will not correct a mistake at the instance of one judgment creditor to the exclusion of another; see *Knight v. Bunn*, 7 Iredell Eq. 77; *Smith v. Turrentine*, 2 Jones Eq. 253; nor where a particular creditor seeks relief against general creditors whose equity is equal to his own and who have the law; *Anderson v. Tydings*, 8 Maryland, 427; *Hunt v. Rousmanier*. A bill filed by a donee against the donor to reform the instrument of gift falls within the same principle; notes to *Lord Glenorchy v. Bosville*, vol. 1; *Henderson v. Dickey*, 35 Missouri, 126. A voluntary deed may, notwithstanding, be reformed after the death of the donor, or where relief is sought during his life against one claiming under him as a volunteer or purchaser with notice; *Huss v. Norris*, 13

P. F. Smith, 367, notes to *Ellison v. Ellison*, vol. 1, 33.

In *Hunt v. Rousmanier*, Washington, J., said that "where the parties upon deliberation and advice, reject one species of security, and agree to select another, under a misapprehension of the law as to the nature of the security so selected, a court of equity will not, on the ground of such misapprehension, and the insufficiency of such security, in consequence of a subsequent event, not foreseen, or perhaps thought of, direct a new security of a different character to be given, or decree that to be done which the parties supposed would have been effected by the instrument, which was finally agreed upon.

"If the court would not interfere in such a case generally, much less would it do so in favor of one creditor against the general creditors of an insolvent estate, whose equity is at least equal to that of the party seeking to obtain a preference, and who in point of law stand upon the same ground with himself."

This language was cited and relied on in *Anderson v. Tydings*, 8 Maryland, 427, and is no doubt just when viewed with reference to the matter in hand; but it is notwithstanding established under the authorities, that if the equity of a mortgagee or other creditor is good against the debtor, it will be good against one claiming under him as a judgment creditor, or purchaser with notice. A mortgage given to secure future advances that have not been made, or to indemnify a

surety who has sustained no actual injury, presents a different case, and a chancellor will not rectify such an instrument to the prejudice of intervening incumbrancers.

A court of equity will not suffer one who agrees to be answerable for another, to escape liability because the writing is erroneously worded and does not express the obligation; *Butler v. Durham*, 3 Iredell, Ch. 589; *Newcomer v. Kline*, 11 Gill & Johnson, 457. It has been said that to reform a writing against a surety who does not share in the consideration, and is chargeable solely on the letter of the contract, the proof must be clear beyond the shadow of a doubt, and such unquestionably is the rule where the allegation is that the parties were ignorant of the legal effect of the instrument and not that they mistook its terms; *Moser v. Libenguth*, 2 Rawle, 428. A writing is moreover requisite to the validity of a promise for the debt, default, or miscarriage of another, and it is questionable whether such an instrument can be reformed on oral proof of mistake or fraud, *post*, but this objection was overruled in *Smith v. Allen*, Saxton, 43.

The reformation of an agreement under seal in accordance with the true intention of the parties as disclosed by parol evidence, does not vary its character, *ante*, 960. It is still a specialty, and may be declared on as such in Pennsylvania where the courts administer equity through the forms of the common law; *Sterner v. Gower*, 2 Wharton, 75. But a cotemporaneous or sub-

sequent parol alteration reduces the whole contract to parol, *post*.

It being thus established, that a chancellor may receive parol evidence that a deed or other instrument has been so worded through fraud or mistake as not to express the agreement of the parties, it follows that he may make the deed conform to the agreement, or what comes to the same thing, carry the agreement into effect as if it had been set forth in the deed. This is a mere application of the principle that what ought to have been done, may be considered as done, for the sake of relieving one who is injured by the omission or default. The jurisdiction of a chancellor extends further in this respect than that of the courts of common law, and he may not only afford relief against the constructive fraud arising from an attempt to take advantage of a mistake, but modify the unsound or obnoxious clauses in a deed or contract, so as to make the operation of the whole conformable to the dictates of good faith and conscience; see *Glass v. Hulbert*, 102 Mass. 24, 36; *Torry v. Buck*, 1 Green, 366; *Lord Abington v. Beittler*, 1 Vesey, Jr. 206; *Calverly v. Williams*, *Ib.* 210.

Accordingly it will make no difference as it regards this principle, whether the mistake or fraud is set up as a reason why the contract should not be enforced, or as a ground for the reformation of the contract and carrying it into execution as amended; *Gillespie v. Moon*, 2 Johnson's Ch. 585. There a bill was filed for a reconveyance of 50

acres which had been included by fraud or mistake in a deed from the complainant to the defendant; and it was contended on behalf of the latter, that if parol evidence was admissible in such a case, it could not be adduced for the complainant against an answer denying the mistake. But this argument was overruled by the chancellor on the broad ground that to take advantage of the miswording of a deed to obtain land which had not been bought or paid for, and which the grantor did not intend to convey, was equally against equity and good conscience whether he was a complainant or defendant. If the mistake could be shown by parol evidence in any case, such evidence must be admissible in every case where the mistake was set up fraudulently or oppressively against the true intent and meaning of the contract.

"It has been said, that there was no instance of a mistake corrected in favor of a plaintiff, against the answer of the defendant, denying the fact of mistake. But I do not understand any of the *dicta* on this point to mean, that the answer, denying the mistake, shuts out the parol proof, and renders relief unattainable, however strong that proof may be. The observations of Lord Eldon, in the case of *The Marquis of Townshend v. Stan-groom*, certainly imply no more, than that the answer is entitled to weight, in opposition to the parol proof, but it certainly can be overcome by such proof. In that very case, the answer denied the mistake, yet parol proof was held ad-

missible. The lord chancellor only said, that the evidence must be taken with *due regard being had to the answer*, and that it must not be forgotten, to what extent the answer of one of the parties admits or denies the intention. Lord Thurlow said, that there was so much difficulty in establishing the mistake, to the entire satisfaction of the court, that it had never prevailed against the answer denying the mistake. I am not inclined on light grounds, to contradict such high authority, but, as I read the case of *Pitcairn v. Ogbourne*, 2 Vesey, 375, before Sir John Strange, the bill was to be relieved against an annuity bond, and to reduce the sum from 150*l.* to 100*l.*, according to the original understanding and agreement of the parties. The answer denied positively all the circumstances, and every particular of the private agreement, and parol proof, by several witnesses, was objected to and admitted, which falsified the answer, and made out the real agreement to the satisfaction of the court, and though relief was not granted, it was refused upon other and distinct grounds no way connected with the question, as to the competency and effect of the proof.

"It is the settled law of this court, as was shown in the case of *Boyd v. M'Lean*, 1 John. Ch. Rep. 582, that a resulting trust may be established by parol proof, in opposition to the deed, and in opposition to the answer denying the trust. There is no reason why the answer should have greater effect

in this than in that case, and there would be manifest inconsistency in the doctrines of the court, if such a distinction existed. The case of *Marks v. Pell*, 1 Johns. Ch. Rep. 598-9, which was referred to by the defendant's counsel, admitted that parol proof of mistakes was competent; and it was held not to be sufficient in that case, because it consisted of naked confessions of a party, made seventeen years after peaceable possession, under a deed. The confessions, in that case, were also of a negative kind, and deduced from tacit acquiescence: the party who made them was dead, and the possession had been, for thirty years, under the deed, and there were no corroborating circumstances in aid of the confessions. Surely there is nothing to be drawn from that case, in opposition to the competency of the proof in this.

"We have a strong case on this subject, in *Washburn v. Merrills*, which was decided on the equity side of the Supreme Court of Connecticut, in 1801; 1 Day's Cases in Error, 139. A mortgagor, in that case, made, by mistake, in 1784, an absolute deed, which he did not discover until some time after. The mortgagee got into possession, and, in March, 1801, sold to a purchaser, by a deed with covenants of warranty. In August, 1801, a purchaser under the mortgagor filed his bill, or petition, against the purchaser under the mortgagee, to redeem. The answer set up the Statute of Frauds as a defence; and, on the trial, parol proof of the mistake was of-

ferred by the plaintiff, objected to and admitted, and the deed established as a mortgage, and a right of redemption decreed. This decree was afterwards unanimously confirmed in the Court of Errors of that State.

"My opinion, accordingly, is that the parol proof, in this case, was competent and admissible, and that it establishes, most clearly and conclusively, the fact of the mistake, as charged in the bill."

It results from what is here said, that where the case does not come within the prohibition of the statute, parol evidence of mistake or fraud is admissible, not only on behalf of a defendant who is resisting a specific performance, but of a complainant who seeks to have a deed or contract rectified and enforced; *Glass v. Hulbert*, 102 Mass. 24, 41; *Worley v. Tugle*, 4 Bush, 164, 173; *Metcalf v. Putnam*, 9 Allen, 97; *Lyman v. The Utica Ins. Co.*, 17 Johnson, 377; *Gooding v. M'Alister*, 9 Howard Pr. 123; *Newson v. Buffelrow*, 1 Devereux, Equity, 379; *Rogers v. Atkinson*, 1 Kelly, 12; *Shipp v. Swann*, 2 Bibb. 82; *Belows v. Stone*, 14 New Hampshire, 175; *Smith v. Greeley*, *Ib.* 378; *Hyde v. Tanner*, 1 Barbour, S. C. 75; *Gouverneur v. Titus*, 1 Edwards, 477; 6 Paige, 347; *Harris v. The Columbiana Ins. Co.*, 18 Ohio, 116; *Webster v. Harris*, 16 Id. 490; *M'Call v. Harrison*, 1 Brockenbrough, 126; *Bailey v. Bailey*, 8 Humphreys, 230; *Wooden v. Haviland*, 18 Conn. 101; *Chamberlain v. Thompson*, 10 Id. 243; *Wesley v. Thomas*, 6 Har. & John-

son, 24; *Clopton v. Martin*, 11 Alabama, 187; *Brady v. Parker*, 4 Iredell Eq. 430; *Christ v. Diefenbach*, 1 S. & R. 464; *Moliere v. The Pennsylvania Ins. Co.*, 5 Rawle, 347; *Gower v. Sterner*, 2 Whar. 75; *Bowman v. Bittenbender*, 4 Watts, 290; *Clark v. Partridge*, 2 Barr. 13; 4 Id. 166; *Susquehanna Ins. Co. v. Perrine*, 7 W. & S. 348; *Beardsley v. Knight*, 10 Vermont, 185; *Smith v. Greeley*, 14 New Hampshire, 378; *Craig v. Kittredge*, 3 Foster, 231; *Leitensdorfer v. Delphy*, 15 Missouri, 160. Such applications are, notwithstanding, addressed to the sound discretion of the chancellor, and will not be granted unless the case is made out with a certainty which leaves no room for doubt, *ante*, 980. *Hunter v. Bilyeu*, 30 Illinois, 246; *Harrison v. Howard*, 1 Iredell, Eq. 407; *Brady v. Parker*, 4 Id. 430; *Bailey v. Bailey*, 8 Humphreys, 230; *Lyman v. The United Ins. Co.*, 2 Johnson Ch. 630; 17 Johnson, 373; *Beard v. Linthicum*, 1 Maryland Ch. 345.

The rule laid down in *Gillespie v. Moon*, is necessarily subject to the control of the legislature, and will not be applied where it would conflict with the letter or spirit of a statute; *Glass v. Hulbert*, 102 Mass. 24, *ante*, 971. The Statute of Frauds provides that no estate or interest in land shall be created, nor any trust declared without a writing signed by the party to be charged. It is well settled that evidence of a parol variation of a written contract, or that the agreement as set forth in the writing, differs

from that actually made, reduces the whole contract in legal contemplation to parol, and thus brings it within the disabling operation of the statute. This is equally true whether the evidence is adduced against or in favor of a decree of specific performance, and although it appears that the defendant was guilty of a fraudulent misrepresentation, which deceived the complainant. Such proof may justify a rescission of the contract, but will not justify an order that the defendant shall make his representations good; *Glass v. Hulbert*, 102 Mass. 24. The legislative prohibition is express, and no exception can be made unless on the ground of an equitable estoppel, which cannot arise where the contract is executory, and nothing has been done under it on either side; *Glass v. Hulbert*; see *Worley v. Tuggle*, 4 Bush, 169, 185. It follows that a complainant in a bill for specific performance, who proves that the writing on which he relies is vitiated by fraud or mistake, destroys his own case. It is then apparent that the contract as it stands is not the true one, and that the true contract is invalidated by the statute, and as the former ought not to be, and the latter cannot be enforced, there is no room for a decree of specific performance. The rule extends to the defendant, and while he may defeat the prayer of the bill by showing that the writing does not contain the terms actually agreed on, he cannot compel a specific execution of the contract as thus varied, unless the modification is

admitted by the plaintiffs; *Miller v. Chetwood*, 1 Green Ch. 199; *Best v. Stow*, 2 Sanford Ch. 298; *Harrison v. Talbot*, 2 Dana, 268.

It follows that one of two or more persons who have entered into a joint contract for the purchase of land, cannot show that the others are sureties, and that he is consequently entitled to the entire estate, *ante*, 928. *Arnold v. Cessna*, 1 Casey, 34; because, although such evidence does not contradict the contract; see *Harris v. Brooks*, 21 Pick. 195; 2 Am. Lead Cases, 442, 5 ed.; it is prohibited by the statute; see *Meason v. Kaine*, 13 P. F. Smith, 339. Such at least is the rule, unless the complainant can establish the existence of some fact which gives rise to a controlling equity, as for instance that he took exclusive possession of the land, or that the consideration moved solely from him.

This doctrine does not conflict with the decision in *Gillespie v. Moon*. The statute of frauds prohibits the creation of an estate in land without a writing. It does not provide that a deed purporting to pass such an estate shall not be invalidated by parol. It is every day's experience that a grant procured by fraud is voidable, and may be set aside. The decree in *Gillespie v. Moon*, was not that the defendant should perform an oral contract, or one established by parol, but that he had no title to the fifty acres which had been conveyed by mistake, and the order for a reconveyance was merely a mode of carrying the de-

cree into effect; see *Worley v. Tuggle*, 4 Bush, 170, 194.

The distinction is clearly drawn in *Elder v. Elder*, 10 Maine, 80. The bill was filed to rectify a mistake in a written contract for the sale of a lot of land in the township of Windham, by showing that part of the land, meant to be embraced in the contract, lay in the township of Westbrook. It is by no means clear, that the ambiguity was not latent, and within the reach of parol evidence. But the court treated the case as an attempt to rectify the contract, and carry it into effect as reformed. And it was held to be clearly distinguishable from *Gillespie v. Moon*, and within the prohibition of the Statute of Frauds. "The case of *Gillespie v. Moon*," said Weston, J., "is relied upon as an authority in favor of the plaintiff. The defendant there had agreed to purchase two hundred acres of land, the location and bounds of which were well understood. But by mistake, clearly proved by parol, the deed embraced fifty acres more. The defendant, perceiving his advantage, although he acknowledged the mistake to several persons, insisted upon holding all the land, covered by his deed. This claim, so clearly against equity and good conscience, was strongly tinged with fraud; for there is little difference in moral turpitude, between fraudulently making a deed conveying more than is intended by the parties, and attempting to hold the same advantage, where it arises from mistake or accident,

Indeed fraudulent conduct is distinctly imputed to him in the opinion of the court." The chancellor says, "the only doubt with me is, whether the defendant was not conscious of the error in the deed, at the time he received it, and executed the mortgage, and whether the deed was not accepted by him in fraud, or with a voluntary suppression of the truth. That fraudulent views very early arose in his mind is abundantly proved. If it was a case of fraud, as well as of mistake, there could be no question either of the admissibility of parol testimony, or that the plaintiff was entitled to relief. Indeed he would have been so entitled at law. But the measure of relief would have varied. At law a fraudulent deed is entirely void. In equity its effects may be defeated only, so far as it is intended to have a fraudulent operation. But aside from the fraudulent views, which may always be imputed to a party, who would take advantage of a mistake, that alone may be regarded in equity as an infirmity calling for relief, where it goes to the whole subject-matter of a conveyance, or where it effects only a part of it. It is not charging a party upon an executory contract, in relation to real estate, which cannot be enforced unless in writing; but it shows defects to defeat the operation of a written contract. It is in the nature of an injunction upon a party, not to avail himself of an advantage against good conscience. It does not make a new contract, but ex-

amines the quality, extent, and operation of one formally executed by the parties. It is one thing to limit the effect of an instrument, and another to extend it beyond what its terms import. A deed by mistake conveys two farms, instead of one. If the suffering party is relieved in such a case by a court of chancery, full effect is not given to the terms of a written instrument. But the Statute of Frauds does not prescribe what effect shall be given to contracts in writing; it leaves that to be determined in courts of law and equity. A deed conveys one farm, when it may be proved by parol, that it should have conveyed two. Here equity cannot relieve without violating the statute. To do so, would be to enforce a contract, in relation to the farm omitted, without a memorandum in writing, signed by the party to be charged, or by his authorized agent. These are distinctions, which may be fairly taken, between the case cited from New York, where the plaintiff sought to be relieved from the undue operation of a deed, which conveyed too much, and the case before us, where the prayer of the plaintiff is, that a contract in writing may be so extended by parol testimony, as to embrace more land than the contract covers. But whether this court, sitting as a court of equity, would receive parol evidence of a mistake in a deed, to restrain its operation, it is not necessary to decide. There may be a great appearance of equity in such a proceeding; but

it may admit of question, whether more perfect justice would not be administered, by holding parties to abide by their written contracts, deliberately made, and free from fraud. As far as this rule has been relaxed by the clear, unequivocal, and settled practice of chancery, we are doubtless bound by it, in administering that of our system, but we are not disposed to adopt any new or doubtful exception to so salutary a rule."

"In *Jordan v. Sawkins*, 3 Bro. C. C. 388; 1 Ves. 402; *Rich v. Jackson*, 4 Bro. C. C. 514; *Clinan v. Cooke*, 1 Schoales & Lefroy, 92; *Woollam v. Hearn*, 7 Ves. 211, and in *Higginson v. Clowes*, 15 Ves. 516, the doctrine maintained is, that a party seeking the specific performance of an agreement, and proposing to introduce new conditions, or to vary those which appear in a written instrument, will not be permitted to do so by parol testimony. And in *Dwight v. Pomeroy et al.*, 17 Mass. 303, Parker, C. J., regards this principle as fully settled by the more recent chancery decisions in England, and that a few cases, bearing a different aspect, have been explained away or overruled by subsequent decisions."

A similar view was taken in *Westbrook v. Harbesson*, 2 M'Cord Ch. 112; and *Brooks v. Wheelock*, 11 Pick. 439, and again in *Osborn v. Phelps*, 19 Conn. 63. In *Osborn v. Phelps*, the plaintiff applied for relief against a mistake in the execution of a written agreement for the sale of land, by which the contract was rendered contradic-

tory, if not unintelligible. The mistake was obvious in itself, and established by the evidence, so that the only question was whether it could be remedied. The court cited and relied on the cases of *Elder v. Elder*, and *The Attorney-General v. Sitwell*, 1 Younge & Col. Exch. 559, as showing that the statutory prohibition was imperative whether the question arose in equity, or at common law, and then went on to say, "These cases appear to be founded upon a just and reasonable construction of the statute, and fully establish the rule, that if two parties enter into an agreement, respecting the sale of estate, and fail to reduce that agreement to writing, according to their intention, it is not competent for the purchaser to come into a court of chancery, for the purpose of having the written agreement rectified by the aid of parol evidence, and then the execution enforced. This rule does not apply, where the mistake is set up by way of defence against a claim for the specific execution of a contract. In such case, the object is not to enforce the execution of a parol agreement, but to prevent the execution of a written one, which the parties never intentionally made, to resist one, which, to enforce, would be inequitable and unjust. It was not the object of the statute to give any greater efficacy to written contracts for the sale of lands than they possessed at the common law; but merely to require such contracts to be made in writing, in order to

lay the foundation of a suit at law or in equity." It was said in like manner of *Miller v. Chetwood*, 1 Green Chancery, 199, that fraud or mistake might be set up against a bill for the specific execution of a written contract; but that the complainant must abide by the writing, and could not vary its effect orally.

The same doctrine may be found in the following extract from the judgment in the recent case of *Glass v. Hulburt*, 102 Mass. 24, 44. "In *Gillespie v. Moon*, the relief sought and granted was by way of restricting, and not by enlarging the operation of the deed. Such relief would not as already shown, conflict with the Statute of Frauds; and neither the discussion in that case, nor the citation of authorities, had reference to the bearing of the Statute of Frauds upon the question of affording relief upon contracts relating to land. Indeed, the English cases afford but little aid upon that point, for the reason the courts there have generally, without reference to the Statute of Frauds, refused to enforce written contracts with a modification or variation set up by parol proof; *Woollam v. Hearn*, 7 Ves. 211, and notes on the same in 2d Leading Cases in Equity, 1104; *Nurse v. Seymour*, 13 Beav. 254.

The principle which was maintained by Chancellor Kent, and upon which the English authorities were cited by him in *Gillespie v. Moon*, was, that relief in equity against the operation of a written instrument, on the ground that by fraud or mistake it did not express

the true contract of the parties, might be afforded to a plaintiff seeking a modification of the contract, as well as to a defendant resisting its enforcement. That proposition must be considered as fully established; 1 Story's Eq. § 161. It is quite another proposition, to enlarge the subject matter of the contract, or to add a new term to the writing, by parol evidence, and enforce it. No such proposition was presented by the case of *Gillespie v. Moon*, and it does not sustain the right to such relief against the Statute of Frauds "

Two inferences may be drawn from the language held in these instances; one that a contract relating to land cannot be established by parol consistently with the statute; the other, that the statute does not prohibit parol evidence to invalidate such a contract. The question arose in *Best v. Stow*, 2 Sandford Ch. 298, where the court held the following language: "The defendant in answer to a bill for a specific performance, may prove by parol evidence, that the written instrument sought to be enforced against him, does not correctly and truly express the agreement of the parties, but that through fraud, surprise or mistake, there is some material omission, insertion or variation, contrary to the intention or understanding of the parties; 2 Story Eq. §§ 769, 770, and note; 1 Sug. on Vend. ch. 3, § 8, p. 224, &c., 6 Am. ed.; 1 Phill. Ev. 4 Am. ed. 569. And see *The Marquis of Townshend v. Stangroom*, 6 Ves. 328; *Ramsbottom v Gosden*,

1 V. & B. 165; *Gillespie v. Moon*, 2 J. C. R. 585; *Rich v. Jackson*, 4 Bro. C. C. 514; S. C., 6 Ves. 334, note c. I will mention a few of the cases, in which this principle has been applied. In *Joynes v. Statham*, 3 Atk. 388, the defendant was permitted to prove that the agreement between the parties was, that the rent was to be paid, clear of taxes, which clause was omitted in the agreement, as written and signed.

"*Clark v. Grant*, 14 Ves. 519, 524, was a case, where performance was refused upon a parol variation of the written contract. In *Winch v. Winchester*, 1 V. & B. 375, parol evidence of the auctioneer, warranting the quality of land, was received in opposition to a specific performance of a contract, which expressed the quantity to be forty-one acres, more or less.

"In *Clinan v. Cooke*, 1 Sch. & Lef. 22, 38, 39, Lord Redesdale fully approved, and admirably vindicated the principle, as applicable to defendants resisting specific performance; but he refused to apply it in favor of the complainant, who sought to enforce performance. And Sir William Grant, Master of the Rolls, pursued the same course in *Woollam v. Hearn*, 7 Ves. 211, at the same time indicating the established rule, in behalf of defendants.

"I think the defendant here is justified in saying that the instrument which he signed, did not contain the agreement, which he entered into, and that he is not bound to perform it. The bill must, therefore, be dismissed, but

without costs. The defendant has failed in showing the fraud, which he set up in his answer, and succeeds on a ground, which is not inconsistent with good faith on the part of the complainant, in making the contract."

The right of the defendant to resort to parol evidence, as a defence to a bill for specific performance, was also held or conceded in *Letcher v. Cosby*, 2 A. K. Marshall, 106; *Lucas v. Mitchell*, 3 Id. 246; *Wood v. Lee*, 5 Monroe, 57; *Chambers v. Livermore*, 15 Michigan, 381; *Bradbury v. White*, 4 Greenleaf, 391; *Ratcliff v. Alison*, 3 Randolph, 537; *Brooks v. Wheelock*, 11 Pick. 439; *Quinn v. Routh*, 37 Conn. 16; *Patterson v. Bloomer*, 35 Id. 57; *Ryno v. Darby*, 5 C. E. Green, 231; *Towner v. Lucas*, 13 Grat-tan, 705, 714; *Workman v. Guthrie*, 5 Casey, 495, 510; and *Raffensberger v. Cullison*, 4 Id. 427. And in *Cathcart v. Robinson*, 5 Peters, 262, the defendant was permitted to set up a verbal stipulation, that he should be permitted to rescind the contract on the payment of a sum certain, as a reason why it should not be specifically enforced.

Although the defendant in a bill for specific performance is free from the restraints imposed by the Statute of Frauds, he is subject to the rules of evidence, and cannot vary a written contract by parol, except on the ground of fraud, or of a fraudulent attempt to take advantage of a mistake. But it is equally well settled, that specific performance is discretionary,

or as the principle, sometimes expressed, is of grace not right; *Toby v. Bristol*, 3 Story, 800; *Brady's Appeal*, 16 P. F. Smith, 277; *Huntingdon v. Rogers*, 11 Ohio, N. S. 511, 516; *Gorham v. Pan-coast*, 6 Casey, 88; and the defendant will generally succeed in procuring a dismissal of the bill, if he can convince the chancellor that the exercise of his jurisdiction will be inequitable under the circumstances; *Bleakley's Appeal*, 16 P. F. Smith, 187; *Purcell v. Smith*, 13 Id. 420; *Backus' Appeal*, 8 Id. 186; *Deck's Appeal*, 7 Id. 467; *Blackwilder v. Loveless*, 21 Alabama, 371; *The Western R. R. Corporation v. Babcock*, 6 Metcalf, 346; *King v. Hamilton*, 4 Peters, 311; *Leigh v. Crump*, 1 Iredell Equity, 299; *Love v. Cobb*, 63 N. C. 324; *Lloyd v. Wheatley*, 2 Jones Equity, 267; *Ellis v. Burden*, 1 Alabama, 458; *Fitzpatrick v. Beatty*, 1 Gilman, 454; *St. John v. Benedict*, Ib. 111; *Seymour v. Delancey*, 6 Johnson Ch. 222; *Matthews v. Terwilliger*, 3 Barbour S. C. 50; *Perkins v. Wright*, 3 Harris & M'Henry, 324; *Simmons v. Will*, 4 Id. 258; *Rogers v. Saunders*, 16 Maine, 92; *Torry v. Buck*, 1 Green Ch. 376; *Henderson v. Hays*, 2 Watts, 148; *Frisby v. Ballance*, 4 Scammon, 287; *Gould v. Womack*, 2 Alabama, 83; *Casey v. Holmes*, 10 Id. 776; *Pennock v. Freeman*, 1 Watts, 408; *Dalzell v. Crawford*, Parson's Equity Cases, 37; *Stoutenburgh v. Tompkins*, 1 Stockton, 332; *Clarke v. The Rochester Rail Road Co.* 18 Barbour, 350; *The Canterbury Aque-*

duct Co. v. Ensworth, 22 Conn. 608, *ante*, 933.

A court of equity may refuse a specific performance on grounds that would not warrant a decree of rescission, or that the contract should be delivered up or cancelled; and it may proceed at the instance of one party where it would not have entertained the application of the other; *Espey v. Anderson*, 2 Harris, 308, 310; *Raffensberger v. Cullison*, 4 Casey, 426; *Workman v. Guthrie*, 5 Id. 495. Such a defence is notwithstanding addressed to a discretion which is not arbitrary or capricious, but exercised in accordance with the established principles. See *The Marquis of Townshend v. Stangroom*, 6 Vesey, 328, 333; *Seymour v. Delaney*, 3 Cowen, 445, 525; *Ash v. Daggy*, 6 Indiana, 259; *Quinn v. Roath*, 37 Conn. 16, 24; *M'Comas v. Easley*, 21 Grattan 31. The defendant may show that he was induced to enter into the agreement by a false representation or assurance, or that he has changed his position for the worse on the faith of a subsequent waiver or modification; but the better opinion seems to be that he cannot, any more than the plaintiff, transgress the limit set in *Lord Irnham v. Child*, by alleging that a writing, which he has accepted, with a full knowledge of its purport, does not express the contract. In *Omerod v. Hardmann*, 5 Vesey, 722, 730; the court refused to hear the testimony adduced to prove the oral variation alleged in the answer: and Graham, Baron,

said, "that such evidence can only be admitted where the written contract is not drawn according to the intention of the parties." The same rule was applied in *Croome v. Lediard*, 2 Mylne and K. 281; and although the dicta of the Master of the Rolls in *Glarke v. Grant*, 14 Vesey, 519, give a wide scope to parol evidence, the true ground for the decision was not the parol variation of the written contract, but the defendant's long and undisturbed possession conformably to the variation, and the plaintiff's acts and declaration by which it was authorized and confirmed. There was consequently a part performance which took the case out of the statute. In *The Marquis of Townshend v. Stangroom*, 6 Vesey, 328, 341, the agreement was obscure and contradictory, and the defendant was allowed to show by the complainants' acts and declarations that he did not mean to include a particular lot, and that the complainants must have known that he could not mean to include it, but this is a very different thing from varying the terms of the writing by parol.

In *Lee v. Kirby*, 104 Mass. 430, the court said, "If there was an independent or collateral agreement to the effect that the defendant might buy for cash at a lower price, and if that collateral agreement was intentionally omitted from the written contract, and left as a matter of honorary obligation merely, it would not present a case of mistake, fraud or surprise upon which the court would refuse

a decree of specific performance. *Irrnham v. Child*, 1 Bro. Ch. 92, was a case in which a right to redeem was omitted from a written contract to convey, and left to an honorary understanding, in order to avoid the objection of usury. Lord Thurlow held that it was no bar to a decree for a specific performance of the written contract. 1 Sugden on Vendors, 7 Am. ed. 181; 1 Story's Eq. § 750, and cases cited," *ante*, 934.

In *Quinn v. Roath*, 37 Conn. 16, it was nevertheless said to be established that the defendant in a bill for specific performance, may show that the writing was executed on the faith of an oral stipulation, which is not set forth in the bill, and which the complainant seeks to disregard. The respondent was accordingly held entitled to prove that it had been verbally agreed at and before the execution of the writing, that if the vendee did not pay the first instalment of the purchase money on the first of April, following, the contract should be void.

If we now pass from executory contracts, to contracts which have been carried into effect by the delivery and acceptance of a deed, the question is complicated by other considerations. It may be presented in two aspects, one where the complainant seeks to qualify or limit the deed, the other where he seeks to enlarge its operation. A bill filed to reform the instrument, by introducing a condition or reservation which has been fraudulently or accidentally omitted, or to ex-

clude land which the grantor did not intend to convey, are instances of the former kind, and the weight of authority is, that relief may be afforded on such grounds without transgressing the statute. *Loss v. Obry*, 7 C. E. Green, 52. What the legislature intended to prohibit, was the creation of an estate in land by parol, not the modification by parol of an estate created by deed. It is accordingly well settled, that a conveyance which transfers more than the grantee is entitled to receive, may be confined to its proper bounds without the aid of written evidence.

In *Gillespie v. Moon*, *ante*, 992, the grant was partially vacated, by directing the grantee to reconvey 50 acres, which had been included in the deed by mistake. A similar decree was made in *Canedy v. Marcy*, 13 Gray, 373; and again in *Newson v. Bufferlow*, 1 Devereux, 579, where the variance arose from fraud.

The principle is the same where the estate is conveyed absolutely, without the reservations or restrictions on which the parties had agreed. In *Athy v. M'Henry*, 6 B. Monroe, 59, the grantee was enjoined from building on ten feet of the land conveyed, so as to exclude the light and air from the grantor's house, contrary to a reservation which had been agreed on orally, but omitted from the deed. The case of *Brown v. Lampton*, 35 Vt. 258, is nearly the same, except that the mistake consisted in not reserving the right to draw water from a spring on the land passed by the deed, and convey it

by a pipe or aqueduct to an adjoining tract belonging to the grantor. So a chancellor may reform a deed which is so worded through the mistake or ignorance of the conveyancer, as to exclude the vendor's lien, contrary to the instructions given by the parties. *Worley v. Tuggle*, 4 Bush, 168. In like manner a deed which describes land in the northwest corner of a township, as being in the northeast corner, or land in one township, as situate in another, may be reformed without contravening the statute, whether the mistake appears by parol or written evidence, because the subject matter is identified, not changed. *Gouverneur v. Titus*, 1 Edwards Ch. 480, 6 Paige, 347; *Wiswell v. Hall*, 3 Paige, 313; *White v. Wilson*, 6 Blackford, 448; *Young v. Coleman*, 43 Missouri, 179; *Stewart v. Brand*, 23 Iowa, 227. But some of these decisions go very far, and it is doubtful whether such relief can be afforded, unless the case falls within the maxim *falsa designatio non nocet*. See *Worley v. Tuggle*, 4 Bush, 168-186; see *Conover v. Wardell*, 5 C. E. Green, 266; 7 Id. 492.

In like manner a mortgage or other writing given as a security for a debt, may be reformed by proof that the debt exceeds the sum named in the writing. *Mathews v. Terwiliger*, 3 Barb. 50; *Rider v. Powel*, 28 New York, 310; *Hoffman v. Fry*, 5 Jones Eq. 415; see *Bellows v. Stone*, 14 New Hampshire, 175. Such evidence does not enlarge the operation of the instrument as a conveyance,

although it imposes a greater burden on the grantor; and the case depends on the established principle, that a deed may be controlled by evidence of the source or nature of the consideration. *Worley v. Tuggle*, 4 Bush, 168, 194. The legal title is in the grantee, and chancery will not suffer the grantor to redeem, without doing the equity which he seeks.

In *Metcalf v. Putnam*, 9 Allen, the bill was filed to reinstate a covenant that the premises contained seven acres, and that if they did not, the grantor would make compensation for the deficiency. The relief prayed for was granted, on proof that the deed as originally drawn, contained such a covenant, and that it was fraudulently erased before the execution of the instrument, without the knowledge of the grantee. This case is not easily reconcilable with the doctrine that, the operation of a conveyance of real estate cannot be enlarged by parol. If the grantor can be compelled to insert a warranty of quantity, he may be compelled to insert a warranty of title, and the effect of such an alteration may be to pass after acquired land, under the doctrine of estoppel as established in Massachusetts, and some of the other States of the Union, 2 Smith Lead. Cases, 7 Am. ed. 991.

It has been contended that the distinction made in these instances between executed and executory contracts is illogical, and at variance with the statute of frauds. If a written agreement for the sale of two parcels of land cannot be

restricted to one of them on the ground of mistake or fraud, and then enforced against the purchaser, how can he be compelled to surrender one of the lots after both have been conveyed. Why should a contract which was not susceptible of reformation while executory, be reformed after it has been carried into effect by a conveyance? The execution of the deed fortifies rather than weakens the position of the purchaser, by conferring the legal title.

The answer to this argument appears to be that a chancellor may afford relief to one who has been injured by the fraudulent conduct of another. This is true, although the fraud is committed through the instrumentality of a contract for the sale of land. It will not avail the contriver of such a harm to insist that the subject matter is real estate, and plead the statute. If land be devised to one on the faith of his promise to convey it to another, a court of equity will compel the execution of a deed; vol. 1, 352; *McCormick v. Grogan*, 4 Law Rep. House of Lords, 82; *Parker v. Urie*, 9 Harris, 305. And as this may be done where the contract is merely oral, so it may be done by reforming a written instrument, which does not fully express the contract; *Moale v. Buchanan*, 11 Gill & Johnson, 314. But it is also true that every such application is addressed to a discretion which must be exercised in view of all the circumstances. The statutory prohibition is express, and ought not to be disregarded, unless the fraud has re-

sulted in an injury that cannot be redressed in any other way; *Glass v. Hulbert*, 102 Mass. 24, 39. In the language of Wells, J., in *Glass v. Hulbert*, it is not that "deceit, misrepresentation, or fraud, of itself entitles a party to an equitable remedy, but that equity will interfere to prevent the accomplishment of the fraud, which would result from the enforcement of legal rights, contrary to the actual agreement." Or as it is expressed elsewhere in the same opinion, "it is not the deceit but the subsequent change of situation or transfer of property, without which the deceit would be innocuous, which is the moving cause for the intervention of a chancellor." Such a cause cannot well arise while the contract is executory, and nothing has been done under it on either side. There is no actual loss, and the vendor may proceed at law for the prospective injury. The conveyance through fraud or mistake of more land than has been bought and paid for, presents a different case. To rescind the sale altogether, would leave the vendor without an effectual remedy unless the purchaser were solvent and able to refund the price. It is therefore requisite to reform the deed, by a decree that the grantee shall keep what justly belongs to him and restore the rest.

The question nevertheless is to a great extent one of circumstances, and does not admit of any fixed rule. A chancellor will not ordinarily reform a contract concerning real estate, because relief may be afforded by setting the

contract aside, or restraining the prosecution of a suit at law. But a purchaser who goes into possession and pays the price, or makes valuable improvements, is as much entitled to consideration as if he had received a deed, and may justly ask for the rectification of any error which has found its way into the contract through mistake or fraud.

The right to relief is indubitable where the acts of part performance indicate that the real agreement differs from that set forth in the writing, and it may be accorded independently of such proof

The hardship that may result from likening the reformation of a deed to the specific enforcement of an executory contract, appears from the case of *Okill v. Whitaker*, 2 Phillips, 338; where the residue of a term of years was assigned under a mistaken belief on both sides, that it would expire in eight years, while in point of fact it had twenty years to run before reaching its termination. A bill having been filed to have the assignee declared a trustee for the assignor as to the twelve years which the latter had ignorantly conveyed, the chancellor said, "It is impossible, to give any relief on this bill. It goes far beyond any of the cases that have been cited. The plaintiffs do not ask to rescind the transaction altogether: nor could they; for, after ten years' occupation and expectation of the benefit of renewal, it would be impossible to restore the purchaser to his original situation. What they say is, that the contract was improperly

executed by the assignment, and they ask that what remains of the term after the expiration of the eight years may be reassigned. But what is that, but to call upon this court to decree specific performance of a contract with a variation? For the thing that both the vendor agreed to sell and the purchaser to buy, was the residue of the term, and not a portion of the residue.

"Suppose a party proposed to sell a farm, describing it as 'all my farm of 200 acres,' and the price was fixed on that supposition, but it afterwards turned out to be 250 acres, could he afterwards come and ask for a reconveyance of the farm, or payment of the difference? Clearly not; the only equity being that the thing turns out more valuable than either of the parties supposed. And whether the additional value consists in a longer term or a larger acreage, is immaterial.

"Some of the cases cited were cases in which the parcels in the deed embraced more than the parties intended to deal with. But the misfortune of this case is, that here the plaintiffs did intend to sell all the remaining interest in the lease, but by their own mistake they misdescribed what that interest was. I cannot distinguish such a case from that of a bill to compel specific performance with a variation; for the object of the bill is to introduce a new term: either to make the purchaser pay more; or to make him a trustee of the rest the term. That cannot be done."

The obstacle to redress, in this instance, appears to have been not the statute, but that if the writing did not express the contract, there was none. The mistake was not in the wording of the deed, but as to the length of the term; and the powers of a chancellor do not extend to making an agreement. Whether the error is as to the duration of the estate or the quantity of the land, it cannot be rectified without compelling the purchaser to pay a greater price for the same thing, or the same price for a less thing. This is as true of a bill to reform an executed contract, as it is of a bill to enforce an executory contract with a parol variation. There is this difference, that while the contract is executory and the parties can be restored to their original position, adequate relief may be afforded by setting the contract aside. When this becomes impracticable through the execution of a deed, followed by the payment of the purchase money, the erection of improvements, or a change of value consequent on the lapse of time, the case is no longer the same, and there should be a corresponding change in the remedy.

The remaining branch of the inquiry, that where the bill is filed to enlarge the operation of the deed, has still to be considered. Such a case is directly within the statute, if considered as one *ex contractu*, and the question is whether relief can be afforded on the ground of tort. The prohibition is conclusive against the right to enforce a contract re-

lating to land, which is not reduced to writing, or proved by written evidence, but the legislature did not intend to preclude a court of equity from taking cognizance of fraud. To warrant the exercise of equitable jurisdiction on this ground, it must appear not only that fraud exists, but that redress cannot be obtained through the ordinary forms of procedure. If a verdict for damages would afford adequate compensation the bill should be dismissed, and the complainant remitted to an action at law. The right to equitable relief depends not so much on the deceit, as on what the complainant has done or suffered in consequence of the deceit. The question, therefore, comes to this: What is such an injury as will justify a chancellor in directing a conveyance contrary to the letter of the statute? So far the authorities agree. But here there is a wide divergence. Agreeably to some of the earlier decisions, which are followed in Massachusetts, the execution of a contract for the sale of real estate by the delivery or acceptance of a deed on the faith of a false or fraudulent description of the location or quantity of the land, does not work such a change in the situation of the purchaser as to authorize a decree that the vendor shall rectify the error. In *Glass v. Hulbert*, 102 Mass. 24, one of two adjoining lots belonging to the vendor, was purchased on the faith of a fraudulent representation, that it included sixteen acres, which were in point of fact con-

tained in the other lot. The fraud was discovered after the delivery of the deed, and the purchaser filed a bill praying that the vendor might be compelled to convey the land which had been fraudulently omitted. The court held that the mere circumstance that the omission or defect in such an instrument, is occasioned by mistake or fraud, does not preclude the defendant from relying on the statute, unless the plaintiff will suffer an irreparable injury if the deed is not reformed. As this did not appear in the case under consideration, the bill was dismissed. It was held in like manner in *Churchill v. Rogers*, 3 Monroe, 81, that a chancellor cannot rectify a deed on parol evidence of mistake, so as to include a greater quantity of land than that actually conveyed. The principle is the same where a deed which should have passed the title to two farms, is so worded through fraud or mistake as only to convey one, *ante*, 995; see *Smith v. Smith*, 4 Bibb. 81; *Harrison v. Talbot*, 2 Dana, 268; *Worley v. Tuggle*, 4 Bush. 168, 185.

The following extract from the opinion of Wells, J., in *Glass v. Hulbert*, gives a lucid and comprehensive view of this side of the question. "When the proposed reformation of an instrument involves the specific enforcement of an oral agreement within the statute of frauds, or when the term sought to be added would so modify the instrument as to make it operate to convey an interest or secure a right, which can only be conveyed or secured through an

instrument in writing, and for which no writing has ever existed, the statute of frauds is a sufficient answer to such a proceeding, unless the plea of the statute can be met by some ground of estoppel, to deprive the party of the right to set up that defence; *Jordan v. Sawkins*, 1 Ves. Jr. 402; *Osborn v. Phelps*, 19 Conn. 63; *Clinan v. Cooke*, 1 Sch. & Lef. 22. The fact that the omission or defect in the writing, by reason of which it failed to convey the land, or express the obligation which it is sought to make it convey or express, was occasioned by mistake, or by deceit and fraud, will not alone constitute such an estoppel. There must concur, also, some change in the condition or position of the party seeking relief, by reason of being induced to enter upon the execution of the agreement, or to do acts upon the faith of it as if it were executed with the knowledge and acquiescence of the other party, either express or implied, for which he would be left without redress, if the agreement were to be defeated.

The principle on which courts of equity rectify an instrument, so as to enlarge its operation, or to convey or enforce rights not found in the writing itself, and make it conform to the agreement, as proved by parol evidence, on the ground of an omission, by mutual mistake, in the reduction of the agreement to writing, is, as we understand it, that in equity the previous oral agreement is held to subsist as a binding contract, notwithstanding the attempt to put it

in writing; and upon clear proof of its terms, the court compel the incorporation of the omitted clause, or the modification of that which is inserted, so that the whole agreement, as actually intended to be made, shall be truly expressed and executed. *Hunt v. Rousmanier*, 1 Pet. 1; *Oliver v. Mutual Insurance Co.*, 2 Curtis C. C. 277. But when the omitted term or obligation is within the statute of frauds, there is no valid agreement which the court is authorized to enforce outside of the writing. In such case, relief may be had against the enforcement of the contract as written, contrary to the purport and intent of the real agreement of the parties. Such relief may be given as well upon the suit of a plaintiff seeking to have a written contract, or some of its terms set aside, annulled or restricted, as to a defendant resisting its specific performance. *Canedy v. Marcy*, 373; *Gillespie v. Moon*, 2 Johns. Ch. 585; *Keiselbrack v. Livingston*, 4 Johns. Ch. 148. Relief in this form, although procured by parol evidence of an agreement differing from the written contract, with proof that the difference was the result of accident or mistake, does not conflict with the provisions of the statute of frauds. That statute forbids the enforcement of certain kinds of agreement without writing; but it does not forbid the defeat or restriction of written contracts; nor the use of parol for the purpose of establishing the equitable grounds therefor. The parol evidence is introduced, not

to establish an oral agreement independently of the writing, but to show that the written instrument contains something contrary to or in excess of the real agreement of the parties, or does not properly express that agreement. *Higginson v. Clowes*, 15 Ves. 516; *Clowes v. Higginson*, 1 Ves. & B. 524; *Squier v. Campbell*, 1 Myl. & Cr. 459, 480.

But rectification by making the contract include obligations or a subject matter, to which its written terms will not apply, is a direct enforcement of the oral agreement, as much in conflict with the statute of frauds as if there were no writing at all. *Moale v. Buchanan*, 11 Gill & Johns. 314; *Osborn v. Phelps*, 19 Conn. 63; *Elder v. Elder*, Fairfield, 80. In *Parkhurst v. Van Cortlandt*, 14 Johns. 15, 32, it is said that, "where it is necessary to make out a contract in writing, no parol evidence can be admitted to supply any defects in the writing." Per Thompson, C. J. Such rectification, when the enlarged operation includes that which is within the statute of frauds, must be accomplished, if at all, under the other head of equity jurisdiction, namely, fraud. *Irnham v. Child*, 1 Bro. Ch. 92; 1 Story Eq. § 770, a; *Davies v. Fitton*, 2 Drury & Warren, 225; *Wilson v. Wilson*, 5 H. L. Cas. 40, 65; *Manser v. Back*, 6 Hare, 443; *Clark v. Grant*, 14 Ves. 519; *Clinan v. Cook*, 1 Sch. & Lef. 22."

It has been held on the other hand, in numerous instances, that whether the fraud consists in including land which the vendor did

not agree to sell, or in omitting land which ought to have been conveyed, it is equally within the rule that no one shall profit by his own wrong, and that as a court of equity may direct a reconveyance in the former case, so it may compel the execution of a deed in the latter. The opposite doctrine lacks the essential element of mutuality, and may result in injustice, by compelling a grantee who has been tricked into accepting a lot of less value than that which he bought and paid for, to elect between a rescission of the contract, and a verdict for damages which the vendor may be unable to pay. The powers of a chancellor are wide enough to embrace every case of fraud, whether the subject matter is or is not within the statute, and although relief cannot be afforded without enlarging the operation of a written instrument. This is conceded even by the courts which deny that they should be exercised to redress the injury is occasioned by the fraudulent substitution of a different tract of land, or from a fraudulent representation by which the purchaser is induced to pay for more land than he obtains. See *Glass v. Hulbert*, 102 Mass. 24, 39. In *Glass v. Hulbert*, Wells J., observed: "An oral agreement for the sale of land, will not be specifically enforced, nor will a written agreement be reformed on parol evidence in the absence of proof of change of situation, or part performance creating an estoppel against a plea of the statute." The question therefore, is,

what change of situation or part performance will estop. Notwithstanding the ability of the judgment in *Glass v. Hulbert*, it is throughout a *petitio principii*, in assuming that the fraudulent substitution of a different tract, or the fraudulent omission of land which ought to be conveyed, can be redressed by rescinding the sale, and remitting the complainant to an action for the deceit, or to recover back the purchase money. The vendor may not be able to respond in damages, and if he is, the injury may not admit of a pecuniary compensation. In *Wiswall v. Hall*, 3 Paige, 313, the whole object of the contract was frustrated by so wording the deed, as to pass the title to a lot which the grantee had not agreed to buy, and which was wholly unsuited to the use which he had in view. We may consequently believe that the payment of the purchase money, and acceptance of a deed on the faith of a false representation of the boundaries or location of the land conveyed, is a change for the worse, which cannot be compensated without compelling the vendor to make the representation good. Payment alone will not take the case out of the statute, because the purchaser voluntarily neglects a precaution which the legislature has required him to observe, but payment induced by fraud, is a very different thing, and one requiring the intervention of a chancellor. The estoppel is, if possible, clearer where money is advanced on the security of a tract of land, and an-

other tract of inferior value fraudulently or mistakenly substituted in the mortgage or deed of trust. *Blodgett v. Hobart*, 18 Vermont, 414; *De Peyster v. Hasbrouck*, 1 Kernan, 582.

The preponderance of American authority, accordingly, is that one who takes advantage of a fraud or mistake in the wording of a deed, to withhold land in a way to occasion irreparable injury to the grantee, may be compelled to rectify the error by a conveyance, notwithstanding the statute. *Worley v. Tuggle*, 4 Bush, 182; *Craig v. Kittredge*, 3 Foster, 231; *Smith v. Greeley*, 14 New Hamp. 378; *Flagler v. Pleiss*, 3 Rawle, 345; *Provost v. Rebman*, 21 Iowa, 419; *Wright v. M'Cormick*, 22 Id. 545.

In *Wiswall v. Hall*, 3 Paige, 313, a vendor who knew that the vendee accepted the deed, under the erroneous impression that it passed the title to a wharf which was his main object in buying, was compelled to rectify the error. So in *Flagler v. Pleiss*, the operation of a deed was enlarged on parol evidence, that land which ought to have been included had been left out by mistake; and a similar decree was made in *Tyson v. Passmore*, 2 Barr, 122. In *Chamberlain v. Thompson*, 10 Conn. 243; the accidental omission of the word "heirs" from a mortgage was rectified by a decree which charged the fee; and in *Hendrickson v. Ivins*, Saxton, 562, a bond was reformed, and enforced against a surety, although the contract was for the default

of another, and within the 4th section of the Statute of Frauds.

The principle was recognized in *Hunter v. Bilyeu*, 30 Illinois, 228, although the circumstances did not admit of its application; while in *Gouverneur v. Titus*, 1 Edwards Ch. 480; 6 Paige, 347, a deed which had been so worded by mistake, as to pass the title to a different tract from that which the grantor intended to convey, was reformed as against a judgment creditor. In *Tillon v. Tillon*, 9 New Hamp. 385, the court rectified a deed of partition by including land which had been accidentally omitted. This case was followed in *Craig v. Kittredge*, 3 Foster, 231; and in *Smith v. Greeley*, 14 New Hamp. 378, an heir was compelled to rectify the deed of his ancestor, by conveying the land actually sold. And it has been held in several instances, that a mortgage or deed of trust may be enforced against land which it does not include in terms, on proof that the omission was due to fraud or mistake. *Blodgett v. Hobart*, 18 Vermont, 414; *Moale v. Buchanan*, 11 Gill & Johnson, 314; *De Peyster v. Hasbrouck*, 1 Kernan, 582. In *De Peyster v. Hasbrouck*, the defendant proposed to secure the repayment of a sum of money which he wished to borrow, by a mortgage of a tract of land which had been conveyed to him by the Bank of Poughkeepsie, and fraudulently induced the complainant to believe that it contained a tannery and bark mill, which stood on an adjoining lot. The com-

plainant, thereupon, advanced the money and took the mortgage, and now sought relief against the fraud. He also averred that the premises actually covered by the mortgage were an inadequate security, and that the defendant was insolvent, and had conveyed the tannery and the bark mill to a third person, in trust for his wife. Denio, J., likened the case to that of *Wiswall v. Hall*, where the vendee accepted a deed for "lot No. 22," in the belief that he would thereby obtain the title to a wharf, which the vendor held under a grant from the city, and the vendor was compelled to convey the wharf. It was accordingly decreed, that the premises described in the mortgage should be sold, and if the proceeds did not satisfy the debt, that the deficiency should be made good by a sale of the tannery and bark mill. In *The Stackbridge Iron Co. v. The Hudson Iron Co.*, 102 Mass. 45, the court held that a reservation or exception may be narrowed by parol, although the effect is to enlarge the operation of the deed; a result which seems hardly reconcilable with the rule laid down in *Glass v. Hulbert*, in the same volume of reports.

The dicta in some of the states go farther and to the point that a written instrument may be reformed on the ground of fraud or a mistake, whether the contract be executed or executory, and in aid of a specific performance as well as against it; *Philpot v. Elliott*, 4 Maryland Ch. 273; *Phyfe v. Wardell*, 2 Edwards, 47; *Gower*

v. Sterner, 2 Wharton, 75. Thus in *Keisselbrack v. Livingston*, 4 Johnson Ch. 144; Chancellor Kent, asked, "Why should not the party aggrieved by a mistake in the agreement have relief as well when he is plaintiff as when he is defendant? It cannot make any difference in the reasonableness and justice of the remedy, whether the mistake were to the prejudice of one party or the other. If the court be a competent jurisdiction to correct such mistakes (and that is a point understood and settled), the agreement, when corrected and made to speak the real sense of the parties, ought to be enforced, as well as any other agreement perfect in the first instance. It ought to have the same efficacy and be entitled to the same protection when made accurate under the decree of the court as when made accurate by the act of the parties."

A similar view is taken in 1 Story Eq. sect. 161; and in *Workman v. Guthrie*, 5 Casey, 495, 510, Woodward, J., said: "The point ruled in *Woollam v. Hearn*, that although a defendant resisting specific performance may go into parol evidence to show that by fraud the written agreement does not express the real terms, a plaintiff cannot do so for the purpose of obtaining a specific performance with a variation—is an emphatic expression of the distinction between a plaintiff seeking and a defendant resisting specific performance, but it is, in itself considered, a doctrine which

we do not follow. In cases of fraud, mistake, surprise, or trust, we allow either plaintiff or defendant to go into parol. We follow Chancellor Kent's able opinion in *Gillespie v. Moon*, 2 Johns Ch. R. 585, as was indicated in our recent opinion in *Raffensberger v. Cullison*, 4 Casey, 426. In *Tyson v. Passmore*, 2 Barr, 122, the plaintiff brought an equitable ejectment to enforce a covenant to convey "all the land acquired by the warrant and survey aforesaid." The plaintiff offered to show that the defendant had falsely represented that the warrant covered the whole of a vacant tract of 260 acres, whereas, it embraced less than one-third, and that the plaintiff had paid the price in full on the belief that this allegation was true. The court held that this evidence should have been admitted, and would if credited by the jury, warrant a verdict and judgment that the defendant should make the representation good.

It should, notwithstanding, be remembered that parol evidence is not admissible to qualify or control a written instrument, except on the ground of mistake or fraud. This is a universal rule and applies *a fortiori* where the case is within the statute of frauds; *Lee v. Kirby*, 104 Mass. 130; *Blakeslee v. Blakeslee*, 10 Harris, 237. In *Blakeslee v. Blakeslee*, Black, C. J., said: "There was but one bargain between the parties, and that was attested and consummated by an interchange of their solemn deeds. When the plaintiff claims land not

embraced in the deed, he is encountered not only by the statute of frauds, but also by that other rule of law, equally unbending, which makes the deed conclusive evidence of the contract."

"It is argued in this case, that the deed does not express the contract, and that a chancellor would reform it or decree on the evidence as if the forty-six acres were included. This is an error; parol evidence can only be admitted in cases of fraud, or plain mistake of fact. Simply stated, the case stands thus: A father agrees, by parol, to give his son sixty-eight acres of land. He afterwards makes and delivers a deed for twenty acres, a portion only of the sixty-eight. The deed being made without fraud and accepted without mistake, cannot be treated as a conveyance of land which it does not mention. The promise to convey the remaining forty-six acres, whether made at the date of the deed or before, still rests in parol, and cannot be enforced because the statute of frauds forbids it, and because there was no such exclusive possession under it as will enable a court to decree performance."

In *Tilton v. Tilton*, 9 New Hampshire, 385, the ground taken in *Elder v. Elder*, *ante*, 995, was denied, and the power of the court said to extend to the rectification of a written contract, and carrying it into effect. But the question arose on a deed of partition, and there was a part performance by actual possession of the land alleged to have been omitted from

the deed, which would have taken the case out of the statute if the agreement had been merely oral. It may be added, that in *Cowles v. Brown*, 10 Paige, 535, the question was treated as still open in New York.

This course of decision is not wholly without precedent in England. In *Clarke v. Grant*, 14 Vesey, 519, 524; the Master of the Rolls said: "A defendant in a suit for specific performance may give the same evidence now which he might have given before the Statute of Frauds, and Lord Thurlow in *Pember v. Mathers*, 1 Brown C. C. 54, went the length of making a parol promise avail in the case even of a plaintiff, and decreed a specific performance on the ground of it. That was a bill for a specific performance, brought by the original lessees of a leasehold estate, against the assignee of the lease on his parol undertaking to indemnify the plaintiffs against all rents and covenants, to be paid or kept on the part of the lessee, and to execute a bond for such an indemnity. The assignment had been made by a sale by auction, and the conditions of sale did not stipulate the indemnity; but it rested only on parol evidence. Lord Thurlow held this evidence to be admissible; and laid it down, that, where the objection is taken before the party executed the agreement, and the other side promises to rectify it, it is to be considered as a fraud on the party, if such promise is not kept. There being in that case a doubt as to the sufficiency of evidence, establishing

the parol undertaking to indemnify, entered into by the the defendants, Lord Thurlow directed an issue to be tried, whether such promise was made on the day of the execution of the assignment, and it being found in the affirmative, the plaintiff had a decree for a specific performance."

It is generally conceded, that a case may be taken out of the statute on the ground of fraud; *Crocker v. Higgins*, 7 Conn. 342; *Collins v. Tillou*, 26 Id. 368; *Thynn v. Thynn*, 1 Vernon, 296; *Strickland v. Aldridge*, 9 Vesey, 516; *Mestaer v. Gillespie*, 11 Vesey, 621; *Brown v. Lynch*, 1 Paige, 147; *Swett v. Jacocks*, 6 Id. 355; *Martin v. Martin*, 16 B. Monroe, 8; *Kennedy v. Kennedy*, 2 Alabama, 571; *Reech v. Kennegal*, 1 Vesey, Sr. 123; *Trapnall v. Brown*, 19 Arkansas, 39, 49; *Shields v. Trammell*, 1b. 51; *ante*, vol. 1, p. 274; although there has been much diversity of opinion as to the limits within which the doctrine should be applied; *Glass v. Hulbert*, 102 Mass. 24. In *Taylor v. Luther*, 2 Sumner, 228. Story, J. said, "nothing is better settled, than that the true construction of the Statute of Frauds, does not exclude the enforcement of parol agreements respecting the sale of lands in cases of fraud; for, as it has been emphatically said, that would be to make a statute, purposely made to prevent fraud, the veriest instrument of fraud. The whole class of cases in which courts of equity act, in enforcing contracts for the sale of lands in cases of part performance,

turns up this general doctrine. It is laid down with great clearness and strength by my learned friend Mr. Chancellor Kent, in his commentaries (vol. 4, 143), and he is fully borne out by the authorities which he has cited (which I have also examined), and also by other authorities *in pari materia*. He states it thus: 'a deed absolute upon the face of it, and though registered as a deed, will be valid and effectual as a mortgage, as between the parties, if it was intended by them to be merely a security for a debt. And this would be the case, though the defeasance was by an agreement resting on parol; for parol evidence is admissible to show, that an absolute deed was intended as a mortgage, and that the defeasance had been omitted or destroyed by fraud or mistake.' It is the same, if it be omitted by design, upon mutual confidence between the parties; for the violation of such an agreement would be a fraud of the most flagrant kind, originating in an open breach of trust against conscience and justice. I do not comment upon this subject at large, because it seems to me wholly unnecessary, in the present state of the law, to do more than to enunciate the principles which govern cases of this nature, and which are as well established as any which govern any branch of our jurisprudence. In the present case there is no pretence to say, that Algernon Westcott, or the defendant, have ever paid to the plaintiffs the full value of the land; and, indeed, the defendant does not

himself assert, as a distinct matter of defence. So, that, if the facts are fully made out, and the plaintiffs are remediless, there will have been perpetrated a gross fraud and injustice upon the plaintiffs, and the defendant will reap the full reward of an iniquitous bargain on his side, obtained by meditated fraud and deceit. It is hoped that the morals of a court of equity will at all times be found too strong to suffer such injustice to go unredressed."

This language approaches, if it does not reach the full extent of the proposition, that parol evidence is admissible, not only for the purpose of proving fraud or mistake, and thus varying or avoiding the effect of a deed or writing, but for that of adding a term to the instrument, and then treating the attempt to enforce it as actually drawn, as a fraud or breach of trust. If this can be done, the salutary restraints imposed by the rule of evidence laid down in *Lord Irnham v. Child*, and by the Statute of Frauds, are at an end.

The mere circumstance that a confidence has been reposed and violated, is not sufficient to exclude the operation of the statute. This is obvious, because the defendant may admit the agreement and yet plead the statute in bar. So an insolvent vendor may induce the vendee to pay the purchase-money by the promise of a deed, and then allege the want of written evidence as an excuse for the non-fulfilment of his engagement; vol. 1, 351. The object of the Legislature, in requiring a writing signed by the

party to be charged, was to establish a rule which, though operating hardly in some instances, would yet in the long run conduce to certainty and prevent fraud. This object must necessarily fail, if evidence is admissible that the writing was executed on the faith of an assurance that it should be subject to an oral variation. There is a preliminary question in every such case, was the assurance given? and this is precisely what cannot be proved by parol consistently with the statute. To justify the reformation of a writing, it must consequently be shown that the stipulation which the complainants seeks to introduce was omitted through fraud or mistake, *ante*, 944. If it appears from the defendant's acts and declarations, or from the source and nature of the consideration, that the agreement has not been correctly reduced to writing, the court may go outside of the writing to look for the agreement; *Cripps v. Jee*, 4 Brown Ch. 472; *Thomas v. M'Cormick*, 9 Dana, 108; *Moses v. Murgatroyd*, 1 Johnson Ch. 119. But until such proof is adduced, parol evidence is inadmissible whether the question arises at common law or before a chancellor. The decisions are clear, and with few exceptions, uniform, that one who executes or accepts a written instrument purporting to be a memorandum of the contract, with a full knowledge of the contents, is estopped from averring that the contract is not what the writing shows

it to be. *Beall v. Greenwade*, 9 Maryland, 185. He cannot therefore prove that the other party procured his signature by promising to do something which the terms of the instrument do not require, or charge the refusal to fulfil such an alleged assurance as a fraud; *Lamborn v. Watson*, 6 Harris & Johnson, 252; *Lamborn v. Moore*, Id. 422; *Wilson v. Watts*, 9 Maryland, 356. This results from the rule of evidence established at common law; *Fulton v. Hood*, 10 Casey, 365; and applies a fortiori where the case is within the statute of frauds; *Broughton v. Coffey*, 18 Grattan, 184; *Towner v. Lucas*, 13 Id. 705, 716; *Lamborn v. Watson*, 6 Harris & J. 252; *Wilson v. Watts*, 9 Maryland, 461; *Wilton v. Warwood*, 23 Maine, 131; *Fisher v. Shaw*, 42 Id. 32, 40; *Glass v. Hulbert*, 102 Mass. 24; *Blakeslee v. Blakeslee*, 10 Harris, 237, *ante*, 944, 946.

"It is argued," said Strong, J., in *Fulton v. Wood*, "that under the doctrine of *Renshaw v. Gans*, 7 Barr, 117, and *Rearick v. Swinehart*, 1 Jones, 233, the parol evidence was admissible. The principle of those cases is, that obtaining a paper for one purpose, and subsequently using it for a different and unfair purpose, is fraudulent; and that the subsequent abuse will open the door for the admission of parol evidence of what took place at the execution of the instrument. But if the principle reaches as far as is contended by the plaintiff in error, the rule which excludes parol evi-

dence, when offered to alter, add to, or contradict a written instrument, is utterly annihilated.

The offer of such evidence always presupposes that the instrument which it attempts to reform is used for a purpose not originally contemplated, and that it is so used the parol evidence proposes to prove. If it must be admitted, on the ground that such abuse of the instrument constitutes a fraud, then the very fact is assumed, before the evidence is given, which it is introduced to prove. This cannot be. Until the abuse or perversion of the written instrument is shown, no fraud appears sufficient to make way for the admission of parol evidence to affect it."

The principle is the same where an oral agreement is alleged as the foundation of a trust. It is not enough that the complainant was induced to change his position for the worse by a promise which has not been fulfilled. It must appear that the promise was used as a means of imposition or deceit. If the case taken as a whole is one of fraud, the promise may be received in evidence as one of the steps by which the fraud was accomplished. But until the fraud appears, there is no room for the admission of the promise. To deduce the fraud from the contract, and then give effect to the contract on the score of fraud, is obviously reasoning in a vicious circle; or as the rule has been stated in Maryland, the parol evidence must show that the contract had its inception in the fraudulent contrivance of

the party against whom the relief is sought, and not merely that he is making an unjust use of the contract to keep an advantage obtained through the reliance of the opposite party on his good faith and fair dealing; *Lamborn v. Watson*, 6 Harris & Johnson, 252; *Wilson v. Watts*, 9 Maryland, 461.

The line was drawn in *McDonald v. May*, 1 Richardson Eq. 91; *Schmitt v. Heywood*, 2 Id. 162; and *Johnson v. La Motte*, 6 Id. 356, where the court held that an oral agreement to purchase land at a judicial sale, for the defendant in the execution, is invalid and cannot be admitted in evidence to prove a trust; although it may be shown that the defendant attended the sale, and deterred bidders by declaring that he was purchasing for the owner, and would hold the land for his use.

In *Johnson v. Lamotte*, the complainant's land was about to be sold under a decree of foreclosure, and one Beard promised to buy it in, take the deed in his own name, collect the rents and profits, and convey the premises as soon as he was reimbursed. The announcement of this purpose at the sale prevented competition, and he became the purchaser at a price much below the real value of the land. Beard died not long afterwards, and the complainant filed a bill against his heirs and executors setting forth the promise, and asking that it should be specifically enforced, but also charging fraud. The Chancellor said, "It is entirely conceivable that a party, under the obligation of a contract to pur-

chase a debtor's property for his benefit, may purchase it even at an under rate, and yet be liable to the imputation of no other fraud than a subsequent repudiation of the contract, and a refusal to carry it into effect; as, for instance, where the agreement is secret, and he is merely silent respecting it at the time of his purchase, and is guilty of no attempt to extinguish competition. Here the sale is fair, and, indeed, his contract has only added one more to the number of competitors. The only fraud of which he can be guilty is in changing his mind after his purchase, and refusing to perform what he had undertaken. He may have been willing to perform it, but may be prevented by death, and and his executors and heirs not being conusant of the agreement, may not feel at liberty to execute it. Such may well be the case in the present instance. In all such cases, the imputation of fraud has no other basis than a mere refusal to perform the contract. Such fraud, whether intentional or unintentional, depends, as is said in *Schmidt v. Gatewood*, entirely upon the question whether there was in fact an agreement to be performed: and the statute will not allow that preliminary fact to be established by parol. It is elsewhere said, I think justly, that if fraud, consisting in the mere non-performance of an agreement, or the injury resulting from non-performance, be sufficient to take the agreement out of the statute, every case of non-performance is taken out of it, and the statute is

a nullity. It seems to me inconclusive to answer this observation by replying that an unconscientious refusal to perform is such fraud, as should be held to displace the statute. The epithet unconscientious is applicable to every naked refusal to perform a fair agreement. It adds, therefore, nothing to the fraud of mere repudiation, and if it be allowed to do so, and to take the case out of the statute, we are brought back to the original position, to wit, that holding a refusal to perform obviates the statute, is a virtual abrogation of the statute itself." But it was at the same time held, that although the contract was invalid, Beard's declarations at the sale were fraudulent, unless he bought the land for the complainants' use. The defendants were accordingly declared to be trustees, and ordered to execute a conveyance.

It has been held in like manner in New Jersey, that a promise to buy land at a sheriff's sale for the defendant in the execution, will not give rise to a trust, or preclude the promisor from purchasing the land for his own benefit; *Merritt v. Brown*, 6 C. E. Green, 401; vol. 1, 362.

It results from a like principle, that a deed may be converted into a mortgage, by evidence that it was given in consideration of an antecedent debt, on which interest was paid and accepted subsequently to the execution of the deed; *Cripps v. Jee*, 4 Brown Ch. 472; *Ruffier v. Womack*, 30 Texas, 342; *Phillips v. Hulsizer*, 5 C. E. Green, 308; or that the defeasance was omitted

through the mistake of the scrivener, or the fraudulent procurement of the grantee, but not by proof of a cotemporaneous oral stipulation, which does not appear in the deed; *Thomas v. M'Cormick*, 9 Dana, 108; *Franklin v. Roberts*, 2 Ireland Eq. 560; *Kelly v. Bryan*, 6 Id. 283. See *Shay v. Norton*, 48 Illinois, 100; *Kent v. Lesley*, 24 Wisconsin, 654; vol. 1, 351.

The defendant in a bill for specific performance may show by parol or extrinsic evidence, that the subject matter of the contract differs materially from what the complainant had led him to believe. Where the minds of the parties do not meet on the same subject matter, as where the purchaser supposes himself to be buying what the vendor does not intend to sell, the basis of the contract fails; *Glassell v. Thomas*, 3 Leigh, 113, and with it the right to a specific performance; *Calverly v. Williams*, 1 Vesey, Jr. 210; *Graham v. Henderson*, 5 Munford, 185; *Schmidt v. Livingston*, 3 Edwards Ch. 213; *Bowen v. Waters*, 2 Paine C. C. R. 1. A chancellor will not enforce such an agreement, and may intervene to set it aside. See *Underwood v. West*, 43 Illinois, 403; *Wiswall v. Hale*, 3 Paige, 183, *ante*. But a misrepresentation as to quantity, quality or value, does not invalidate the contract; *Powers v. Mayo*, 97 Mass. 180; *Martin v. Hamlin*, 18 Michigan, 354; *Mason v. Chappell*, 15 Grattan, 572; *Juzan v. Toulmin*, 9 Alabama, 662; unless the vendor said what he knew to be false, or positively

asserted what he did not know to be true; 1 Smith's Lead. Cases, 7 Am. ed. 320; *Tryon v. Whitmarsh*, 1 Metcalf, 1; *Hazard v. Irwin*, 18 Pick. 95. If there be an exception, it is where one of the parties has no means of information, except the statements made on the other side. One who sells a tract of land by dint of an untrue allegation that it contains a rich vein of ore which has not been opened, cannot rely on his own good faith as a reason why the purchaser should be bound. See *Fisher v. Worrall*, 5 W. & S. 483; *Tyson v. Passmore*, 2 Barr, 122. Under these circumstances, a court of equity may reform the contract or declare it void, as will best promote the ends of justice.

Although a contract will not ordinarily be set aside for a misrepresentation falling short of fraud, it is a sufficient answer to a bill to enforce the contract, that the defendant was misled by the complainant's statements innocently made. Here, as elsewhere, a chancellor acts on the maxim that specific performance is of grace not right, and will stand aloof unless the circumstances are such as to render it a duty to intervene; *Boynton v. Hazleboom*, 14 Allen, 107; *Best v. Stowe*, 2 Sandford's Ch. 298; *Fisher v. Worrall*. Accordingly, where it appeared that the vendor had represented the land as being in a different county from that in which it was really situated, the bill was dismissed; *Best v. Stowe*. The Vice-Chancellor said that the mis-

statement need not be fraudulent, if it is material and deceives the purchaser.

A false representation renders the contract voidable, not void. The injured party may waive the tort, and ask that the contract shall be enforced with a compensation or abatement, for the loss occasioned by the fraud. *Voorhees v. De Meyer*, 2 Barbour, 137. But one who is chargeable with a deceit, cannot ask that the part affected by the fraud shall be stricken out and the rest enforced, because a misrepresentation as to a material particular, affects the whole. It is well settled, that the complainant must come into court with clean hands, and without any shadow of blame. *Codwan v. Harmer*, 18 Vesey, 10; *Chremont v. Tasburgh*, 1 Jacobs & Walker, 112, ante, 937; *Thompson v. Todd*, 1 Peters C. C. R. 388; *Boyn-ton v. Hazelboom*, 14 Allen, 107.

The court cannot make a contract for the parties because that which they made for themselves is invalidated by fraud or mistake; *Glass v. Hulbert*, 104 Mass.; *Glassell v. Thomas*, 3 Leigh, 113; but it will adapt the relief to the circumstances as disclosed in proof, and may substitute compensation for performance, or couple a decree for specific performance with an award of compensation. See *Masson's Appeal*, 20 P. F. Smith, 26, 29; *Pratt v. Carroll*, 8 Cranch, 47; *M' Corkle v. Brown*, 9 Smedes & Marshall, 167; *Anthony v. Leftwich* 3 Randolph, 258; *Gibbs v. Champion*, 3 Ohio, 338; *Slaughter v. Tindale*, 1 Littell, 358; *Woodcock v. Bennett*, 1 Cowen, 71. A

vendor who misrepresents the quantity or value of the land, may be compelled to convey with an abatement of the price. But such a decree will not be made in favor of one whose conduct has not been fair and honest, or who has, although unintentionally, misled the other party to the agreement.

It has been seen that the variation of a written contract by parol evidence, reduces the whole to parol. Whether the alleged variation is cotemporaneous with the execution of the contract, or the result of a subsequent modification, the bill will fail unless it can be sustained on the written proofs. But the complainant may notwithstanding, succeed by showing such a part performance, as would take the case out of the statute if the agreement was merely oral. If a deed which should embrace two lots of land, is so worded as only to convey one of them, and the grantee goes into possession of both with the consent of the grantor, the latter cannot rely on the want of written evidence as a reason why the error should not be rectified. That part of the case is established by a writing, is not a reason for refusing any relief that would be given, if the whole depended on the uncertain memory of witnesses. *Moale v. Buchanan*, 11 Gill & Johnson, 314. The case of *Parkhurst v. Cortland*, 1 Johnson Ch. 273, 14 Johnson, 14, was decided on this principle, which was also applied in *Moale v. Buchanan*; and the case of *Tilton v. Tilton*, 9 New Hamp. 385, admits of a

similar explanation. See *Glass v. Hulbert*, 102 Mass. 25, 43.

In *Moales v. Buchanan*, a deed was executed, and possession delivered, as well of the property included in the deed, as of other land which the vendor had agreed to sell, but which was accidentally omitted in preparing the conveyance. The court said: "The parties have ineffectually attempted to execute the contract, the deed of 17th July having left out a part of the property agreed and intended to be conveyed, and the complainant's seek to rectify the mistake, and specifically enforce the agreement. It is supposed, that by the established principles of chancery, this object is not attainable; and that the evidence ought not to be let in to show the mistake in the executed contract, where the complainant is seeking to enforce the contract; because it would controvert the statute of frauds, and charge a party with the sale of lands, by an agreement not in writing; but if the party have so far executed the contract, by putting the complainant in possession, that it would be a fraud upon them to insist that their agreement was not in writing, a case is presented not within the Statute of Frauds, so that the statute is not contravened by letting in the evidence. And such it would seem was the opinion of Lord Redesdale, who, although he held the doctrine that a complainant in a bill for a specific performance of a contract in relation to land, could not offer evidence of a mistake in the agreement, and have it

executed as rectified, still thought that the contract might be executed, where there was such a part performance as took the case out of the statute. 2 Scho. & Lef. 39. Had the agreement been entirely by parol and a part performance, the complainant would have been entitled to relief. Shall he be in a worse situation by having attempted to reduce the whole agreement into the form of a conveyance, if he shall make an omission in the conveyance, by mistake of an essential part of the agreement. This is not the case of a party resting solely on a written contract for the sale of lands, and who seeks to reform it by parol, and as reformed to have it executed. But the complainant rests on possession, amounting to such a part performance as withdraws his case from the operation of the statute, and then there would be nothing to distinguish it from the ordinary case of a complainant going into chancery to reform a contract on the ground of mistake."

In like manner an oral modification of a written contract may be enforced, on proof of acts of part performance, which take the case out of the statutes. *Ligal v. Miller*, 2 Vesey, 299; *Price v. Dyer*, 17 Id. 356.

The rule does not apply unless the act of part performance substantiates the contract in its altered form; vol. 1, 1040, 1051, 1058. It is not enough that the grantee enters; his possession must be such as cannot be explained and justified by the instrument as it stands, nor without admitting the alleged va-

riation. Possession in conformity with the deed will not authorize a decree that the grantor shall convey land not embraced in the deed. See *Allen's Estate*, 1 W. & S. 383. *Glass v. Hulbert*, 102 Mass. 24, 28, *ante*. "Possession of by the purchaser," said Wells, J., in the case last cited, "under such a deed as was given to the plaintiff, is possession according to the title thereby conveyed; and is not such a possession as to afford ground for enforcing an alleged oral agreement to convey other land claimed to have been embraced in the same contract with that conveyed. *Moale v. Buchanan*, 11 Gill & Johns. 314. The plaintiff does not appear to have been let into actual possession of the seventeen acres, nor to have been induced to do any act thereon, as owner, under his supposed rights as purchaser. The conveyance of a portion of the land is neither a part performance, nor is it a recognition of the alleged oral contract, so far as it relates to the remaining land not included in the deed. On the contrary, it is in distinct disregard and implied disavowal of such a contract. The deed was given and accepted in execution of the entire contract of sale. Its terms are in literal conformity with the agreement as made." The same doctrine will be found in *Broughton v. Coffey*, 18 Grattan, 184.

By the general rules of the common law, said Lord Denman, "if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given

of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract; but after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreements, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement."

It is well settled in accordance with these principles that an executory written contract may be varied or rescinded orally at any time before breach; *Foster v. Dawber*, 6 Exchequer, 839; *Stead v. Dawber*, 10 A. & E. 507; 1 Smith's Lead. Ca. 601, 622, 7 Am. ed.; *Goss v. Lord Nugent*, 5 B. & Ad. 65. But this rule does not apply where a writing is required by statute. An oral modification of such a contract is invalid, because it would otherwise be impossible to draw the line, and the whole might ultimately depend on the memory of witnesses. Every such change is in effect a new agreement, and as much within the statute, as if the original agreement had not been made; *Goss v. Lord Nugent*, 5 B. & Ad.

65. In *Goss v. Lord Nugent*, Lord Denman said, that the object of the legislature was "to exclude oral evidence as to contracts for the sale of lands, and that any contract which is sought to be enforced, must be proved by writing only. But in the present case the written contract is not that which is sought to be enforced; it is a new contract which the parties have entered into, and that new contract is to be proved, partly by the former written agreement, and partly by the new verbal agreement; the present contract, therefore, is not a contract entirely of writing."

The rule is established in England on this basis, and generally in the United States; *Goss v. Lord Nugent*; *Stead v. Dawber*; *Moore v. Campbell*, 10 Exchequer, 325; *Noble v. Ward*, Law Rep. 1 Exchequer 117; 2 Id. 135; *Hassbrouck v. Tappen*, 15 Johnson, 200; *Brooks v. Wheelock*, 11 Pick. 489; *Dana v. Hancock*, 30 Vermont; *Cumming v. Arnold*, 3 Metcalf, 486; *Stearns v. Hall*, 9 Cushing, 31; although a different view was taken in *Cuff v. Penn*, 1 M. & S. 21, and still prevails in Massachusetts, in cases growing out of the sale of goods under the 17th section of the statute. An action cannot therefore be maintained on a contract for the sale of land as altered by parol, nor can such a variation be specifically enforced, unless there has been a "part performance which substantiates the variation;" *Goucher v. Martin*, 9 Watts, 106; *Cravener v. Bowser*, 4 Barr, 259. But while this rule

precludes the plaintiff from obtaining a decree for the specific performance of the contract as modified by parol, it does not necessarily apply to the defendant, who may, as we have seen, show that the prayer of the bill is inequitable by any means of proof consistent with the general rules of evidence, *ante*, 999; *Workman v. Guthrie*, 5 Casey, 495, 510; *Stevens v. Cooper*, 1 Johnson's Ch. 429. Proof that he has changed his position for the worse on the faith of an oral modification of the writing, and will be a loser if it is not fulfilled, will consequently lead to a dismissal of the bill, unless the plaintiff elects to have the contract executed in its altered form. So a purchase by a third person on the faith of an oral waiver or rescission, may be a good answer to a bill for a specific performance; *Boyce v. M'Cullough*, 3 W. & S. 429; *Workman v. Guthrie*, 5 Casey, 495. And it is a general rule that acts of part performance may authorize a decree for the specific performance of the contract as varied by a subsequent oral stipulation; *O'Connor v. Spaight*, 1 Schoales & Lefroy, 305; *Devlin v. Little*, 2 Casey, 502. In the case last cited the court held that a stipulation in articles of agreement for a title clear of incumbrances, might be waived by a subsequent parol agreement, that the vendee should pay the purchase-money to the mortgagee, and take a release from him, and that the court would not suffer the vendor to fall back on the original agree-

ment after the release had been prepared, and was ready for delivery.

The authorities above cited show that a partial change or modification of the contract is invalid, unless reduced to writing; Fry on Specific Performance, 696; Sugden on Vendors, ch. 4, sect. 9; *Price v. Dyer*, 17 Vesey, 356; *Moore v. Campbell*, 10 Excheq. 323; *Marshall v. Lynn*, 6 M. & W. 117; *Noble v. Ward*, 1 Law Rep. Ex. 117; 2 Id. *ante*, 1020. It has, nevertheless, been contended that the whole contract may be rescinded or dissolved by parol. The statute says that the defendant shall not be charged without a writing; it does not say that he shall not be discharged orally. Accordingly, a parol rescission before breach seems to be a defence to an action brought on the contract as such, for the recovery of damages. The right involved is a mere chose in action, and not an estate or interest in land; *Goss v. Lord Nugent*. If a different conclusion is deduced, it must be drawn from the spirit of the act, and not from its letter. "As there is no clause in the act which requires the dissolution of such contracts to be in writing, it would seem that a written contract concerning the sale of lands may still be waived and abandoned by a new agreement not in writing, so as to prevent either party from recovering on the contract which was in writing;" *Goss v. Withers*, 5 B. & A. 58. But, however true this may be at law, it does not follow that such a waiver is an answer to a bill for the specific

performance of a written agreement concerning land. In the language of Sir William Grant, "a contract for a purchase is an equitable title, and the person having such a title is in equity for most purposes considered as the complete owner of the estate;" *Buckle v. Mitchell*, 18 Vesey, 111; *post* notes to *Seton v. Slade*. If the premises rise in value, the advantage is his, and he must bear the loss if they fall in value, or are destroyed by fire.

It is difficult to believe that such an interest can be relinquished by parol consistently with the statute. In *Burthouse v. Crosly*, 2 Eq. Cases, 32, pl. 44; Lord Hardwicke said "an agreement to waive a contract for the purchase of real estate is as much an agreement concerning lands as the original contract." A similar view was taken in *Bell v. Howard*, 9 Modern, 305; and *Parteriche v. Powllet*, 2 Atkyns, 383; and the question seems to have been regarded as an open one in *Price v. Dyer*, 17 Vesey, 356. But the English doctrine is now said to be "that a contract in writing, and by law required to be in writing, may in equity be rescinded by parol; and a waiver by parol therefore furnishes a sufficient answer to a bill for specific performance," Fry on Specific Performance, 305, *ante*, 935. The same rule has been laid down in Tennessee and New Hampshire; and such decisions may be found in some of the other States; *Buel v. Miller*, 4 New Hampshire, 196; *Walker v. Whaley*, 2 Humphreys, 119; *England v. Jackson*, 3 Id.

584; see *Workman v. Guthrie*, 5 Casey, 495, 509; *McCorkle v. Brown*, 9 Smedes & Marshall, 167; *Tolson v. Tolson*, 10 Missouri, 736; *Bobsford v. Burr*, 2 Johnson, 416; *Ryno v. Darby*, 5 C.E. Green, 231; although there has generally been a change of circumstances, or some act done on the faith of the waiver and rendering it inequitable to enforce the contract.

The doctrine as thus stated is open to the objection that the agreement may be dissolved by means which would not suffice for its modification. The parties may rescind the agreement, but they cannot vary or annul a particular clause, although the greater power ordinarily implies the less. The right to rescind a written contract by parol, is accordingly questioned by Sugden as at variance with the maxim, *unumquodque dissolvitur eodem ligamine quo et ligatur*.

"The agreement must be in writing or no action can be maintained upon it. Does not this by a necessary implication, exclude a parol agreement which is to waive a written one? Is not a like mischief to be guarded against in either case." Sugden on Vendors, ch. 4, sect. 9, 167; *Boyce v. McCullough*, 3 W. & S. 429. If the purchaser transfers his interest to a third person, the contract must be in writing; why should the rule be different when he resells to the vendor. *Goucher v. Martin*, 9 Watts, 106. An equitable estate is as much shielded by the statute as if it were legal, and cannot be divested by a naked parol agreement, *Goucher v. Mar-*

tin, 9 Watts, 106; *Cravener v. Bowser*, 4 Barr, 259. It has accordingly been held in Pennsylvania that an oral waiver without more, is not an answer to a bill for the specific performance of a written contract; *Espy v. Anderson*, 2 Harris, 308, 310. To render such a rescission valid, it must be evinced by acts, and not rest merely in parol. The original agreement must be cancelled or surrendered, or the vendee must surrender the possession of the premises to the vendor; *Lauer v. Lee*, 6 Wright, 165.

The principle is clearly stated in *Goucher v. Martin*, 9 Watts, 106, 110; "A written agreement may be waived and discharged by parol. But in *Burthouse v. Crossly*, 2 Eq. Cases Ab. 26; the chancellor said "that he would not say a contract in writing could not be waived by parol, yet he should expect, in such a case, very clear proof; and the proof in that case he thought insufficient to discharge a contract in writing; and observed that the statute of frauds and perjuries requires that all contracts and agreements concerning lands, should be in writing. Now, an agreement to waive a contract of purchase, is as much an agreement concerning land as the original contract." In *Goman v. Salisbury*, 1 Ver. 240; the single point was, whether an agreement made since the statute of frauds and perjuries, might be discharged by parol? And the Lord Keeper held it might, and therefore dismissed the bill which was brought to have the agreement executed in specie. In both the

cases cited, it was a mere agreement to convey without any act done, and even then, notwithstanding the case in 1 Ves. was cited, the chancellor doubted (inasmuch as it was a contract concerning land) whether it could be waived by parol. But where the contract is in part executed, and the party becomes seized of an estate in the land, I hold it to be a very clear proposition, that he cannot be deprived of his estate on the pretext that the agreement had been waived by a parol contract. And even if this should be held to be the law, a chancellor would require the most clear and satisfactory proof of the contract, and of all its terms and limitations. But here the point does not arise, for there is no proof whatever, of any waiver of the original bargain, but the case is presented on the fact of a contract of sale and a repurchase of land on different terms and conditions, from the original agreement." See *Meason v. Kaine*, 13 P. F. Smith, 339.

It is notwithstanding clear, that an equity may be rebutted by evidence which would not sustain a decree of specific performance; and although a chancellor will not execute an oral modification, he may still regard it as a reason why the contract should not be enforced in its original form; *Raffensburger v. Cullison*, 4 Casey, 426, 429; *Workman v. Guthrie*, 5 Id.; *Espy v. Anderson*, 2 Harris, 308, 310. A parol waiver or rescission executed by the parties, or followed by a change of circumstances rendering it inequitable to enforce the

contract, is consequently a sufficient answer to a bill for a specific performance; *Lauer v. Lee*, 6 Wright, 165; *Bowser v. Cramer*, 6 P. F. Smith, 132; especially if third persons have given value in the well founded belief that the contract is at an end; *Boyce v. McCulloch*, 3 W. & S. 429; *Raffensburger v. Cullison*; *Workman v. Guthrie*.

In *Ong v. Campbell*, 6 Watts, 392, the purchaser went into possession under an oral contract. The vendor subsequently took an assignment of a mortgage which he had agreed to extinguish, and issued a *scire facias*, which is the substitute in Pennsylvania for a bill of foreclosure. It was held that he had thereby forfeited the right to a specific performance. Ch. J. Gibson said that "an agreement for the sale of land, may be resisted for a waiver of it by parol, or for acts which induce a presumption of abandonment." The defence in this case rested on the act; and it is established under the subsequent decisions, that an oral waiver without more, is not enough as against a purchaser who has gone into actual possession; *Boyce v. McCulloch*; *Raffensburger v. Cullison*; *Workman v. Guthrie*, ante. The principle is the same whether the contract is oral or in writing, if it has been so far executed as to confer an equitable right.

Whatever the rule may be when the rescission is absolute, an agreement by a purchaser who has gone into possession, that the land shall revert to the vendor on terms or

conditions which do not appear in the contract as originally made, is manifestly within the statute, and invalid unless reduced to writing or substantiated by an actual surrender of the premises; *Goucher v. Martin*; *Meason v. Kaine*.

In *Moore v. Campbell*, 10 Exchequer, 328; the parties agreed orally that the goods should be delivered at a different place from that provided by the terms of the written contract of sale. It was contended that this was virtually a rescission, which put an end to the agreement. The original contract could not be enforced because a new one had been substituted, and the new contract was invalid under the Statute of Frauds. The court held on the authority of *Marshall v. Lynd*, 6 M. & W. 109; that as the new contract was invalid, it did not vary or affect the existing obligation. It was not a rescission, because the parties did not intend to dissolve the agreement but to perpetuate it in an altered form. This decision was followed and confirmed in *Noble v. Ward*, L. R. 1 Ex. 117; 2 Id. 135. These cases arose under the 17th section of the statute, but the rule which they lay down is applicable to contracts for the sale of land.

The rule that prevention is equivalent to performance, is not excluded by the Statute of Frauds. A failure to comply with the terms of the writing, may consequently be excused by proving a tender, and that it was refused. It is an established principle, that no one can take advantage of a breach which he has caused. The prin-

ciple is nearly, if not quite the same, where the defendant authorizes or sanctions the default which he sets up as a defence to the contract. In *Cuff v. Penn*, 1 M. & S. 21, the plaintiff was accordingly allowed to excuse a failure to deliver the goods at the time prescribed, by showing that the delay was at the defendant's request, and for his accommodation. Such a waiver does not vary the contract, because like a license, it may be recalled at any time before it is acted on or executed, but it also resembles a license in being a justification for every thing done in pursuance of it, while still standing and unrevoked. *McCombs v. McKennan*, 2 W. & S. 216. Although this distinction has been overruled in England, it is generally recognized in the United States, and may help to reconcile the decisions in Massachusetts, under the 17th section of the statute, with the rule deduced in *Goss v. Lord Nugent*, from the 4th. See *Brown v. Wheelock*, 11 Pick, 439; *Pierrepoint v. Barnard*, 5 Barb. 664; 2 Selden, 279; 2 American Lead. Cases, 593, 5 ed.

In *McCombs v. McKennan*, Sergeant, J., said: "The defendant contends that the contract had been subsequently varied by the agreement of the parties, that the residue of the seed should be delivered at Indiana instead of Pittsburgh; and therefore the plaintiff's action should have been assumpsit on the new contract, and not covenant on the original one. We think, however, the true principle is stated in the charge of the

court, that this was not so much an alteration of the original contract, as a waiver or dispensation on the part of the defendant, of certain things to be done by the plaintiff, which were conditions precedent to be performed by him. If a party agrees to accept the thing to be delivered, at another time or place than that stipulated, a performance of this by the other party is equivalent to a performance of the original undertaking." The principle is the same when the question arises under the Statute of Frauds. *Devling v. Little*, 2 Casey, 502.

Proof that the writing was inaccurately drawn, or that it underwent a subsequent alteration, does not necessarily put the complainant out of court, and he may generally elect to have the contract performed with the variation. *Bradford v. The Union Bank of Tennessee*, 13 Howard, 57, 69; *Ryno v. Darby*, 5 C. E. Green, 231; see *Martin v. Pycroft*, 2 De Gex, M. & G. 785. So the contract may be reformed and enforced at the instance of the defendant, without the expense and delay of a cross-bill, *ante*. See *Stapylton v. Scott*, 13 Vesey, 425; *Gwynn v. Lethbridge*, 14 Vesey, 585. *Bradford v. The Union Bank of Tennessee*. But such relief will not be granted where the subject matter of the contract is real estate, unless the evidence is sufficient to take the case out of the statute. *Harrison v. Talbot* 2 Dana, 268; *Miller v. Chetwood*, 1 Green Ch. 199. In *Harrison v. Talbot*, the court dismissed a cross-bill filed to

rectify the contract, and enforce it as reformed, because the defendant could not in the attitude of a complainant, compel a specific execution of the contract as varied or modified by parol evidence, nor otherwise than according to the written memorandum of the sale. The line is accurately drawn in the following citation from the opinion of Sir Wm. Grant, in *Winch v. Winchester*, 1 V. & B. 377. "If the defendant insists that the evidence being received, he will be entitled to have the contract performed with an abatement of the price, I think it not admissible for that purpose, as the court cannot execute in his favor a written agreement, with a variation introduced by parol testimony; but, if he says he was deceived by this representation, and therefore was induced by fraud to enter into the contract, and offers the evidence for the purpose of getting rid of such contract altogether, for that purpose, I think it may be received."

It is a matter of some nicety to determine, when evidence of a parol variation of the contract will deprive the plaintiff of all claim to a specific performance, or merely put him to his election between a dismissal of the bill and the performance of the contract as modified by the defence. A plaintiff cannot set up one case in pleading, and have judgment on another as disclosed in evidence; *Allen v. Burke*, 1 Maryland Ch. 534; *Sims v. M'Ewen*, 27 Alabama, 184, vol. 1, 1051. It is immaterial in this regard whether the variance ap-

pears from his evidence or from the defendant's. Proof that the *allegata* are false in an essential particular, is accordingly a defence, unless the defect can be cured by an amendment; *Harris v. Knickerbacker*, 5 Wend. 638, 1 Paige, 209; *Bellows v. Stone*, 14 New Hampshire, 175; *Craige v. Craige*, 6 Iredell Eq. 191; *Phillips v. Thompson*, 1 Johnson Ch. 131, 146; *Hoxie v. Carr*, 1 Sumner, 173; *Parrish v. Koons*, 1 Parsons' Equity Cases, 79; *Forsyth v. Clark*, 3 Wend. 637; *Sims v. M'Ewen*, 27 Alabama, 184. A specific performance will not therefore be decreed where there is a material difference between the contract as set forth in the bill, and that confessed in the answer or appearing in the proofs. *Harris v. Knickerbacker*. In the case last cited, the complainant alleged that the purchase-money was to be paid in seven annual instalments, with interest annually from the date of the agreement. The defendant denied that he had agreed to be liable for interest, although admitting the contract in all other respects. This was held to be a material variance, which precluded a decree for specific performance; In *Lyndsay v. Lynch*, 2 Sch. & Lef. 1, the prayer was for the execution of a lease for three lives; the answer admitted an agreement for a lease for one life. The complainant amended his bill, and prayed for a decree in the alternative, for a lease for three lives or for one life, and it was refused.

It results from these authorities, and the general course of decision,

that where the contract alleged in the bill is denied in the answer, and not established by the evidence, the defect is fatal and the complainant will not ordinarily be suffered to amend. The case is widely different where the defendant admits the contract, and seeks to vary it by parol. Such a defence is an appeal from the strict letter of the law to equity. Whether it should be allowed and on what terms, is a question depending on the circumstances in each case. It may be a ground for dismissing the bill, or simply for modifying the relief accorded. A complainant who fails in the endeavor to establish an unjust demand, should not readily be allowed to insist on a different case presented by the defendant's answer or proofs. See *Clowes v. Higginson*, 1 Vesey & Beames, 524; *Pilling v. Armitage*, 12 Vesey, 78; *Lindsay v. Lynch*. So one who makes a false representation concerning a particular clause, cannot strike that out and have a specific performance of the residue, *ante*, 937; although a variance which is consistent with good faith, and leaves the substance of the contract intact, will not preclude the enforcement of the contract as gathered from the evidence adduced on either side. *Ramsbottom v. Gosden*, 1 Vesey & Beames, 165; *The London Railway Co. v. Winter*, 1 Craig & Phillips, 57; *Martin v. Pycroft*, 2 D. G. M. & G. 788; 11 English Law & Equity, 110; 15 Id. 376. The better way is to plead the transaction according to the truth, setting

forth the contract as reduced to writing, and also any promise or representation by which it has been varied or modified, and then leave the defendant to elect whether he will abide by the written instrument, or accept the variation. *Martin v. Pycroft*; *Ives v. Hazard*, 4 Rhode Island, 14. But a failure to pursue this course, is not conclusive against the plaintiff, and the court may in the exercise of a sound discretion, base a decree in his favor on the defendant's case, although differing materially from that alleged in the bill. *Bradford v. The Union Bank*, 13 Howard, 57; *Wallace v. Brown*, 2 Stockton Ch. 308; *Ryno v. Darby*, 5 C. E. Green, 230. In *Ryno v. Darby*, the complainant was accordingly held entitled to a decree for the specific performance of the substituted contract alleged in the answer, without amending the bill, and the same rule was applied in *M'Comas v. Easley*, 21 Grattan, 31. A specific performance may in like manner be decreed in favor of the defendant on his answer and proofs, without the expense and delay of a cross-bill. *Bradford v. The Union Bank of Tennessee*, 13 Howard, 57, 69; see *Spurrier v. Fitzgerald*, 6 Vesey, 548; *Fife v. Clayton*, 13 Id. 546; *Gwynn v. Lethbridge*, 14 Id. 585.

To justify a decree of specific performance the contract must appear with reasonable certainty from the written evidence. This may consist of letters or memoranda, which, read together, make a consistent whole; see *Bell v. Bruen*, 1 Howard, 169, 173; *Neuf-*

ville v. Steward, 1 Hill Ch. 159; *Tallman v. Franklin*, 4 Kernan, 584; *Dobell v. Hutchinson*, 3 A. & E. 365; 1 Smith's Lead. cases, 497; 7 Am. ed.; 2 Id. 256; although if there is an ambiguity or hiatus, witnesses cannot be called to supply the defect or make that plain which the parties have left in doubt. No chain of proof can be stronger than its weakest link, and an agreement which depends in any material particular on oral testimony is for all legal purposes merely parol; *Stoddert v. Tuck*, 5 Maryland, 18; *Willis v. Forney*, 1 Busbee Eq. 256; *Aday v. Echols*, 18 Alabama, 353; *Steel v. Stamps*, 2 Sneed, 172; *Talman v. Franklin*, 3 Duer, 395; *Soles v. Hickman*, 8 Harris, 180; *Farwell v. Lowther*, 18 Illinois, 253; *McClintock v. Laine*, 22 Michigan, 212; *Taylor v. Williams*, 45 Missouri, 80; *Baker v. Glass*, 6 Munford, 212; *Graham v. Coll*, 5 Id. 396; *Nicholls v. Williams*, 7 C. E. Green, 63; *Minturn v. Baylis*, 33 California, 129; *The Canton Co. v. The R. R. Co.*, 21 Id. 395; *Foot v. Webb*, 59 Barb. 38; *Labdell v. Labdell*, 36 New York, 327; *Buckmaster v. Thompson*, 1b. 558; *Waring v. Ayres*, 40 Id. 457; *Madeira v. Hopkins*, 12 B. Monroe, 595; *Jordan v. Deaton*, 23 Arkansas, 704; *Munsell v. Lorer*, 21 Michigan, 491; 1 Smith's Lead. Cases, 497; 2 Id. 259; vol. 1, 1058. The law was so held by Chancellor Kent, in *Parkhurst v. Van Cortland*, 1 Johnson Ch. 273; 14 Johnson, 32, and although the decree was reversed by the Court of Errors, it was be-

cause the contract had been taken out of the statute by part performance. The rule was applied in *Seitzinger v. Ridgway*, 4 W. & S. 472; and again in *Parrish v. Koons*, Parson's Eq. Cases, 79: "To constitute an adequate written agreement for the sale of lands within the statute, it is necessary that it should state the terms of the contract with reasonable certainty, so that the substance of it can be made to appear and be understood from the writing itself, without having recourse to parol proof. An agreement defective in certainty, cannot be supplied by parol proof, because that would at once open the door to perjury, and introduce all the mischiefs which the statute was intended to prevent. A contract cannot rest partly in writing and partly in parol. Unless the essential terms of the bargain and sale can be ascertained from the writing itself, or by a reference contained in it to something else, the writing is not a compliance with the statute; *Parkhurst v. Van Cortland*, 1 John Ch. R. 273. If a contract be vague and uncertain, a court of equity will not exercise its extraordinary jurisdiction, but leave the party to his legal remedy; *Colson v. Thompson*, 2 Wheat. 341; *Abeel v. Radcliff*, 13 John. R. 297. In *Reed's Heirs v. Hornback*, 4 J. J. Marsh. 377, it was ruled that specific execution of a contract will not be enforced, unless the parties have described and identified the particular tract, or unless the contract furnishes the means of identifying with certainty the land to

be conveyed. Other American cases on the doctrine will be found in *Ellis v. Deadman's Heirs*, 4 Bibb. 467; *Kendall v. Almy*, 2 Sumner, 278; *Carr v. Duval*, 14 Peters, 77; *Abeel v. Radcliff*, 13 John. R. 297. The English cases on this subject are cited and commented upon in Sugden on Vendors, vol. 1, p. 118. And whether the instrument from which the contract is sought to be deduced is a receipt for a deposit, earnest, or purchase-money, it must contain the same requisites to bring it within the statute. In *Blagden v. Bradbear*, 12 Vesey, 466, it was held by the master of the rolls, that although an auctioneer's receipt for the deposit may amount to a sufficient note or memorandum of an agreement within the statute, *yet for that purpose* the receipt must contain in itself, or by reference to something else, what the agreement is. This doctrine had previously been strongly intimated by Lord Eldon, in *Coles v. Trecothick*, 9 Ves. 252, 253.

"The application of these principles to the case before the court, seems decisive against the plaintiff. The only written memoranda of the original contract are found in the defendant's proposal and the plaintiff's receipt, which are considered by the plaintiff as forming one instrument. The absolute insufficiency of these documents to constitute any definite contract in themselves, appears best from simply reciting them. They are as follows: 'The most is 3700, subject to 3000 mortgage. No taxes or other liens (except the

mortgage) will be allowed. Received Ten Dollars on account of the purchase. The mortgage to be removed from the Fifth street lot as soon as the title is made, without delay. R. A. Parrish: For Isaac Koons, Richard Tea.' Can anything be extracted from such papers, from which a court of chancery can advisedly decree a specific performance? Where is the estate bargained for? What is the quantity of land to be conveyed? What is the kind of estate to be conveyed? Without associating these papers with the parol evidence in the cause, it is impossible to extract anything intelligible from them. This, as has been seen, is wholly inadmissible; *Parkhurst v. Van Courtland*, *supra*. Every agreement which is required to be in writing by the Statute of Frauds, must be certain in itself, or capable of being made so by reference to something else, whereby the terms can be ascertained with reasonable precision, or it cannot be carried into effect."

In *Soles v. Hickman*, 8 Harris, 180, a memorandum acknowledging the receipt of "\$30 in part payment of a lot in Keesport, No. 34," was held too vague to be specifically enforced, because it did not state how much more was to be paid, or when.

The land, the price, and the time of payment, must be designated with a clearness which leaves nothing to conjecture; *Carr v. The Passaic Land Co.*, 4 C. E. Green, 424; 7 Id. 25; *McKibbin v. Brown*, 1 M'Carter, 13;

Hyde v. Cooper, 13 Richardson Eq. 250; and an agreement to sell for a sum, or on a credit to be subsequently arranged or settled, will not be specifically enforced unless there is written proof that the parties came to terms, and what the determination was; *M'Kibbin v. Brown*; *Welsh v. Bayand*, 6 C. E. Green, 186; *Nichols v. Williams*, 7 C. E. Green, 63; *Hyde v. Cooper*.

If the agreement is certain to a common intent, more will not be required; see *Broom v. Batchelor*, 1 H. & N. 255; *Barry v. Coombe*, 1 Peters, 640; *White v. Hormann*, 51 Illinois, 243; and in *Matteson v. Sanfield*, 27 Wisconsin, 671, a letter offering certain land for "three thousand dollars, \$1,000 down, and \$500 annually with interest, until the whole is paid; to be secured by mortgage," was held to be within this principle as implying that the conveyance was to be made to the purchaser, and the mortgage given by him. The court may, moreover, go outside of the writing for the purpose of ascertaining and identifying the subject matter; and a contract to sell "my farm" or "the mill" is sufficiently certain, if it appears that the vendor has but one such building or tract of land; *Fish v. Hubbard*, 21 Wend. 652; *Robeson v. Hornbaker*, 2 Green Ch. 60; 1 Smith's Leading Cases, 496; 2 Id. 256, 7 Am. ed. See *Shortridge v. Cheek*, 1 A. & E. 57; *Haigh v. Brooks*, 10 A. & E. 309; *Aldridge v. Eshelman*, 10 Wright, 420; *Barry v. Coombe*, 1 Peters, 640.

In the case last cited "*Coombe*

made out a statement of an account between himself and Barry, consisting of various items, amounting to a large sum. In this statement he credits Barry as follows: "By my purchase of your half E. B. wharf and premises this day, as agreed on between us, \$7,578.63." This paper was signed by Coombe, each party having a copy. On a bill filed for a specific performance, Barry set up the uncertainty of the agreement, and relied on the Statute of Frauds. The court said, "that for anything that appeared on the face of the instrument, E. B. wharf may be as definitive a description of locality as F. street; and then there would be no ambiguity, unless the bargainor had more than one house in F. street, like the manors of Dale put in the old books;" *Robeson v. Hornbaker*.

In like manner, the consideration of a contract within the statute may be identified by the aid of parol evidence. Such proof is always admissible to acquaint the judge with every material circumstance known to the parties; *Lawrence v. M'Calmont*, 1 Bl. C. C. 232; *Aldridge v. Eshelman*, 10 Wright, 420; *Goldshede v. Swan*, 1 Exchequer, 154; 2 Smith's Leading Cases, 256, 7 Am. ed., ante, 674. These cases arose under the fourth section of the statute, but are equally applicable where land is the subject matter of the contract.

On the other hand in *Hammer v. M'Eldowney*, 10 Wright, 334, a bill to enforce the specific performance of a contract for the sale

of "the houses on Smithfield street" was dismissed on demurrer, although it averred that the defendant had two houses on Smithfield street, and that he owned no other property on the said street; the ground of the judgment apparently being, that the lots extended at the rear to an alley, and that it did not appear how much of them was to be set off to the complainant, or whether he was to have the whole.

An agreement to sell at a fair valuation, or appraisal, is sufficiently certain, and if the parties cannot agree on who shall fix the price, it may be ascertained by a master; 3 De G. M. & G. 24; *Van Doren v. Robinson*, 1 C. E. Green, 256; *Whitlock v. Duffield*, 1 Hoffman Ch. 130; *City of Providence v. St. John's Lodge*, 2 Rhode Island, 46; *Dike v. Greene*, 4 Id. 285. Where, however, the contract designates a mode of ascertaining the price which fails in consequence of the disagreement or refusal of the arbitrators, a court of equity cannot remedy the defect; *Norfleet v. Southall*, 1 Murphy, 189. See *Dike v. Greene*, 4 Rhode Island, 285, 289; *Graham v. Call*, 5 Munford, 396; *Baker v. Glass*, 6 Id. 212.

It is an established legal principle, that if a consideration is shown to exist, the court will not inquire whether it is adequate; *Kidder v. Chamberlain*, 41 Vermont, 62; *Viele v. The Troy and Boston Rail Road*, 21 Barb. 381; *Worth v. Case*, 42 New York, 362. The rule prevails in equity as well as at law, and a chancellor

will not pronounce a contract void, or direct that it shall be given up or cancelled for mere inadequacy aside from fraud; *Eyre v. Potter*, 15 Howard, 42; *Davidson v. Little*, 10 Harris, 245, 252; *Harris v. Tyson*, 12 Id. 347, 360; *Cribbins v. Markwood*, 13 Grattan, 495. It has nevertheless been contended, that as specific performance is discretionary, it should not be decreed where the bargain is hard and unequal. A manifest disproportion between price and value, is in this aspect of the question a defence to a bill to enforce the contract. It has accordingly been said, that a specific performance may be refused on the single ground of inadequacy; *Clitherall v. Ogilvie*, 1 Dessausure, 257; *Gasque v. Small*, 2 Strobhart Eq. 72; *Clements v. Reid*, 9 Smedes & Marshall, 535; although there is no pretence of fraud, surprise, or undue influence; *Lucas v. Barrett*, 1 Iowa, 510. It has been contended on the other hand with more reason, that as a sale at an under-value is obligatory in law and morals, it should be enforced by a chancellor if there is no other objection. The maxim *caveat emptor*, is an answer to argument drawn from the inadequacy of the consideration unless so gross as to be evidence of fraud, or where there is actual fraud, or undue advantage taken of imbecility or ignorance; *Crocker v. Young*, Rice, 30; *Seymour v. Delancy*, 6 Johnson Ch. 222; 3 Cowen, 445; *Sarter v. Gordon*, 2 Hill Ch. 121; *Fripp v. Fripp*, Rice Eq. 84; *The Western R. R. Corporation v.*

Babcock, 6 Metcalf, 346; *Burich v. Hogge*, Harrington Ch. 31; *Harrison v. Town*, 17 Missouri. 237; *Beal v. Vallee*, 12 Id. 126; *Viele v. The Troy & Boston Rail Road*, 21 Barbour, 381; *Lee v. Kirby*, 104 Mass. 420; *Westervelt v. Matheson*, 1 Hoffman Ch. 37; *Garnet v. Macon*, 2 Brock, 185; *Cathcart v. Robinson*, 5 Peters, 263; *Barton v. Schaffer*, 21 Grattan, 474; *Rodman v. Zilly*, Saxton, 320; *Hale v. Wilkinson*, 21 Grattan, 751; *Osgood v. Franklin*, 2 Johnson Ch.; 14 Johnson, 527; *Black v. Cord*, 2 Harris & Gill, 100. In *Adams v. Weare*, 1 Brown Ch. 567, Lord Thurlow said, that no case could be found where the court had refused a specific performance on such a ground, as between parties who had contracted with their eyes perfectly open; and if this dictum did not accurately reflect the past, it is sustained by the subsequent course of decision.

In *Seymour v. Delancy*, Ch. Kent held, that "inadequacy of price, may of itself and without fraud or other ingredient, be sufficient to stay the power of the court to enforce a specific performance of a contract to sell land; although it may be true, that mere inadequacy independent of other circumstances, is not sufficient to set aside the transaction." A court of equity "should not enforce a hard, unreasonable, or unequal bargain, but rather leave it to a jury at law to investigate or apportion the damages as the position of the case shall appear;" *Willan v. Willan*, 16 Vesey, 83. See *Campbell v. Spencer*, 2 Biunev,

133. These dicta must be taken in connection with the facts. The controversy grew out of an agreement to exchange a farm for an undivided third of a lot in the village of Newburg. The testimony as to value was conflicting, but the chancellor arrived at the conclusion, that the farm was worth twice as much as the complainant's share of the lot. It also appeared that the defendant was habitually intemperate, although he was not shown to have been incapable of transacting business when free from the influence of liquor. This gave rise to the inference, that "his mind must have felt the pernicious effects of that habit and have lost its original strength." Thus regarded, the contract was clearly one which a court of equity should decline to enforce.

The court of appeals took a different view of the evidence, which led to a corresponding change in the legal result. In their judgment, the difference between what the defendant agreed to give, and what he was to receive, did not exceed one-sixth. It did not appear that the natural vigor of his intellect had been impaired by his excesses, or that he was intoxicated at the time of entering into the contract. He proposed the exchange, and it was not concluded until after a negotiation of several weeks. If he made a disadvantageous bargain, it could not be imputed as a fault to the complainant, or be a ground for refusing to exercise the established jurisdiction of the court. The decree was consequently reversed,

and a specific performance decreed in accordance with the prayer of the bill.

The authorities are not insusceptible of being reduced to a common basis. It is universally conceded that a chancellor should not enforce a hard and unconscientious bargain, and the difficulty is to know what bargains are within this principle. The vendor is obviously entitled to determine what he will accept, and the purchaser how much it is worth his while to give. If a price is deliberately agreed upon, the question will not be reconsidered in either jurisdiction; *Davidson v. Little*, 10 Harris, 245, 347; *Harris v. Tyson*, 12 Id. 360. "Inadequacy of price is not fraud. A man may be as honest in making a profitable bargain as a bad one, and the law does not require him to pay a full price, if the person he deals with is willing to take less. The owner of property may sell it for very little, or give it away for nothing, if he thinks fit; and however unreasonable his conduct may seem, his will alone is sufficient to vouch the act;" *Davidson v. Little*, 10 Harris, 245, 251. But this is entirely consistent with the proposition that gross inadequacy gives rise to a presumption, which shifts the burden of proof; *Davidson v. Little*; *Seymour v. Delancey*, 3 Cowen, 445, 529. If the complainant can succeed in demonstrating the fairness of the transaction, a specific performance will not be refused merely on the ground of inadequacy.

The doctrine is not at variance

with the original decree in *Seymour v. Delancey*, or the judgment of reversal pronounced by the court above. The difference was rather as to figures than principle. If the exchange had been one which no fair man could have proposed, and which no man of sound judgment would have accepted, both courts might have concurred in dismissing the bill. But inasmuch as the value on either side was to a great extent speculative, the court might properly decline to be wiser than the parties themselves.

There is another consideration which influenced the judgment of the court of error. The defendant owned two-thirds of the lot, and his motive for making the exchange was to acquire the residue. The case, therefore, came within the rule that one who offers a *pretium affectionis*, or fancy price, cannot allege that it is in excess of the market value. He may want the land to build on, because it is near his dwelling, or as a means of accomplishing some other object on which he has set his heart. A contract made under the influence of such motives is not less obligatory, because the price is higher than could be obtained from any other purchaser; see *Coles v. Trecothick*, 9 Vesey, 246.

Where the consideration is both good and valuable, as in the case of a sale to a child or relative, the unfavorable inference that might otherwise be drawn from the inadequacy of the price is repelled, and the contract may be specifically enforced; *Fripp v. Fripp*,

1 Rice Eq. 84; *White v. Thompson*, 1 Dev. & Bat. Eq. 493; *Shepherd v. Bevin*, 9 Gill, 32, 39; 4 Maryland Ch. 133; *Haines v. Haines*, 6 Maryland, 435.

The agreement, said Frick, J., in *Shepherd v. Bevin et al.*, "is not between strangers, but the parties are mother and son, in the closest relation of life. The contract has the meritorious consideration of love and affection, superadded to the valuable consideration which passed between them. Could the appellant reasonably have declined the proposition to release the amount of his claim against the mother, when coming from herself? And, as her own proposition to her child, of what weight is the objection on the score of the inadequacy of the price proposed and accepted by herself? No small part of the consideration besides, acting upon her motives, was the desire to gratify the last expressed wishes of her deceased husband. And in an agreement made by a parent with a child, a slight consideration will be sufficient to support it; 4 H & McH. 258. The case of *Hays v. Hollis*, 8 Gill, 357, decided at the present term of this court, is, upon this point, precisely parallel, and obviates all further remarks upon the objection to the adequacy of consideration in the case now before us."

It was, nevertheless, said in *Callaghan v. Callaghan*, 8 Cl. & Fin. 374, that such evidence brings the case within the rule, that a court of equity will not enforce a voluntary contract; see notes to

Ellison v. Ellison, vol. 1, 420, and there can be no doubt that near relationship, coupled with great disproportion between price and value, may give rise to a presumption of undue influence, which will invalidate the sale; *Whelan v. Whelan*, 3 Cowen, 537.

The inadequacy of the consideration must be judged by the state of things when the contract is made, and not in the light of subsequent events; *Lee v. Kirby*, 104 Mass. 420. Hence, where land was bought, and paid for in Confederate money, the court compelled the execution of a deed, although the notes in which the payment was made had not only depreciated, but become worthless before the hearing; *Hale v. Wilkinson*, 21 Grattan, 75. In this case, however, the complainant showed himself ready, prompt and eager, and the case would have been decided the other way, if he had waited for the fall of the Confederacy to make the tender; *Whitaker v. Bond*, 63 North Carolina; *Borton v. Schaffer*, 21 Grattan, 474. See *M'Carty v. Kyle*, 4 Caldwell, 349; *Hudson v. King*, 2 Heiskell, 561.

The effect of inadequacy of price on the right to specific performance, depends to a great extent on the circumstances of the case as disclosed by the evidence. Standing alone, it may be nothing; but it amounts to much when coupled with proof that the losing party was under the control or influence of the other, or that from ignorance, weakness of mind, or the pressure

of debt, he could not exercise a sound or unbiased judgment; *Powers v. Hale*, 5 Foster, 145; *Cathcart v. Robinson*, 5 Peters, 264; *Byers v. Surget*, 19 Howard, 303; *Brooke v. Berry*, 2 Gill & J. 83; *Benton v. Shreeve*, 4 Indiana, 66. In *Clitherall v. Ogilvie*, 1 Dessausure, 257, the court refused to execute an unequal contract between an inexperienced youth and a man of mature life, and a similar decision was made in *Gasque v. Small*, 2 Strobbart Eq. 72. The same principle was applied in *Graham v. Pancoast*, 6 Casey, 89, where the incapacity arose from old age. On the other hand, a court of equity may disregard the unfavorable inference arising from a disproportion between price and value, on proof that both parties knew what they were about, and entered into the contract with their eyes open, or that the contract was prompted by friendship or affection, and should not be viewed as a mere business transaction; *Shepherd v. Bevin*, 9 Gill, 32; 4 Maryland Ch. 133; *Haines v. Haines*, 6 Maryland, 435; *Fripp v. Fripp*, 1 Rice, Eq. 84.

Where one buys at auction, or at a judicial sale, fraud will not be inferred from inadequacy of price, however gross; *Damon v. Damon*, 7 Vesey, 30; *Ayers v. Baumgarten*, 15 Illinois, 444, although the transaction may be set aside on proof of actual fraud, or that the buyer controlled the sale, and was at once vendor and purchaser; *Byers v. Surget*, 19 Howard, 309.

All the authorities agree that inadequacy of price throws a doubt on the transaction, and may, when coupled with other circumstances, be a ground for refusing specific performance, although the evidence does not establish actual fraud. There are many degrees of mental weakness short of the entire want of a disposing mind, and memory, which renders a deed or will merely void. A contract just and equal in all its parts may be enforced, although the vendor is, from age, disease, or other causes, below the average capacity of mankind. But where incapacity and inadequacy go hand in hand, a chancellor may refuse to enforce the contract, although the purchaser was guilty of no greater fault than making a hard and unconscientious bargain; *Graham v. Pancoast*, 6 Casey, 89.

A contract made under the influence of the complete intoxication, which suspends the reason, is invalid, and should be so treated whether the question arises at law or in equity; *Pren-tiss v. Acorn*, 2 Paige, 30; *Donelson, Adm'r, v. Posey*, 13 Alabama, 752; *Gore v. Gibson*, 13 M. & W. 626; *Clifton v. Davis*, 1 Parsons' Eq. 31. Such a condition is a temporary madness precluding the assent without which the most solemn instrument is an empty form; *Clifton v. Davis*. Nor is this all; to contract with one who from whatever cause, is unable to act understandingly on any proposition, is a wrong nearly akin to fraud; *Gore v. Gibson*. It is an obvious inference that such a con-

tract should not be specifically enforced; *Pren-tiss v. Acorn*, 2 Paige, 30; *Shaw v. Thackeray*, 1 Smale & Gifford, 537.

It has, nevertheless, been held in some instances, that intoxication is not an answer to a bill for specific performance, without the aid of other circumstances; *Rodman v. Zilley*, Saxton, Eq.; *Pittinger's Adm'r v. Pittinger*, 2 Green's Ch. 156.

The case of *Shaw v. Thackeray*, 1 Smale & Gifford, 537; might seem to incline in this direction, but really turned on the point, that the bill was filed against a third person, who had taken advantage of the vendor's incapacity, to obtain a conveyance of the premises which he had already sold to the complainant. In *Pittinger v. Pittinger*, the chancellor said that "supposing the purchaser to have been so much intoxicated at the time of the sale as not to understand what he was doing; it would still be incumbent on him to make out that such intoxication was procured or induced by the vendor, or that some undue advantage was taken of him while in that situation." Stated as a general proposition, this would have a tendency to mislead. To induce or even suffer one who has lost the power of judging what his necessities require, to part with his property or convert it into another shape, is unfair, although a full price is given and no false representation made. The explanation of the decision in *Pittinger v. Pittinger*, is that the purchaser bought at a public sale whither he had gone

with a view to bidding; that the objection was raised after his death; and finally that it did not sufficiently appear that he was so much under the influence of liquor as to be unable to exercise his judgment.

Whatever the rule may be under these circumstances, it is settled that one who induces another to drink, with a view of obtaining his assent, or takes advantage of the helplessness of intoxication, to impose hard and disadvantageous terms, is guilty of a fraud justifying a rescission of the contract, and which will for a still stronger reason preclude a decree of specific performance; *Crane v. Conklin*, Saxton, 346; *Hotchkiss v. Forston*, 7 Yerger, 67; *Reynolds v. Weller*, 1 Washington, 164; *Lavalette v. Sage*, 29 Conn. 577; *Whitesides v. Greenlee*, 2 Dev. Ch. 152; *Morrison v. McLeod*, 2 Dev. & Bat. Eq. 221; *Calloway v. Witherspoon*, 5 Iredell Eq. 128; *Prentiss v. Acorn*, 2 Paige, 30; *Shaw v. Thackeray*.

A chancellor does not readily intervene to set aside a grant, sale, or other executed agreement, on the ground of intoxication, where it does not appear from inadequacy of price or other circumstances, that the defendant took advantage of the complainant's condition, and the inclination of the authorities seems to be against such an exercise of jurisdiction; *Cook v. Claypoole*, 18 Vesey, 12; *Shaw v. Thackeray*; one reason being that the question whether the grantor knew what he was about and could assent

understandingly, is one of fact which should be determined with the aid of a jury. A man may be under the influence of liquor, and yet shrewd enough to take care of himself, or play on the weaknesses of others; nor can it always be readily ascertained whether such a defence has a real foundation, or is an after thought to get rid of a bargain which does not suit the complainant. A deed or contract executed by one who has become insane through habitual excess, presents a different case, and may be declared void in a court of law or by a chancellor; *Clifton v. Davis*, 1 Parsons Eq. 31; *Lavalette v. Sage*, 5 Conn. 77.

The mere circumstance that one is of less than ordinary strength of mind, from a congenital defect, from the inroads of disease, or from the abuse of ardent spirits, is not necessarily inconsistent with the power to contract; *Graham v. Pancoast*, 6 Casey, 89; *Nace v. Boyer*, 1b. 99. It is an established principle that legal capacity may co-exist with mental weakness; *Greer v. Greer*, 9 Grattan, 330; *Stewart v. Lispenard*, 26 Wend. 255.

A different rule would be cruel to a considerable portion of mankind, by depriving them of the power to make agreements which may be essential to their welfare in life. A chancellor will not therefore order a deed to be delivered up or cancelled, merely because the grantor is of feeble intellect, unless there is something in the transaction to indicate that the opportunity afforded by his

weakness was abused; *Graham v. Pancoast*, 6 Casey, 89; *Nace v. Boyer*, Ib. 99; *Thomas v. Shepard*, 2 McCord Ch. 36; and it has been held that contracts with such persons may be specifically enforced when fair and equal, and made with full opportunity for deliberation and advice; although such a decree should not be pronounced readily, or without a rigorous scrutiny of all the facts; *Graham v. Pancoast*.

The hardship of the contract, is not in the absence of other causes a ground for refusing a specific performance. If this cannot be laid down as a universal proposition; see *The City of London v. Nash*, 3 Atkyns, 512, 1 Vesey, 512; *Dean of Ely v. Stewart*, 2 Atkyns, 44; *Talbot v. Ford*, 13 Simons, 173; *Hamilton v. Grant*, 3 Dow, 33, 47; *Clark v. The Rochester Rl. Rd.*, 18 Barb. 350, it is in general true that the failure of the hope or expectation which induced the purchase, is not a reason why it should not be enforced; *Adams v. Weare*, 1 Brown, C. C. 567. If a man deliberately parts with that which is useful to him for that which he cannot use, the inconvenience concerns him and not the buyer. A chancellor will not refuse a decree of specific performance, because of an inconvenience growing directly out of the terms of the agreement, and which the parties must be presumed to have anticipated; *Corson v. Mulvany*, 13 Wright, 88, 97. But here, as in the kindred case of inadequacy, courts of equity incline to those who from any cause

are unable to protect themselves, and will not enforce an improvident bargain against one who from weakness of intellect, ignorance, or the pressure of adverse circumstances, was incapable of exercising a free and unbiased judgment; *Hays v. Henderson*, 2 Watts, 448, 152. The contract may be for a full price and untainted by fraud or undue influence, and yet within the scope of this principle; *Graham v. Pancoast*, 6 Casey, 89, 97; *Hays v. Henderson*.

A sale will not be enforced at the risk of exposing the vendor to a forfeiture; See *Fraine v. Brown*, cited 2 Vesey, Sr. 307; *Peacock v. Pearson*, 11 Bevan, 355; *Henderson v. Hays*, 2 Watts, 148, 151; and in *Henderson v. Hays*, the court refused to compel a man whose mind had been weakened by habitual intoxication, to execute a contract with the effect of turning his land into money which would in all probability be squandered at the tavern. In *Campbell v. Spencer*, 2 Binney, 133; the defendant agreed to exchange his farm for the stock in trade of a shopkeeper. It appeared that the parties were drinking at an inn, and that the vendor expressed great regret immediately after the writing was executed, and implored the purchaser to let him off. The court treated the bargain as an improvident one, which should not be enforced, although the consideration was full, and it did not appear that the defendant was drunk, or was materially affected by liquor.

The right to enforce a fair and

equal contract, will not be defeated by a change of circumstances for which the complainant is not directly or indirectly responsible, however hardly it may bear on the defendants; notes to *Seton v. Slade*, post; *Hale v. Wilkinson*, 21 Grattan, 75; *Morgan v. Scott*, 2 Casey, 51, although such a change may turn the scale against one who has been in default, or is guilty of laches; *Garrett v. Macon*, 6 Call. 309; *Borton v. Shaffer*, 21 Grattan, 474; *Whittaker v. Bond*, 63 N. Carolina. The complainant must show himself ready, prompt, and diligent, and one who delays until the course of events has rendered the fulfilment of the contract hard or oppressive, is not entitled to the aid of a chancellor, although the opposite party may also have been in fault; *The Bk. of Alexandria v. Lyman*, 1 Peters, 371; *Porter v. Dougherty*, 1 Casey, 305; *Patterson v. Martz*, 8 Watts, 374. The court may under these circumstances look beyond the parties, to the effect which the decree will have on third persons who have acquired an interest by descent, devise, or contract; *Johnson v. Hubbell*, 2 Johnson Ch. 232; *Patterson v. Martz*; *Anthony v. Leftwich*, 3 Randolph, 238. In *Anthony v. Leftwich*, 3 Randolph, 238, the purchaser did not institute proceedings until after the lapse of six years, and the death of the vendor, who had devised the land to his daughter during the interval without making any other provision for her in his will, and it was held to be a sufficient reason for dismissing the bill.

A contract made in a depreciated paper currency, will not be enforced after that has been swept away by conquest or revolution, and another substituted which makes a much nearer approach to specie. *Hudson v. King*, 2 Hieskell, 561; *M'Carty v. Kyle*, 4 Caldwell, 349. Under these circumstances, the measure of value chosen by the parties fails, and the contract with it. But a contract which has been executed by the payment of the price, may be enforced, although the paper money in which the payment was made has depreciated in value or become worthless. See *Hall v. Wilkinson*, 21 Grattan, 75; *Borton v. Schaffer*, 21 Id. 474.

In *Secrest v. M'Kenna*, 1 Strobhart Eq. 356, the chancellor put the complainant on terms to indemnify the vendor who was answerable as his surety in a collateral obligation; and the case was likened to that of a mortgagee who may tack other debts to that which the instrument was intended to secure. See *Walling v. Aiken*, 1 M'Mullen 1; ante, vol. 1, 858.

There is much force in the position, that where a collateral demand could be set off if the suit were brought for damages at law, it should not be excluded by a change of forum, or because the complainant asks for performance instead of compensation. But in *Seamen v. Rensselaer*, 10 Barb. 81, the defendant was compelled to convey a lot of land which the complainant had bought and paid for, although the latter was unable to pay for another lot which he

had purchased at the same time under a distinct contract.

Where payment is by the terms of the agreement to be deferred, the court may have regard to the pecuniary ability of the complainant, *Crosbie v. Tooke*, 1 Mylne & Keene, 436; *Price v. Assheton* 1 Younge & Collier, 441, and his insolvency may be a defence to a bill for the specific performance of a contract in the nature of a partnership, although relating to land, or having real estate for its subject. *Semmes v. MEwen*, 27 Alabama, 184. The principle is the same where the obligation of the complainant is continuing, as in the case of a bill filed to enforce a covenant to give or to renew a lease. *Wellington v. Joyce*, 3 Vesey, 168.

But in *Corson v. Mulvaney*, 13 Wright, 88, the insolvency of the purchaser was held not to be a defence to a bill for specific performance, although the price was to be secured by mortgage, and the use to which he intended to put the land, would diminish its value.

A contract by a husband, or by a husband and wife, for the sale of the wife's land, will not be specifically enforced at the instance of the purchaser, because a decree that he should convey would be futile, and the court will not compel her to perform a contract which is destitute of legal obligation. *Clark v. Reims*, 12 Grattan, 98; *Young v. Paul*, 2 Stockton Ch. 401; *Welsh v. Bayand*, 6 C. E. Green, 186.

